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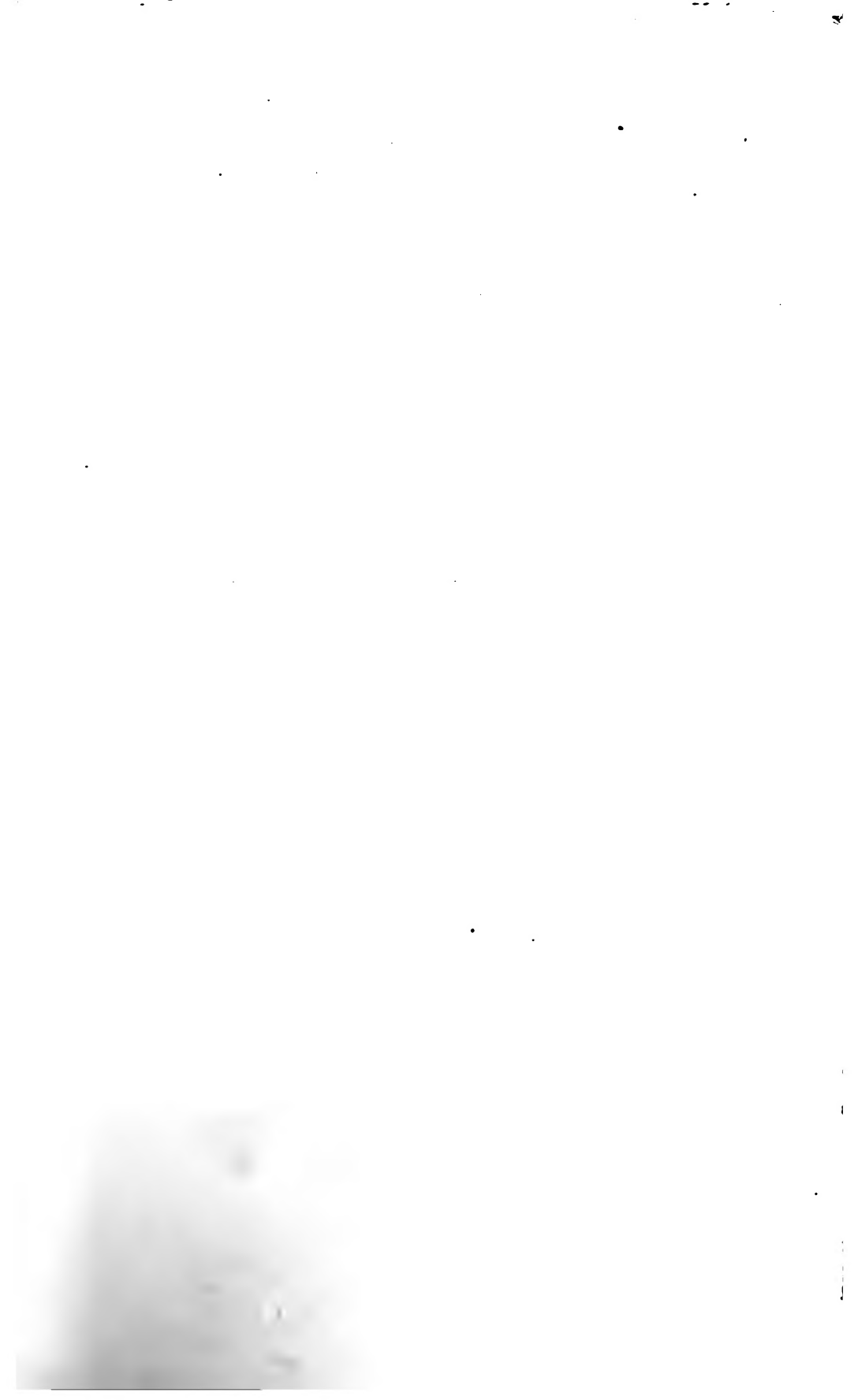
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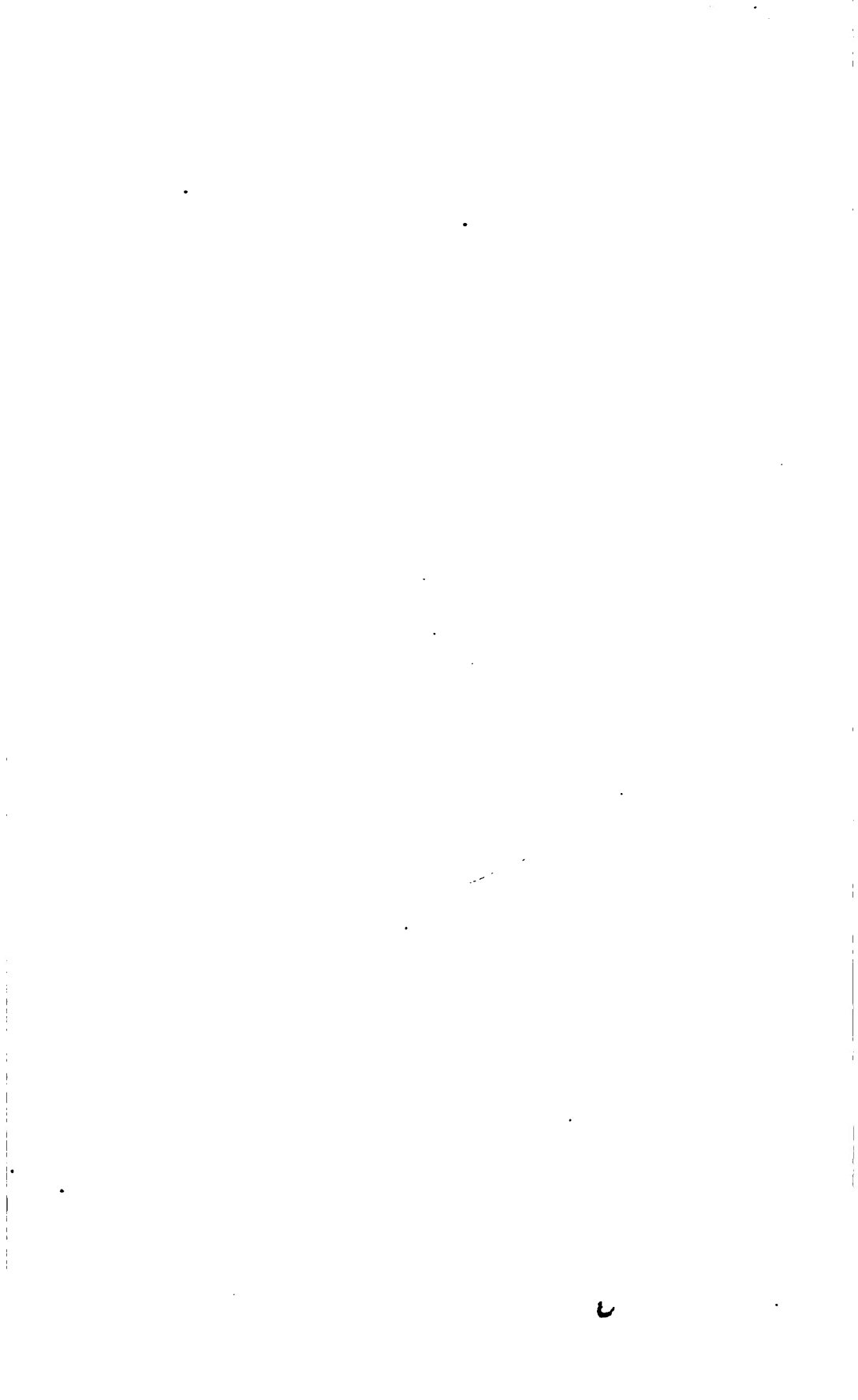
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C A S E S

DECIDED IN

THE COURT OF SESSION, COURT OF JUSTICIARY,

AND

HOUSE OF LORDS,

FROM JULY 20, 1876, TO AUGUST 14, 1877,

REPORTED BY

MIDDLETON RETTIE, DONALD CRAWFORD, G. F. MELVILLE,
A. E. HENDERSON, D. GILLESPIE, AND H. JOHNSTON,
ESQUIRES, ADVOCATES.



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JUDGES

OF THE

COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

FIRST DIVISION.

Lord President, The Right Hon. JOHN INGLIS.

Lord DEAS.

Lord MURE.

Lord SHAND.*

SECOND DIVISION.

Lord Justice-Clerk, The Right Hon. Lord MONCREIFF.

Lord NEAVES.†

Lord ORMIDALE.

Lord GIFFORD.

PERMANENT LORDS ORDINARY.

LORD SHAND.*

Lord YOUNG.

Lord CRAIGHILL.

Lord CURRIEHILL.

Lord RUTHERFURD CLARK.

Lord ADAM.

* Lord Ardmillan died on 7th September 1876, and on the appointment of Lord Adam in November 1876 Lord Shand took his seat in the First Division.

† Lord Neaves died on 22d December 1876.

HIGH COURT OF JUSTICIARY.

Lord Justice-General, Right Hon. JOHN INGLIS.

Lord Justice-Clerk, Right Hon. Lord MONCREIFF.

LORDS COMMISSIONERS OF JUSTICIARY.

Lord DEAS.

Lord YOUNG.

Lord MURE.

Lord CRAIGHILL.

Lord ADAM.*

Lord-Advocate,	{	Right Hon. E. S. GORDON, succeeded by WILLIAM WATSON, Esquire.
Solicitor-General,	{	WILLIAM WATSON, Esquire, succeeded by J. H. A. MACDONALD, Esquire.
Dean of Faculty,	{	WILLIAM WATSON, Esquire, succeeded by ROBERT HORN, Esquire,

HOUSE OF LORDS.

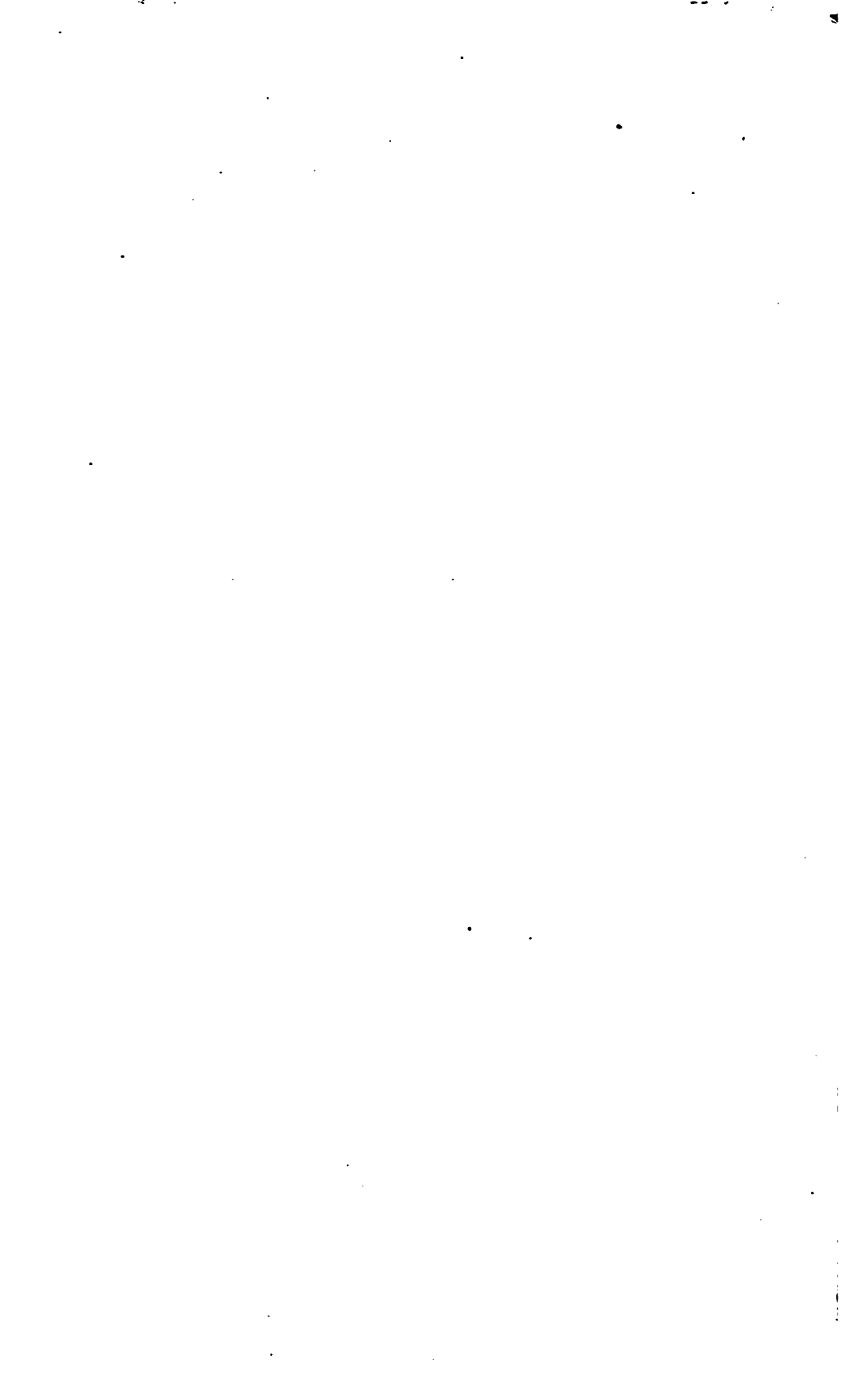
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WHO DELIVERED JUDGMENTS IN SCOTCH APPEALS DURING THE
PERIOD OF THESE REPORTS.

Lord Chancellor, Lord CAIRNS,

Lords CHELMSFORD, HATHERLEY, PENZANCE, O'HAGAN,
SELBORNE, BLACKBURN, and GORDON.

* In December 1876 Lord Adam was appointed a Lord of Justiciary in room of Lord Ardmillan.



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ERRATA.

P. 185, line 10 from foot, *for* is the owner, *read* is not the owner.

P. 244, line 7 from foot, *for* Mrs Young, *read* Mrs Duncan.

P. 515, on margin in *Morris v. Brisbane*, *insert* name of Lord Rutherford Clark as Lord Ordinary.

P. 628, line 11 from foot, *for* Carey's, *read* Paley's.

P. 745, line 26, *for* dominium directum, *read* dominium utile.

P. 966, line 2, *for* imperative, *read* inoperative.

P. 1032, line 1 of rubric, *for* c. 44, *read* c. 94.

House of Lords Reports, p. 103, in agents' names, *for* Webster & Will, S.S.C., *read* Auld & Macdonald, W.S.

Justiciary Cases, p. 43, line 7, *for* Evidence Act, 1866, *read* Evidence Act, 1853, sec. 3.

CASES

DECIDED IN

THE HOUSE OF LORDS.

1876-7.

JAMES WALKER (Suspender), Appellant.—*Cotton, Q.C.—J. M. Duncan.* No. 1.

THE PRESBYTERY OF ARBROATH (Respondents), Respondents.—

Southgate, Q.C.—Gloag.

Nov. 24, 1876.

Walker v.
Presbytery of
Arbroath.

Church—Churchyard—Presbytery—Jurisdiction—Ecclesiastical Buildings Act, 1868 (31 and 32 Vict. c. 96), secs. 3, 14, and 20—Compulsory Sale—

Notice.—On 18th April 1875 a notice was read from the pulpit of a parish church intimating that a petition had been presented to the Presbytery, “craving them to design and set apart the piece of ground immediately adjoining the churchyard on the north, or other suitable piece of ground, for an addition to the same, and that the Presbytery are to visit and inspect the churchyard on Thursday, the 6th day of May next, at one o'clock afternoon, at which time the heritors and all others concerned, or persons duly authorised to act for them, are requested to attend.” For several months prior to the giving of this notice the heritors of the parish had been in treaty with W., a heritor, the proprietor of part of “the piece of ground immediately adjoining the churchyard on the north,” but had been unable to conclude an agreement with him.

At the time specified the Presbytery, after inspecting the churchyard, proceeded to designate the piece of ground to the north belonging to W., who was not present, but who had heard the above intimation made in church. On 11th May notice was sent to W., as a heritor, that a second meeting of Presbytery would be held on 17th May “to take further steps towards making an addition to the churchyard,” and requesting him to attend.

At this meeting the Presbytery, upon the report of men of skill, fixed the value of W.'s ground. No notice of either judgment of the Presbytery was sent to W. or to his tenant till 22d July 1875.

In a suspension and interdict brought by W., on the grounds (1) that the only notice he had got of the meeting of 6th May was a notice that the Presbytery would merely visit and inspect the churchyard, and that therefore the decree of designation then pronounced was illegal, and (2) that he had been deprived of his statutory right of appeal to the Sheriff by not receiving notice of the judgment until after the time for appeal had expired, the First Division held (1) that the designation of an addition to a churchyard, and the regulation of the procedure thereanent, being matters within the exclusive jurisdiction of the Presbytery, were not subject to review in the Court of Session; and (2) that considering the fact that W. had been engaged in negotiations with the heritors as to the sale of his ground before the application to the Presbytery the notice from the pulpit was not insufficient, so as to justify the Court in quashing the whole proceedings as illegal. *Judgment affirmed.*

No. 1. (In the Court of Session, March 1, 1876, *ante*, vol. iii. p. 498.)

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Arbroath.

Ld. Chancellor
(Cairns).
Ld. O'Hagan.
Lord Black-
burn.
Lord Gordon.

This appeal was presented by James Walker of Ravensby against a judgment of the First Division of 1st March 1876 in a process of suspension and interdict at his instance against the Presbytery of Arbroath. In that process the appellant craved suspension of a decree of designation by the Presbytery of a piece of land on the estate of Ravensby as an addition to the churchyard of Barry, and interdict against the respondents carrying the same into effect.

The First Division refused suspension and interdict.

The circumstances are fully narrated in the opinion of the Lord Chancellor.

LORD CHANCELLOR.—My Lords, the appellant in this case complains that a portion of his land, about three-quarters of an acre in extent, has been taken from him for the purpose of enlarging the churchyard of the parish of Barry, and that it has been taken from him irregularly, in a manner of which he is entitled to complain, and as against which he is entitled to have redress. My Lords, the appellant does not say that the churchyard of the parish should not be enlarged; on the contrary, he admits that it ought to be enlarged; and he does not say that his land is not the proper land out of which the enlargement ought to be made, and that some other land belonging to some other person would be better land for that purpose. An appraisement of the value of his land has been made, by which the three-fourths of an acre has been valued at about £106 or £107. What the value which the appellant puts upon his piece of land may be your Lordships are not informed, but of course he is quite in his right in saying that he estimates the value more highly than at the sum I have mentioned.

But I point out, in the first place, to your Lordships—and I do so with some regret—that the whole of this litigation is confined to the difference between the sum which I have mentioned and the larger sum, whatever it may be, which represents in the mind of the appellant the value of this small portion of land; and I cannot but strongly suspect that the costs incurred in the present litigation must amount to a very much larger sum than the difference between the sum which the respondents have been prepared to pay and that which the appellant would wish to have paid to him for this piece of land.

However, my Lords, be the sum which is at stake large or small, the appellant is entirely in his right in testing the regularity of the proceedings by which this portion of land is attempted to be taken from him. The complaint which he makes as to the regularity of these proceedings divides itself into two parts. In the first place, he says that under the circumstances of the case the Presbytery never acquired any jurisdiction to take his land, or to designate it as the land by which the churchyard was to be enlarged; and, in the second place, he says that even supposing that the circumstances were such as to give the Presbytery jurisdiction to designate a piece of ground for the enlargement of the churchyard, they did not give him that notice or intimation of the proceedings they were taking which he was entitled to, and which would have enabled him both to intervene in these proceedings, and, if dissatisfied with the result, to appeal against them under a recent statute of the present reign. I will take the second of these questions first. I will afterwards consider whether the Presbytery had, under the circumstances, jurisdiction to designate land for the enlargement of the churchyard; but I will assume at this moment that they had that jurisdiction, and will proceed to point out to your Lordships the facts of the

case, as to the notice which the appellant received of the proceedings of the Presbytery. No. 1.

Now, in order that your Lordships may have that matter properly placed before you, I must remind you, in the first instance, of the origin and inception of these proceedings. The churchyard was supposed by the heritors and inhabitants of the parish to be too small for the increasing population of the principal town or place in the parish, namely the town of Carnoustie; and on the 18th of February 1874 we find that a meeting of heritors took place upon the subject. Mr Walker (the appellant) was present at that meeting, and was chairman. At that meeting, "after due deliberation on the present and prospective circumstances of the churchyard, and hearing the sexton's statement," "on the suggestion of Mr Walker, Mr Stevenson moved, and Mr Borrie seconded, that the meeting be adjourned to the 4th of March ensuing, at one o'clock afternoon, in order to obtain a fuller meeting of members of the committee."

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What was done at the committee meeting of the 4th of March we are not told, but afterwards, on the 19th of March, a meeting of the heritors took place, at which again Mr Walker was present; and your Lordships have this information as to the opinion of that meeting of the heritors—"The meeting having had under consideration the state of the present burial-ground of this parish, is unanimously of opinion that some steps must immediately be taken, either for the purpose of enlarging the present burial-ground, or for acquiring ground in some other part of the parish for the purpose of burial." Therefore your Lordships have the opinion of the appellant that the churchyard should be enlarged, and of course he must have been aware that one, and not the most unlikely, mode of enlarging it would be by means of his own land, which was in actual contact with the churchyard.

On the 1st October, after an interval of some months, there was another meeting of the heritors. At that meeting Mr Walker was not present. "The meeting having had under consideration the necessity of providing additional burying-ground for the parish," we find that they say they are "unanimously of opinion that the most suitable ground for this purpose is the small field immediately adjoining the present burying-ground—to the north of the existing churchyard—belonging to James Walker, Esquire." Then they came to a resolution as to the offer which should be made to Mr Walker for a portion of his ground, and the clerk was "instructed to transmit to Mr Walker an extract of this minute, and the following committee was chosen, with power to carry into effect the resolutions aforesaid and report to another meeting."

Then your Lordships find by the minutes of the 19th November 1874 that upon the day after this formal meeting, namely on the 2d of October, the clerk immediately communicates with Mr Walker, and Mr Walker is then made aware, not merely that the churchyard was to be enlarged (to that he had assented), but that the opinion of the heritors was that the enlargement ought to be made out of his ground, and that they were willing to pay him a certain price for the ground. It further appears from the minute of this same meeting of the 19th of November that an answer had been given by Mr Walker, stating the price at which he would sell, but the meeting thought that price unreasonable, and declined to entertain it. Then it appears that a suggestion was made that some person else might be willing to sell a piece of land in the neighbourhood of another part of Mr Walker's property, and that might be exchanged by the heritors for the piece of ground of Mr Walker's which they wanted for the enlarge-

No. 1. ment of the churchyard; and the meeting appointed some members of the committee as a deputation, to wait upon Mr Walker and ascertain whether he would fall into this alternative plan. Your Lordships find that in the minute of the 1st December 1874 there is a report of the interview which the committee had with Mr Walker, from which it appears that Mr Walker declined the exchange, and adhered to his former offer as to price.

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In the year 1875 it appears that there was a meeting of heritors on the 18th of March. Counsel's opinion had been taken as to the difficulty the heritors were in, and I infer that counsel had advised that it would be better if the heritors were to hand over the further conduct of this matter—the enlargement of the burying-ground—to the Presbytery, inasmuch as they themselves did not appear to have the power of getting the ground which they desired. The memorial and counsel's opinion “having been read and carefully considered by the meeting, it was unanimously resolved to act upon” counsel's “opinion, and make application to the Presbytery of Arbroath to design the ground necessary for the extension of the churchyard. The clerk was accordingly instructed to prepare the necessary petition.” The petition was prepared and signed by a number of heritors in the parish, and was presented to the Presbytery.

Now, I will ask your Lordships to observe the resolution at which the Presbytery arrived, because when I come to look at the intimation given in the kirk, it will connect itself with this resolution, and the resolution therefore should be borne in mind. The minute of the meeting of the Presbytery is of the 6th of April 1875; it is in these words—the “petition was read, and the Presbytery having considered the same, resolved to visit and inspect the churchyard of Barry on Thursday, the 6th day of May next, at one o'clock p.m., with a view to fix upon a piece of ground suitable for designating as an addition to the churchyard, if they shall find the same to be necessary, and to designate the same; and directed and hereby direct the minister to intimate this petition, and the time fixed for the visit, from the pulpit, and on the church door, and also by advertisement,” and so on. Therefore your Lordships, I think, can have no doubt in arriving at this, that whatever may be the effect of the intimation when it was given (that I will consider afterwards) the object and intention of the Presbytery was that there should be an intimation given in the kirk that they were going on the 6th of May to the churchyard, not alone to consider the question of the enlargement of the churchyard, but, feeling confident that the enlargement must take place—for the heritors were agreed upon it—to designate a piece of ground which would be suitable for the purpose of the enlargement. And in that respect they were acting upon the petition, because the petition had stated to them, not merely that the churchyard ought to be increased, but “that at a meeting of the heritors, held on the 1st of October 1874, it was unanimously agreed that a piece of ground immediately adjoining the churchyard on the north side is the most suitable and convenient for appropriating as an addition to it,” viz. Mr Walker's piece of ground.

Your Lordships, therefore, before you come to the intimation in the kirk, approach it with this knowledge, that this matter had been a subject of general consideration throughout the parish, and among the heritors; that it was perfectly well known to Mr Walker, and that Mr Walker was himself of opinion that the churchyard ought to be enlarged; that he knew that the heritors desired to enlarge it by means of a piece of ground belonging to him, and that he was, or had been, in controversy with the heritors as to the price to be paid to him for that

piece of ground; and therefore if he heard, as I shall afterwards shew he did hear, the intimation as to what the Presbytery were going to do, he heard that with a knowledge of all that had gone before, and of what was the desire of the heritors as to the mode and form of the enlargement of the churchyard.

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My Lords, the intimation which the Presbytery had ordered was given in the kirk on the 18th of April, and your Lordships have it admitted that Mr Walker was present at the kirk and heard that intimation. The intimation, therefore, must be read, not as it might have struck your Lordships if you had been at the kirk without any knowledge of what had taken place, but as it would appear to the mind of Mr Walker, who knew everything which had taken place up to that time, and who knew the piece of ground which was referred to in the intimation as the source from which the enlargement was to take place. With that knowledge on his part this intimation is made in the kirk:—"Intimation is hereby given to the heritors of this parish, and all concerned, that a petition has been presented to the reverend the Presbytery of Arbroath, craving them to design and set apart the piece of ground immediately adjoining the churchyard on the north, or other suitable piece of ground, for an addition to the same, and that the Presbytery are to visit and inspect the churchyard on Thursday, the 6th day of May next, at one o'clock afternoon, at which time the heritors, and all others concerned, or persons duly authorised to act for them, are requested to attend."

Now, my Lords, as regards Mr Walker, this to his mind of course would read just as if his own name had been mentioned in it—as if it had been an intimation that a petition had been presented to the Presbytery craving them to set apart Mr Walker's piece of ground for an addition to the churchyard, and that the Presbytery would visit and inspect the churchyard at one o'clock on Thursday, the 6th May, at which time Mr Walker—for he was one of the heritors—was required to attend.

Now, I ask your Lordships to observe, with respect to the objection which has been made to this notice, that it consists both of an introduction and also of a part which conveys the actual affirmative intimation. The introductory part does not say that the petition presented to the Presbytery had asked the Presbytery first to consider whether there should be an enlargement or not, and then to designate the piece of ground, but it states that the Presbytery had been asked to do one thing, and one thing only, namely, assuming that there should be an enlargement, to designate and set apart the particular piece of ground mentioned in the notice, or other suitable piece, for the purpose of the enlargement. My Lords, I attach some importance to that, for this reason: If the introductory part of the notice had stated that the Presbytery had been asked to consider the expediency of enlarging the churchyard and then the mode of enlarging it, and thereupon an intimation had been given that the Presbytery were to meet in the churchyard on a particular day, it might have been said—I, hearing this notice, am in doubt whether it means that the Presbytery at their meeting are going to do anything more than consider the first question, namely, whether the churchyard ought to be enlarged at all. But, my Lords, when that is not the form of the notice—when the introductory part speaks of designating a particular piece of land, and the notice then states that the Presbytery will, upon a particular day, visit and inspect the churchyard—I must say that the inference which I should draw from that intimation, and I think the inference which any person who reads it or hears it, ought to draw from the intimation, is this, that the Presbytery, upon the day named, is coming to the churchyard for the

No. 1. purpose of considering that step—that proposal—which is mentioned in the introductory part of the intimation, namely, the designation of the particular piece of land, or other suitable piece of land, mentioned in the introduction. Your Lordships cannot of course tell what passed through the mind of Mr Walker, but I am bound to say that any person of ordinary understanding ought to have concluded that this was the meaning of the intimation, and that in any Court Mr Walker must be held to have received an intimation which has that natural and fair construction.

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I should be extremely unwilling under any circumstances to hold as inept or irregular merely upon a matter of form the proceedings of a Presbytery, which is not a Court of law, and which does not proceed upon fixed and settled formulæ with regard to notices or other documents; but in this case it appears to me that both in form and in substance, upon a fair construction of the notice, the Presbytery had given a notice such as fairness required them to give before they were proceeding to designate the land under their powers.

The case does not stop there, because a subsequent notice was given on the 11th of May, following that which was given on the 18th of April. The notice of the 11th of May was not a notice in the kirk; it was a notice in a letter addressed to the appellant personally, and it states to him that "the reverend the Presbytery of Arbroath will meet at Barry on Monday, the 17th instant, within the parish church at Barry, at 1-30 p.m., to take further steps towards making an addition to the churchyard at Barry, which meeting you are requested to attend."

Now, supposing for a moment that on hearing the first intimation in the kirk the appellant had conceived that the Presbytery were going to divide their proceedings in two, and were going at their first meeting to consider whether the churchyard should be enlarged at all, and were going to leave over for a separate meeting whether it should be enlarged by the taking of the ground of the appellant—supposing, I say, that that had been his idea when he heard the first intimation, then it seems to me that this second intimation, given to him personally by letter, ought to have told him that the first step had been taken, and had resulted in the opinion that the churchyard should be enlarged, and that the Presbytery were now going to take the second step which had been referred to in the former intimation, namely, to designate his piece of ground as the ground by the addition of which the enlargement ought to be made.

My Lords, I have no hesitation in adopting the conclusion arrived at by the Lord President and the majority of the Court below, that there was in this case, supposing the Presbytery to have had the jurisdiction, a sufficient intimation to the appellant of their intention of exercising that jurisdiction for the purpose of designating his land.

I now turn to the other point which I reserved for subsequent consideration, namely, had the Presbytery the jurisdiction in this case to proceed to designate land for the enlargement of the churchyard? My Lords, the only objection made to their jurisdiction is this—and it is an objection which did not meet with favour from any of the Judges in the Court in Scotland—it is said the jurisdiction of the Presbytery to designate land for the enlargement of a churchyard is not a primary or original jurisdiction as it were; it arises only upon the failure or the refusal of the heritors to enlarge the churchyard and to procure ground for the purpose. The duty, argues the appellant, lies in the first instance upon the heritors to enlarge the churchyard. If they neglect it, or if they refuse

to perform it, the Presbytery may step in and exercise their jurisdiction; but their jurisdiction does not arise until there is a failure on the part of the heritors, and, says the appellant, there was no such failure on the part of the heritors here. You are not able to predicate, he says, of the heritors that they did fail or refuse to enlarge the churchyard. On the contrary, he says, they were endeavouring to do it.

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My Lords, I will assume—though I should desire not to be understood as myself affirming it—that the view taken by the appellant of the law is correct. The old statute upon the subject is very obscure, and I should be sorry myself to appear to be defining what is the jurisdiction of the Presbytery, or how it arises; but I will assume that the appellant is right in his statement of the law. If the law be as he states it, of course it is obvious to your Lordships that the reason of the law must be this—until there has been some neglect by those who ought to be the best judges of the manner of the enlargement of the churchyard, and who will have to pay for that enlargement, the law does not desire to take the matter out of their hands, and to place it in the hands of what I may term an external body, who are not the body to pay for the enlargement. On the other hand, the law says that that which is necessary must be done, and if those who ought to do it fail to do it then the Presbytery are to be allowed to exercise their rights. What, my Lords, I ask, does that mean? Does that state of the law require that the heritors must contumaciously and violently refuse to exercise their power, or to discharge their duty, of providing an enlargement of the churchyard? Supposing the heritors admit openly and candidly that it ought to be enlarged, but suppose that in point of fact they do not enlarge it; suppose that they say—We cannot make a bargain of a satisfactory kind with any owner of land for the purpose of procuring an enlargement which we all admit to be required—are the Presbytery to be paralysed by the mere fact that the heritors have made no refusal, but have simply done nothing?

But I carry it further. Suppose the heritors come to the Presbytery and say, We do not desire to stand in your way; we do not desire to be supposed to be persons who are going to enlarge the churchyard, or to take any steps towards acquiring land for that purpose; we find the difficulties to be such that we abandon it in despair, and now you must look upon us as asking you to step in and to exercise the right which we might have exercised. It would appear to me to be the most monstrous and violent and the most inconvenient proposition possible, and one for which I know of no authority, to contend that in that state of things the jurisdiction of the Presbytery is not to arise, just as much as if the heritors had been contumacious—had denied that there ought to be an enlargement at all, or, admitting that there ought to be an enlargement, had refused to take any steps for the purpose of procuring that enlargement.

My Lords, I have in the former part of the case laid before you the facts as to the meetings which were held, and your Lordships remember what took place before the petition was presented to the Presbytery. If the heritors had been able to do so they would have made a bargain with the appellant, and have bought his land, and enlarged the churchyard; but they found they could not do that, and they took counsel's opinion, and the difficulties of their position being pointed out to them they gave up any idea of acting. They presented that petition to the Presbytery, in which they abandoned any intention of acting, and asked the Presbytery to proceed upon the footing that they, the heritors, were not going to act. My Lords, if the law be such that the Presbytery cannot

No. 1. act unless there be a failure by the heritors to act, then I say that in this case there was that failure by the heritors to act, and the jurisdiction therefore of the Presbytery arose. Therefore I entirely concur in the unanimous opinion of the learned Judges in the Court of Scotland.

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Upon the whole, I submit to your Lordships that this appeal is one which does not rest upon any solid foundation, and that it ought to be dismissed, with costs.

LORD O'HAGAN.—My Lords, I have had some difficulty, during the argument of this case, in reaching a conclusion satisfactory to myself. But, on the whole, I do not feel warranted in refusing my assent to the resolution proposed by my noble and learned friend. My difficulty was of a two-fold character. The conflict of opinion between the eminent Judges of the Court below created a reasonable hesitation in my mind. They had to consider a question of local procedure, to be determined very much by local usage, on which their knowledge of the ordinary course of action in the Church Courts of Scotland with reference to the extension of graveyards must necessarily have been greater than is possessed by the majority of your Lordships, and the marked difference in their mode of applying that knowledge suggested the propriety of caution and diffidence to persons less informed. But, further, the views of the Lord Ordinary and Lord Ardmillan as to the insufficiency of the notice given to the appellant have manifestly much to commend them to respectful attention.

Undoubtedly no man's property should be taken from him for any purpose, private or public, in the absence of such notice as may enable him to assert his right and offer such reasons, in respect both to the taking and the terms of the taking, as may secure him justice and adequate compensation. Now, in this case neither the statement to the congregation, of which the appellant appears to have been a member, nor the letter addressed to him personally, made any express reference to the designation or the value of his land. The statement only announced that on a given day the Presbytery would "visit and inspect," and did not declare that they would "designate," the ground; and the letter merely made the intimation that they would meet within the parish church "to take further steps towards making an addition to the churchyard." It is further to be observed that in neither case was the appellant addressed as the owner of the land in controversy, but only as one of the heritors of the parish.

Now, I think it very unfortunate that a more full and unequivocal indication of the intentions of the Presbytery was not given, for if it had been, this wretched litigation, at such heavy cost, about an interest so trivial, could not have been maintained. But when we are asked to set aside the entire proceedings and declare them of no effect we must consider the position of the appellant and the means substantially afforded him for self-protection. The notice published from the pulpit, affixed to the church door, and inserted in the newspapers, had more in it than the announcement of intention to "visit and inspect." It recited the petition craving the Presbytery to "design and set apart the piece of ground immediately adjoining the churchyard on the north, or other suitable piece of ground." The piece of ground "on the north" was the ground of the appellant, as to which there had been much negotiation, and which everybody knew the Presbytery wished to acquire; and taking the whole notice together, I incline to agree with the Lord Chancellor that, the "visit and inspection" being undertaken in pursuance of a petition "to design and set apart," the appellant might

reasonably have expected to see for himself that nothing be done to prejudice his rights. He knew what was desired and what was contemplated. He had had interviews about the ground; he had had offers for it; and it would have been easy for him to have guarded himself from injury by his presence, or that of a representative, at the inspection to which he was invited.

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Then, as a matter of fact, can we reasonably doubt that he had knowledge of the doings of the Presbytery on the occasion of their visit—quite time enough to appeal if he had been disposed to do so? The churchyard is in the immediate vicinity of the appellant's residence. His complaint rests very much on the allegation that the "amenity" of his property will be injured by its extension, so that the addition will become visible from the windows of his mansion-house. Is it conceivable in such circumstances that he should not have inquired about the proceedings of the Presbytery, almost at his very door, upon the 6th of May, or that he should not have heard of their designation of the ground? If he did know of it, the lapse of the time for appealing occurred through his own default.

Next, we have the letter of the 11th of May inviting him to meet the Presbytery on the 17th of May, with a view to the taking of further steps "towards making an addition to the churchyard." He may not have been bound to attend that meeting, but he was free to do so, and he must have understood it to have been designed to complete a proceeding already taken, and, if he had attended, he would still have had full time and opportunity to make his appeal.

This being the history of the matter, I think it important to note that there is no impeachment of the *bona fides* of the Presbytery. They did not seek to deceive or over-reach the appellant. They took the best advice they could get in Scotland, and acted honestly upon it for the general interest. And their proceedings are not lightly to be set aside if your Lordships are of opinion that, although technically the notices might have been better framed, the appellant did not suffer wrong, but had substantially such information given to him as should have been sufficient for the protection of his rights.

Then, we must not forget that there was no hard and fast line of procedure imposed upon the Presbytery. They acted, as was said in the Court of Session, under a jurisdiction regulated by the common law; the regulation of it depended on established usage, and that usage is authoritatively described by the Lord President when he says—"We have been referred to the forms and styles in Church Courts, which are well known and published and acted on every day, and in analogous cases, where styles are provided, we certainly find a great deal of authority for holding that an intimation of this kind, conveyed in general terms and making reference to the prayer of the application which is before the Presbytery, is quite sufficient notice to everybody concerned." And Lord Mure speaks of the practice to the same effect—"All this is done in the usual mode of giving notice by Presbyteries of proceedings before them, as I understand the style book." It is very hard for strangers to Scotland to resist the force of such testimony as to a local practice, coming from those whose position and experience must make them especially conversant with it.

And, finally, my Lords, it is plain that according to the law of Scotland the Court of Session had no power, and your Lordships have no power, to supervise or review or correct the action of the Presbytery. We can only interfere if there has been some flagrant violation of the fundamental principles of justice, resulting in substantial wrong to an individual, which it would be contrary to the universal course of legal tribunals to allow. We are not asked to amend a statutable or

No. 1. other irregularity, but to declare the proceedings absolutely null and void, on the ground that they have been essentially inequitable ; and can we do this, having regard to the good faith of the Presbytery, the substantial intimations of its purpose given to the defendant, and the opportunities afforded to him of resisting any wrong ?

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As to the question of jurisdiction, I shall add nothing to the observations already made. The Scottish Judges were unanimous upon it, and I see no reason to doubt that they were right.

I therefore give my concurrence to the proposition of the Lord Chancellor.

LORD BLACKBURN.—My Lords, I also am of opinion that the resolution which has been proposed to your Lordships should be adopted.

I take it that the facts are to a certain extent undisputed here. The churchyard of the parish of Barry was in fact too small, and required to be enlarged, and the heritors agreed that a particular portion of land on the north side of the churchyard, which belonged in part (the greater part of it) to Mr Walker, the appellant, was the best piece of ground to be added to the churchyard. They wished to get it, and some negotiations between them and Mr Walker went on for that purpose for some time, in which they were endeavouring amicably by some arrangement to get this piece of land added to the churchyard. He objected to the proposed conditions,—I should conjecture not solely to the conditions as to the price, but also to the mode in which the piece of ground was to be laid out and occupied, which might affect the amenity of his property. But whatever the reason might be, the parties could not agree, and it is an admitted and agreed fact on all sides that the churchyard required enlargement, and the heritors thought that the piece of ground which ought to be added to it in order to make the enlargement was that which belonged to Mr Walker. Under these circumstances, having taken advice, they petitioned the Presbytery of Arbroath, in which the parish of Barry is, saying, what seems to be agreed on all hands, “that the providing and maintaining of a churchyard sufficient in extent for the wants of the parish is a burden incumbent on the heritors of each parish, and the duty of enforcing the obligation belongs to the Presbytery of the bounds.” Then they proceed to narrate in their petition (truly) that the churchyard was too small ; they narrate (truly) that the heritors had, at a meeting duly constituted, unanimously resolved that a portion of land on the north side was most suitable to be added, and they request the reverend Presbytery to take the proper steps to get that piece of land, or some other suitable piece, to be the addition.

Now, the first objection urged, as I understand, to the jurisdiction of the Presbytery, is this, that the duty of enforcing the obligation upon the heritors does not arise until the heritors have made default, and that consequently all that the Presbytery could or should have done here was to declare the undisputed fact (nobody ever disputed it ; it was a matter of common sense), that the churchyard did require increase, to agree with what seems to be the fact as stated by the heritors, that this piece of land on the north was the most convenient, and to send it back to the heritors and say, get that piece of land somehow—it is not explained by the learned counsel who have argued the case at your Lordships’ bar, how, but get it somehow—and it could only be (says the appellant) when the heritors had made default in getting it in some unexplained manner that the Presbytery would have jurisdiction.

My Lords, I am very unwilling upon such a subject as this, with which I am

not familiar, to say anything that is unnecessary ; but supposing it was so, and supposing that the heritors had failed in doing what they were required to do—supposing that they had the power, and consequently the duty, to take this piece of land, and supposing that that duty had remained unfulfilled for a year and more, I cannot conceive how it could be said that the Presbytery, who had the jurisdiction of enforcing that duty, ought not to have intervened to enforce it when the heritors, fully a year after it was recognised that facts existed which would have placed the duty upon them, had done nothing towards fulfilling it. It seems to me, therefore, my Lords, that the Presbytery were duly seised of the cause, and should have proceeded to enforce upon the heritors the fulfilment of their obligation in the way in which the law required them to do it.

Now, my Lords, it appears that by the 31st and 32d Vict. chap. 96, the Presbytery having this jurisdiction are finally subject to a particular appeal, which must be brought within twenty-two days. The Presbytery here having proceeded, and the appeal not having been brought within the twenty-two days, what the Presbytery have done cannot be looked into. It was urged, and I think correctly, by the appellant below, that although it is true that you cannot inquire into what the Presbytery has done in the interim, yet the Presbytery must pursue their jurisdiction properly ; and it is the very essence of justice, and runs through the law of every country, that where proceedings are to be taken which may have the result of taking away a man's land, you must intimate to him sufficiently what you are going to do, that he may come and be heard, and shew, if possible, that you ought not to take away his land, or if you do take away his land, you ought to do it upon better terms than those which would otherwise have been offered to him. That lies at the very foundation of the administration of justice.

The real question here seems to me to be, whether the intimation given to Mr Walker of what the Presbytery were going to do was a sufficient intimation to fulfil the requirements of justice ? I do not understand that any of the Judges in the Court below doubt that it was necessary to shew that Mr Walker had such notice given to him as to enable him to come and defend his rights. The question was, whether or not the notice actually given to him was sufficient. Now, let us see what was done in order to see whether that was so or not. The Presbytery having taken into account the petition, which clearly asked them to designate this particular piece of land, determine that they will meet on "the 6th day of May next, at one o'clock p.m., with a view to fix upon a piece of ground suitable for designating as an addition to the churchyard, if they shall find the same to be necessary, and to designate the same." Then they proceed to direct that the minister shall intimate that from the pulpit and elsewhere. Clearly the Presbytery there intended to express in the clearest words possible that they intended to meet at the churchyard for the purpose, amongst other things, of designating the piece of land ; and it is pretty obvious, when you consider the nature of things, that the very purpose for which the Presbytery met upon the ground must have been the purpose of designating the ground. It is very true that upon the undisputed question of whether the churchyard was too small or not a personal inspection by the Presbytery might have afforded them evidence of that, and have shewn them that the churchyard was overcrowded ; but it is quite plain that upon the question of which was the most convenient piece of land to be added to the churchyard the personal inspection which they actually performed was of the greatest importance. The Presbytery themselves had made the most clear statement that they were going there for that very pur-

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pose, but unfortunately the intimation which has caused this litigation is in more general words. It is this—"Intimation is hereby given to the heritors of this parish, and all concerned, that a petition has been presented to the reverend the Presbytery of Arbroath, craving them to design and set apart the piece of ground immediately adjoining the churchyard on the north," (I may observe that that included, besides Mr Walker's ground, a part belonging to Lord Dalhousie as well, but he has not made any complaint), "or other suitable piece of ground, for an addition to the same, and that the Presbytery are to visit and inspect the churchyard on Thursday, the 6th day of May next, at one o'clock afternoon, at which time the heritors, and all others concerned, or persons duly authorised to act for them, are requested to attend."

Now, my Lords, the Lord Ordinary and Lord Ardmillan thought, as a matter of fact, that this notice did intimate to those who were present—and Mr Walker was present and heard it—that the Presbytery were going to meet at the churchyard, but that although the Presbytery, in point of fact, were going to meet at the churchyard for the purpose of viewing and designating the land if they thought proper, with power to adjourn any matter for decision afterwards, Mr Walker had a right to suppose, and would naturally suppose, that they were merely going to look at the land and do nothing more. I think, for the reasons I have stated, that the natural and *prima facie* impression of any one who read or heard that notice, and knew what the nature of the thing was, would be that the meeting of the Presbytery upon the ground in order to view it must have been principally for the purpose of ascertaining the suitability of the ground on the north for the addition, and of designating that piece of ground. But when we find what the Lord President states as to the styles and forms of the Court of Presbytery, and the manner in which they conduct their business—when we find that, according to his statement, an intimation of this general sort, referring generally to the terms of the petition, has always been held sufficient, and when we consider that Mr Walker, or at all events his advisers, knew what were the styles and forms of the Court of Presbytery, I cannot bring myself to doubt that upon hearing this intimation he ought to have known that the Presbytery were to meet at the churchyard for the purpose of taking steps, then and there, to fix upon this land as the land which was to be added to the churchyard; and if he did not choose to go, and consequences followed, and things passed behind his back, it was his own fault.

I think, my Lords, that that is greatly confirmed by the fact that the Presbytery, not having ascertained the value of this piece of land, adjourned that matter to a future occasion, and there were further steps taken on that day; and although formal notice was given, through the clerk, to the heritors, and amongst others Mr Walker, of that adjourned meeting, still Mr Walker did not attend. I quite agree with what has been said, that that further shews that Mr Walker was to blame, for had he attended then he would have known what they were doing, and he would have had an opportunity of appealing if he had wished to do so. Even if the twenty-two days ran, not from the time when the notice was given to him of the meeting of the 17th of May, but from the 6th of May, they would not have run then. It seems to me, my Lords, that he had complete and sufficient intimation of what the Presbytery were going to do, and consequently he cannot establish the want of such notice as I quite agree with all the Judges below in thinking was necessary. He cannot set up the ground of a want of such sufficient notice given to him as would authorise him to come

and defend his own interests. I think that such notice was amply given, and consequently that what the Presbytery did was with full jurisdiction, and if Mr Walker lost his opportunity of appealing it was owing to his own fault, which we cannot now help.

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LORD GORDON.—My Lords, the first question which arises is, whether the Presbytery had jurisdiction to do the act which is the subject of complaint here, namely, to designate the land which belonged to the appellant. As to that there appears to be no doubt whatever expressed in the Court below. I do not see any suggestion on the part of the Lord Ordinary that there was any doubt as to that, and I find also on looking at Lord Ardmillan's judgment that he expressed a very clear opinion that he had no doubt whatever as to the jurisdiction. We have had an able argument from my learned friend Mr Duncan, whose skill in these matters is well known, but I think he has not established to your Lordships' satisfaction that the Presbytery were not entitled to act in the manner in which they did act under the circumstances of this case, for although he pushed his argument so far as to say that it was necessary that there should be contumacious opposition on the part of the heritors, I venture to think that that is not correct, and if there has been default and failure to perform a duty incumbent upon them by law, then the duty of the Presbytery to compel them to do so does come into operation. I apprehend, therefore, in the first place, that there is no question whatever as to the jurisdiction of the Presbytery to pronounce the judgment which is the subject of complaint.

But, in the next place, the ground upon which objection was taken to the judgment was that no notice had been given to the appellant of the proceedings intended to be taken by the Presbytery. Now, after what has been stated by your Lordships so very clearly, and with reference to the documents, particularly the intimation of the meeting of the 6th of May, which must have been known to Mr Walker, who was present in the church when the intimation was given, I think it is plain that he did receive due notice that the Presbytery intended to exercise their jurisdiction, and having received such notice it was his duty, if he intended to combat any resolution which they might adopt in the way of taking possession of his property for adding it to the churchyard, to have attended the meeting of the Presbytery; but he failed to do so. And even after the notice of the 11th of May was given to him, intimating that they were about to take further steps in the matter, he failed to appear before the Presbytery on the 17th. He did not avail himself of the opportunity which the law afforded to him of stating his views to the Presbytery, and, if they refused to adopt his views, of taking an appeal to the Sheriff. In having thus neglected to avail himself of the opportunity given to him by the Presbytery of stating his objections to any designation of his land, I think he has put himself out of Court. He is not in a position to say that the land has been taken without due notice, and therefore I venture to think that upon that ground the judgment which was adopted by the Lord Ordinary, and adopted also by the late Lord Ardmillan, is not well founded, but that the opinions of the other learned Judges below are entitled to the greater weight.

I do not think it necessary to trouble your Lordships by going over the details of the documents, because those have been sufficiently brought before your Lordships; but it is of importance to keep in view what has been stated by my noble and learned friend who has last spoken, that there is no allegation of a breach

No. 1. of a statutory form on the part of the Presbytery ; neither is there any allegation of there being any deviation from any customary procedure on the part of the Presbytery. That, I think, has been clearly brought out in the opinion of the Lord President, and has not been challenged by anything which has been stated at the bar.

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That being so, my Lords, I think there was jurisdiction on the part of the Presbytery, and there was due notice given of the intention to exercise that jurisdiction in the way of dealing with this particular piece of land which is the subject of dispute. I do not go into the question as to whether there is not a strong reason for presuming that all the facts were substantially known to Mr Walker. I venture, however, to think that the impression which must be left on the mind of everybody is that it is very difficult to conceive that he was in ignorance of the meetings of the Presbytery with reference to this piece of ground, in which he held so great an interest. Therefore I think, under the whole circumstances of the case, your Lordships will be of opinion that the interlocutor appealed against ought to be affirmed.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

W. ROBERTSON, Westminster—DRUMMOND & REID, W.S.—W. A. LOCH, Westminster—
MACKENZIE & KERMAK, W.S.

No. 2. ALEXANDER COWAN AND SONS AND OTHERS (Defenders), Appellants.—
Thesiger, Q.C.—Davey, Q.C.—Asher.

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THE DUKE OF BUCCLEUCH AND OTHERS (Pursuers), Respondents.—
Southgate, Q.C.—Cotton, Q.C.—R. Johnstone.

Process—Summons—Joint Pursuers—Joint Defenders.—In an action at the instance of several proprietors of different lands on the banks of a river against several firms of paper manufacturers having their works at different places on its course, concluding for declarator that the pursuers were entitled to have the water of the river transmitted in a state fit for the primary uses, and for interdict against the defenders polluting the same, the defenders pleaded that the pursuers were not entitled to sue jointly or to maintain the action against the several defenders, in respect that the rights and interests of the several pursuers and of the several defenders were different, that the summons did not set forth a joint cause of action, each defender being responsible only for his own acts, and that the calling of the defenders in one action was oppressive.

Held (aff. judgment of the Second Division) that the action having been brought by persons jointly interested in preserving the stream from pollution alleged to result from the actings of all the defenders, and the conclusions of the summons being merely for declarator of the pursuers' right to prevent that pollution and for interdict, the conjunction of the several pursuers and of the several defenders in one action was competent and convenient.

Process—Contingency—Conjunction.—Three actions raised by riparian proprietors, concluding for interdict against owners of paper-mills upon the banks of a river polluting the water were conjoined by the Court, although some of the parties in one of the actions were not parties in the others. *Held (in aff. the judgment of the Second Division)* that the conjunction was competent and convenient.

Ld. Chancellor
(Cairns).
Ld. O'Hagan.
Lord Black-
burn.
Lord Gordon.

(IN the Court of Session, 2 Macph. 653, 4 Macph. 475, 5 Macph. 214 and 1054, and 11 Macph. 676.)

This was an appeal from judgments of the Second Division in conjoined actions at the instance of the Duke of Buccleuch and other riparian proprietors on the river North Esk in Midlothian, against Alexander

Cowan and Sons and other proprietors and occupiers of paper-mills on the banks of that river. No. 2.

The first of the conjoined actions, raised in 1841, was insisted in after 1863 by the Duke of Buccleuch, Viscount Melville, Sir James William Drummond of Hawthornden, and Robert Brown of Firth, against Alex-
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ander Cowan and Sons, paper-makers at Valleyfield Mill, William Somerville and Sons, Dalmore Mill, Annandale and Son, Polton Mill.

The summons concluded for declarator that the pursuers had right to have the water of the North Esk transmitted to them in a state fit for the primary uses, and that the defenders had no right to pollute the water, and for interdict against the defenders discharging into the river polluting matter from their respective works.

The pursuers averred that the stream had been polluted by noxious refuse of materials discharged from the defenders' works.

The defenders, *inter alia*, pleaded ;—(1) The action is incompetent. (2) The several pursuers are not entitled to sue this action jointly, or to maintain it against several defenders, in respect that their rights and interests are different. (3) The summons being libelled, and the action laid, at the instance of the pursuers jointly, the action ought to be dismissed, in respect the summons does not set forth a joint cause or causes of action, which the pursuers are entitled jointly to sue and maintain. (4) The causes of action alleged in the summons against the defenders respectively being essentially separate and distinct, and none of the defenders being responsible or liable for the acts or conduct of the others, but each only for his own acts and conduct, it was unfair, oppressive, and illegal to include the whole in one summons, and on this account the action ought to be dismissed.

On 23d January 1864 the Lord Ordinary (Ormidale) repelled the pleas, and on 9th February 1864 the Second Division adhered.

Thereafter two other actions of declarator and interdict were brought, the one by the Duke of Buccleuch, Viscount Melville, and Sir James William Drummond, against Alexander Cowan and Sons (the partners being different from the original firm of Alexander Gowan and Sons), James Brown and Company, paper-makers at Esk Mill ; and William Somerville and Son, paper-makers at Dalmore Mill ; and the other action by the Duke of Buccleuch and Viscount Melville only against Alexander Annandale and Sons of Polton Mill, Alexander Fullerton Somerville, paper-maker at Kevock Mill, and William Tod and Son, paper-makers at St Leonard's Mill.

The cases were reported on the issues, and the Second Division, on the motion of the pursuers, conjoined the three actions by interlocutor of 23d February 1866.

The conjoined actions were subsequently tried by jury on 30th July 1866 and following days, and the jury returned a verdict for the pursuers on all the issues, and thereafter the defenders, under an agreement with the pursuers, conducted experiments with a view of abating the nuisance. In 1873 the pursuers moved for decree. The Court pronounced decree of declarator ; and the defenders having stated that they had no proposals to make for abating the nuisance, and did not move for further inquiry, the Court further granted the interdict.

The defenders appealed. At delivering judgment,—

LORD CHANCELLOR.—My Lords, the subject-matter brought under your Lordships' consideration in this case is one the importance of which to the appellants can hardly be overstated. At the same time, your Lordships have had the advantage of a most able argument, which has submitted to you every topic

No. 2. which could be urged on behalf of the view taken by the appellants. You have the unanimous decision of the Second Division, and I think I speak correctly when I say that the arguments of the appellants have not raised in the minds of any of your Lordships any doubt as to the correctness of that decision. Under these circumstances I think your Lordships are prepared, without further argument, to dispose of the question which is now raised.

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The action is one instituted in Scotland with reference to an alleged pollution of the river called the North Esk. A number of riparian proprietors are proceeding against a certain number of owners of paper-mills upon the Esk, and the summons alleges pollution of the river by those owners of paper-mills. The objections which have been urged on the part of the appellants resolve themselves really into one principal objection, and that is that it was not competent, either in the shape of one original action or in the shape of a conjunction of several actions, for different riparian owners to pursue the various owners of paper-mills in one proceeding with regard to the pollution of the same river.

My Lords, this objection is, as your Lordships will at once see, an objection with reference to procedure and practice, and, to a certain extent, an objection with reference to the exercise of the discretion of the Court below. In matters of procedure and practice, and still more in matters of discretion, and, above all, where the Judges of the Court below are unanimous as to a matter of procedure and practice, the uniform practice of your Lordships' House has been not to differ from that opinion unless your Lordships are perfectly satisfied that it is founded upon erroneous principles.

For the purpose of determining the competency of the action we must look at the allegations which are found in the pleadings upon both sides, and I will, in the first place, with regard to the record, direct your Lordships' attention to the particular relief which is asked in the original action in this case.

I can very well understand that there is an inconvenience almost amounting to an impossibility in joining a number of pursuers in an action of damages against a number of defenders. Suppose four riparian owners, A, B, C, and D, commence a proceeding against four owners of separate mills, W, X, Y, and Z, for the pollution of a river—a proceeding in which the pursuers seek to recover damages against the defenders—there the jury or the tribunal, whatever it might be, which would have to inquire into and assess the damages, would have first to take the case of the millowner W, and, having ascertained that he was liable in damages, they would have to find out what damages he had to pay, first to the riparian owner A, then to the riparian owner B, then to C, and then to D. The amount of damage might be, and in ninety-nine cases out of a hundred would be, different as to those different riparian owners, and a different inquiry and an assessment of a different sum would have to take place as to each of them. So, my Lords, it may be with regard to the defenders; when you had ascertained the sum which would have to be paid by W by way of damages to each of the four riparian owners, you would then have to proceed to the case of X. It is almost impossible that the damage occasioned by W should be exactly the same as the damage occasioned by X. You would have, therefore, in the case of X and of Y and of Z, to ascertain as to each of them the damage which he had done, and again, the damage which he had done to each riparian owner. The inconvenience of a proceeding of that kind is so great that, although it is not a point for your Lordships' decision in the present case, and I do not desire to be taken as expressing any final opinion upon it, I can well understand that by

reason of that inconvenience it might well be held that it was incompetent to join together the pursuers whom I have described, and the defenders whom I have indicated, in one and the same proceeding.

But when I turn to the nature of the present proceeding I find that it is as different as anything well can be from a proceeding sounding in damages. Your Lordships find that there are three different subjects to which the conclusions of the summons point—I refer to the summons in the original action, which, in this respect, is the same as the summons in the later actions. The first object is, that it “should be found and declared that the pursuers have good and undoubted right to have the water of the North Esk, so far as it flows through or by their properties, transmitted in a state fit for the use and enjoyment of man and beast; and the said defenders have no right to pollute or adulterate the water, nor to use it or the channel of the stream in any way or for any purpose such as to render the water noxious or unwholesome or unfit for all its natural primary purposes to the pursuers, or in any way to destroy the amenity of the stream”—that is to say, that there may be a declarator that the natural right to the running stream in its natural condition, which *prima facie* would be possessed by these riparian owners, has not been in this particular instance taken away or abridged, or in any way affected by any right acquired by those who are said to be polluting the stream

The second object of the action is, that the defenders may be “prohibited and interdicted from discharging into the water of the Esk, from their respective paper-works, any impure stuff or matter of any kind, whereby the water in its progress through or along the property of the pursuers, or any of them, may be polluted or rendered unfit for domestic use, or for the use of cattle, or its amenity in any way diminished, or the right of the pursuers therein in any way injured or affected”.—that is to say, an interdict following the declarator, and protecting the right which, in the first instance, is sought to be declared; and then, in the alternative, “it ought and should be found and declared that in the event of the defenders, or any of them, being found entitled to continue the use of the water, or any portion thereof, for all or any of the works mentioned, that they are bound and obliged to make use of the water in the manner least injurious to the pursuers, and to use all necessary and proper precautions, by filtration and otherwise, to restore the water to the stream, after having been used at the works respectively, in as pure a state and condition as possible.”

Along with that conclusion of the summons your Lordships will probably take those averments in the condescendence and in the replies, to which, in the course of the argument, your attention was directed. Those are averments asserting upon the part of the pursuers a course of pollution of the river, uniform in this respect, that it comes from the different paper-mills used by the different defenders in the manufacture of paper, the process of the manufacture of paper being asserted to be of the same or of a similar kind; and the defenders make defences to these averments which are identical in point of expression and in point of allegation.

Now, my Lords, I do not mean to say that even in this case (I am still considering the *a priori* arguments for or against the united action) there may not be inconveniences in having to try the action which it is proposed to try by the summons to which I have referred. The nature of the case is such that, tried in any way, either in a joint action or in separate actions, great and grave inconvenience and difficulty will be experienced by any Court upon which the

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task devolves. But I have no hesitation in saying that, as a balance of convenience and inconvenience, it appears to me that, looking at the subjects of relief which are comprised in this summons, the convenience of dealing with these matters of relief in one conjunct action rather than in separate actions preponderates immensely in favour of the conjunct action. Take, for example, the intermediate conclusion of the summons with regard to an interdict; supposing an interdict had been granted in five or six different actions, and it became a question as to whether that interdict had or had not been obeyed, it would be utterly impossible for any Court to answer that question without having before it the whole of the defenders, in order that the Court might know to the conduct of which of the defenders the continued pollution of the river was to be attributed. And, my Lords, so also with regard to the pollution before the interdict was granted. The experience of any of your Lordships who have observed trials of this kind will have shewn you that where the proceeding is directed against one individual simply for polluting a river, it is always a topic of defence with that one person that the pollution either comes altogether from the works of some other person upon the river, or comes from the works of that other person in so great a degree as to render the pollution of the individual actually sued not worthy the attention of the Court. It is therefore only where you can have placed face to face before you the various persons who are said to be polluting the same stream by the same process and by similar acts that you can decide whether they are all culpable or not, and whether there shall be a declarator with regard to all of them or not, and if anything is to be done which bears the aspect of an intermediate course—anything in the way of remedy—how that shall be carried out as between the different persons before the Court.

Those are the considerations which, altogether irrespective of authority, naturally occur to my mind, and which I submit for the approval of your Lordships. We must, however, be regulated by the well-established rules of procedure and practice upon the subject; and however convenient the course which I have indicated may be, if there are rules of procedure against it, those rules must not be departed from.

But, my Lords, are there such rules of procedure and practice in Scotland as render an action, such as I have described, incompetent?

The procedure of the Courts both of equity and of common law in England is very well known, and the procedure in the common law Courts has long been of a very rigid and exact description. That is a procedure generally between one person and another person—between A and B—the one almost always suing the other for damages; a single issue is raised and is adjusted between the two litigants, and the right of the plaintiff is established or is denied as against the particular defendant. So rigid and so inconvenient at times was the course of procedure at common law found to be that in the Court of Chancery it has been very much relaxed, and much greater latitude has been allowed there in the joinder of different parties having an interest in the same subject-matter. Your Lordships were referred, in the course of the very able argument by Mr Davey, to a well-known proceeding in the Court of Chancery, called a bill of peace, a bill not of very common occurrence, but of which there have been instances even within living memory—a bill which brings before the Court a number of persons having, not identical rights, but rights in regard to the same subject-matter, who are making claims and

asserting those rights, and who are brought together to have something like a declarator made in the presence of the whole, with regard to the nature and extent of those rights, in order in that way to give quiet and peaceful possession to the plaintiff who brings them before the Court. In one point of view the present proceeding, if we put aside the more active part of the relief sought, namely, the interdict, bears a certain analogy to a bill for a quiet possession. The tendency in this country, as has been pointed out, with reference to recent legislation, has been very much to enlarge the power of bringing parties having several interests, or interests in the alternative, before the Court.

But, my Lords, passing from the English practice, which can only be referred to as an illustration, and coming to the Scotch practice, what do your Lordships find to be the state of the authorities? The competency of joining in an action of this kind several pursuers appears to me to be put beyond all doubt by the authorities which have been referred to.¹ Your Lordships have the case of the river Don, where the upper heritors appear to have maintained an action for the purpose of having removed a fence or weir or impediment of some kind which was placed across the river lower down, and which interfered with the passage of salmon up to the various lands of the upper heritors. Your Lordships have the case of Lord Moray,² where one general act done by the order of Lord Moray, affecting a number of persons, each in his own premises, namely, the carrying of certain drainage from a suburb of Edinburgh to the village of Stockbridge, was made the subject of proceedings, which were maintained successfully by several pursuers of the same character as the pursuers in the present case. And, my Lords, there is no authority produced the other way. As to the question of pursuers joining, therefore, the authorities appear to be quite clear and quite satisfactory; and, indeed, the argument was not directed at all so strongly as against the case of the junction of the pursuers as against the junction of the defenders.

But, my Lords, how do the authorities stand with regard to a joinder of defenders in a case of this kind? In the first place, I must point out what seems to me to be a matter to which your Lordships should give the greatest possible weight. There is no authority produced in any decided case, or in any book of practice, which negatives the right and competency in a case of this kind, of bringing before the Court several defenders. On the other hand, your Lordships have, what I have before referred to, the unanimous opinion of the Judges of the Court in the present case, that such a proceeding is competent and is not at variance with the known and recognised procedure. Now, my Lords, if the practice is one entirely consistent with the whole spirit of the procedure in Scotland, your Lordships will not be surprised to find that there is no case actually decided and recorded upon the subject, because it would not occur to any person to make and record an objection to that which was really a part of the ordinary procedure of the Courts of the country.

But, further than that, your Lordships happen to have a case recorded in which, although it is perfectly true no objection such as is taken here was taken, yet a similar objection might have been taken, and from the fact that the objection was not taken I infer that the joinders in that particular instance, of

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¹ Lord Forbes v. Leys, Mason, and Company, Jan. 13, 1824, 2 S. 603.

² Downie v. Earl of Moray, Nov. 12, 1825, 4 S. 167 (N. E. 169)

No. 2. various defenders, was assumed by every person to be consistent with the ordinary procedure in Scotland. I refer to Lord Breadalbane's case¹—the case of the sheep drovers—which came before your Lordships' House. There Lord Breadalbane brought before the Court several persons who were united in interest only in this way, that they all alleged that they had a right, in driving sheep from certain farms in the north of Scotland towards the south, not only to use a roadway, the right to use which, indeed, was not in any way denied, but that they were entitled every ten or twenty miles to halt the droves of sheep and to pasture them in the neighbouring land of Lord Breadalbane, or what were called the stances, which really were parts of the hill-side. Lord Breadalbane united together as defenders seventeen, eighteen, or twenty of those persons who asserted a right of that kind; he brought them before the Court for the purpose of obtaining a declarator and an interdict; he succeeded in doing so, and the objection, my Lords, was never taken that it was wrong or contrary to Scotch procedure to join those various defenders together.

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There is, moreover, an Act of Parliament applying to Scotland, the 48 Geo. III, c. 151, which provides "that where any action, matter, process, complaint, or cause has been brought before one of the said Divisions or the Lords Ordinary thereof, the other Division or the Lords Ordinary thereof shall remit any action, process, matter, complaint, or cause subsequently brought before them relating to the same subject-matter or thing, or having a connection or contingency therewith, to the consideration of the Division or Lords Ordinary before whom the first cause, action, process, complaint, or matter had been previously brought, which remit shall be made in such form and manner as is now used, or as shall be established by future regulations from time to time." Therefore, my Lords, if there had in this case been separate actions brought by these pursuers against the different owners of these mills, it would have been obligatory upon the Division of the Court before which they were brought to send the second and subsequent of those actions to the Lord Ordinary who had possession of the first, and they must all have stood before that same Judge, and it would have been for that one Judge to consider what, under those circumstances, he ought to have done. I took the liberty of asking the learned counsel whether he could shew that it would have been *ultra vires* of that Lord Ordinary to have joined those actions if he had thought that they were so connected in point of evidence and in point of interest that it would be more convenient that they should be tried on one occasion by one jury than that they should be tried on different occasions before different juries. The learned counsel doubted the power of the Lord Ordinary, but no authority was adduced to shew that the Lord Ordinary had not such a power.

The Act of Parliament evidently indicates that the remit is to be made for some practical purpose. There can be no practical purpose, as, indeed, was pointed out by the Lord Justice-Clerk, except that the Lord Ordinary when he has the different actions before him may consider what is the best course to adopt, whether to join them together or to sist all but one, to wait until that one is tried—that is to say, it is in the discretion of the Lord Ordinary which course he will adopt. But, my Lords, if it is in the discretion of the Lord Ordinary to join together a number of actions brought by these pursuers against each polluter of the river, I ask why is it to be held to be contrary to procedure,

¹ Breadalbane v. M'Gregor, July 14, 1848, 7 Bell's App. 43.

or contrary to competency, that in the first instance the pursuers should join the various persons said to be polluting in the same way the same river in one and the same action? It appears to me that there is nothing in reason or in principle which could lead your Lordships to hold that the learned Judges of the Court of Session were wrong when they affirmed that such an action was competent in Scotland. It appears to me to be perfectly clear that the action is competent as regards the joinder of the pursuers. Although the authority is not so distinct for the joinder of the different defenders, there is authority for their joinder; there is the united testimony of the Judges in the present case that such joinder is consistent with the Scottish procedure; there is every argument of convenience for having this whole question decided in one litigation between the different parties, and therefore the objection as to competency must, in my opinion, fail.

Some argument was adduced with regard to the form of the issues, but that came, I think, in the result, not to be really insisted upon before your Lordships. Whether, if your Lordships had now the settling of the issues, some words might or might not, with advantage, be altered, I do not stop to inquire. It appears to me that in substance these different issues presented to the jury the various questions which had to be decided, and there is nothing before your Lordships to lead you to suppose that there has been any miscarriage of justice in the determination which has been elicited from the jury.

Upon the whole, I submit to your Lordships that this appeal fails, and that it must be dismissed, with costs.

LORD PENZANCE.—My Lords, the case has been so completely gone into by the Lord Chancellor, and I so entirely agree with everything that has fallen from him, that very little on my part needs to be added.

A great deal has been said in argument about the convenience or the inconvenience of adopting this or that course; but, after all, I apprehend that the question before your Lordships to-day is not whether it is most convenient that this or that procedure should be adopted, but whether, as a matter of fact, the procedure in the present case is or is not consistent with the existing practice of the Court in Scotland.

When we come to examine that question I admit that we are met with some difficulty by reason of the very meagre materials that are afforded us upon which to form a conclusion as to what the practice of the Court in Scotland is. But, my Lords, I conceive that where the Court has a by unanimous decision affirmed that this proceeding is entirely within the limits of its own practice and procedure something very much stronger than any argument as to such a procedure being inconvenient ought to be required before your Lordships can come to a conclusion that a decision affirming that procedure ought to be reversed. And, indeed, I think that, under the circumstances, the Scotch Court having affirmed the existence of the procedure, the *onus* is cast upon the appellants to satisfy your Lordships that that conclusion is wrong by referring you to some distinct precedent, decision, or authority to the contrary effect.

The appellants have wholly failed to lay before your Lordships' House anything in the shape of a decision contrary to the decision which is now appealed from; but they have adduced a great deal in the way of argument tending to shew that such a practice might be inconvenient. And here, my Lords, I will observe that there is a constant tendency in the argument of a case of this kind

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No. 2. to draw analogies from the law of England, and I think your Lordships cannot be too much upon your guard against importing into a question which is purely a Scotch question, relating to the practice of the Scotch Courts, conclusions drawn from a practice purely English, namely, the procedure of the Courts of this country. As the Lord Chancellor has said, there is no doubt whatever that, as far as common law is concerned, the Courts in this country have been bound, most of them, by inflexible rules, handed down in great measure from the time of the Plantagenets, and until certain modern statutes were passed there was no possibility of altering or improving them.

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But when I inquire in this case as to the Scotch practice I am struck at once by the great dissimilarity that there is between the practice in Scotland and the practice of the Courts in this country, because to take, for instance, one of the cases which have been cited, the case of *Revey and Bell v. Murdoch*,¹ which was the case where two men were thrown out of a gig by reason of somebody's negligence in leaving a heap of rubbish out in the road, it was held in the Court in Scotland that those two men could join together in an action. That, I need hardly say, is a matter which is entirely inconsistent with any practice in this country. They were independent persons, each having independent causes of action, each having received independent injuries, and each was entitled to a personal action. No doubt the cause of action would be similar in each case, but there was no community between the two plaintiffs, which, according to English practice, would admit of their being joined in one action. The next case cited was the case of *Harkes v. Mowat*.² That was an action of slander by two pursuers against one defender, who had said that they were robbing, swindling rascals. It was quite consistent with the practice of the Scotch Court that that should be a joint action; but that again is wholly at variance with English notions upon the subject. I think an even stronger illustration is found in the case of *Douglas*,³ which has been alluded to in the argument. In that case the Lord Justice-Clerk said, after alluding to an Act of Regulations which was passed in 1695,—“It is not pretended that this regulation can receive, or ever has received, literal obedience. On the contrary, the object of the provision, much more limited than the words seem to import, is well known, historically, to have been the prevention of a practice, formerly prevalent, of embracing in one summons actions against debtors more than six in number, each defender being pursued on a separate ground of debt unconnected with the debts of the other defenders called. Strange as this may sound to modern ears, there is no doubt of the fact, for it is distinctly stated by Sir George Mackenzie, writing before the Act of Regulations in the year 1684. In the fourth book and first title of his *Institutions* he says,—‘Though the accumulation of several actions into one libel was not allowed by the civil law yet it is allowed by ours, in which we may not only pursue several persons for several debts in one libel, which we call by a general name an action against debtors, but we may likewise accumulate several conclusions against one and the same person, though they be of different natures, as reductions, improbations, and

¹ *Revey and Bell v. Murdoch*, March 11, 1848, 3 D. 888.

² *Harkes v. Mowat*, March 4, 1862, 24 D. 701, 34 Scot. Jur. 348.

³ *Liquidators of Western Bank v. Douglas*, Jan. and March 1860, 22 D. 447, 32 Scot. Jur. 434.

declarators of property, and actions of general and special declarator—in all which it is a general rule, *quot articuli tot libelli.*"¹

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That, my Lords, is a general statement of what the old law of Scotland was, and it is utterly at variance with the English practice upon the subject. Although it is quite true that this practice with regard to debts, as the learned Judge goes on to point out, has long since been disused, and has not for the last hundred or two hundred years been followed, still here is a statement which shews that the old law of Scotland was, in this respect of joining both plaintiffs and defendants together, so widely at variance with the English law that we need not be astonished to find that in such a case as the present, although this joining of plaintiffs and defendants is a thing which according to the English law we could not support, yet according to the Scotch law it might be the most natural thing in the world.

Now, my Lords, there being no authority whatever against this conjoint proceeding, there being the statement of the Court itself that it is according to practice, and there being, from the authorities I have just alluded to, proof that the procedure in Scotland differs widely from the procedure in England in this respect, I think there can be no more natural conclusion to arrive at than that this conjoint proceeding is quite consistent with the practice of the Court in Scotland; and I venture to say that that is really the whole question before your Lordships upon the present occasion.

But as a very able argument has been addressed to us with regard to the convenience and inconvenience of the matter, and as distinctions have been taken by the learned counsel, according to which, supposing that those distinctions are correct, although the defenders might in some cases be joined, they could not be joined in such a case as this, I will trouble your Lordships with one or two remarks, and one or two only, upon the subject. It has been argued that the cause of action in such a case as the present against each defender is wholly separate and distinct and unconnected with that against the others, and it is upon this proposition that the chief reliance is placed against the competency of the action. But the cause of action in each case is not the mere act of pouring polluting matter into the river, for the quantity might be insufficient to do mischief by reason of dilution, or the water might purify itself as flowing water does, so that the cause of action is not complete until the result of rendering the water unfit for the pursuers' use has been brought about. This result may in some cases perhaps be traced to the individual act of one of the defenders, but in the majority of cases the reverse is the fact, and the extent of deterioration in the water worked by the polluting acts of several other defenders would have to be inquired into. This establishes, I think, a very obvious connection between the several defenders. The cause of action against each of them depends upon the ultimate impurity of the water when it reaches the pursuers' lands, and that ultimate impurity is the joint result of the acts of all of them. The main ground, therefore, upon which the incompetency of the present action is rested appears to me to fail.

But if I turn to the question of convenience I think the case is even stronger for the respondents, for the choice, as a matter of inconvenience, lies between investigating this joint result and determining the share which each defender may have in it in the presence of all the defenders on the one hand,

¹ See 22 D. 496, 32 Scot. Jur. 441.

No. 2. or trying the effect of each defender's acts separately, and in the absence of the others, on the other hand. Even in the case of damages there would be much to be said under such circumstances in favour of a joint trial, but in such a case as the present, which is one not of damages but of declarator and interdict, the convenience and even justice of the case is, in my opinion, best met by a joint proceeding.

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Now, my Lords, I am well aware, on the other hand, of the inconvenience to which the learned counsel adverted. There is no doubt that there are never three prisoners tried, and there are never cases in which there are three defendants in a common law action, whose defences are separate, and there are never cases in which there are three or four parties in the Divorce Court or in the Probate Court, coming before a jury, where great inconvenience may not arise by reason of the several parties having separate interests, so that the defence of one party is not identical with that of the others, and still more, by reason of what is evidence against the one party not being evidence against another. The strongest possible evidence against a man is a letter or paper written by the man himself; but such a letter, which is evidence only against the man who wrote it, may prejudice the jury against the other defendants, who never wrote the letter, and had no concern in it. Notwithstanding this inconvenience which arises where there are several parties joined together, I think the balance of convenience, on the whole, is in favour of a joint proceeding as against a separate proceeding in such a case as the present. But, again I say, I invite your Lordships to decide this question, not upon the question of convenience, but upon the only question which, according to my mind, arises in the case. Aye or no, is this in accordance with the practice of the Scotch Court? And as we have a unanimous statement of the Scotch Court upon that point I would advise your Lordships to affirm that decision, unless you are satisfied that there has been some authority or proof adduced by the appellants that that decision is erroneous.

LORD O'HAGAN.—My Lords, I have given careful attention to the very able arguments addressed to us, but they have failed to satisfy me that your Lordships would be well advised in disturbing the unanimous decision of the Scottish Judges.

The question is one of local procedure and practice, and most fit to be dealt with by the local tribunals. Many subjects of controversy have been discussed, but they have really resolved themselves into a single one, the competency of the several actions. We have been relieved, by the candid statement of the learned counsel, from the consideration of the sufficiency of the issues; and the suggestion of "acquiescence" and the objection as to "conjunction" has been urged only as affecting the argument on "competency." Indeed it could not have been otherwise judicially pressed, for the right of the Court to conjoin actions in proper circumstances has been established by ample authority, and its exercise being plainly within the discretion of the Judges your Lordships would scarcely have departed from the ground of your ruling in *Wauchope v. The North British Railway Company*, 4 Macq. 248, or interfered in any way with the decision they have pronounced. The reasoning of counsel on the point of "conjunction" does not appear to me to have aided them in their denial of "competency;" and as to this your Lordships would be slow, without coercive reason, to differ from the Judges in ascertaining the existence and

effect of rules of procedure established by no written law, but originating in views of social convenience and the interests of suitors, with which their judicial experience must have made them especially conversant. I think, however, that on authority and principle the ruling of the Court below was perfectly right.

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Our duty is to discover as well as we can what has been the practice in Scotland with reference to the joinder of parties, and in this we have been assisted by many authorities, to which I shall not, after the ample analysis they have undergone, particularly refer. The result of them, to my mind, very clearly is, that at least as to pursuers, what was done in this case was fully warranted. Indeed it was not ultimately denied by the learned counsel that when a single act which affects several persons is the subject of complaint they may together sue the doer of it. In my opinion, this admission decides the case against the appellants. There is here in reality only one matter of complaint, namely, the pollution of the river. One remedy is obtained,—the issue of an interdict. To the single result which injures the pursuers the defendants are contributories in different degrees. But the aim of the proceeding is not to affect each of them apart from the others, but to prevent the one consequence of their combined action. Damages are not sought against them individually. The effort is to abate the mischief they have all wrongfully wrought. Thus regarded, on a fair consideration of the cases, and on the interpretation given to them on behalf of the appellant himself, the junction of the pursuers appears to me unimpeachable. They have a common interest in the stream—in its purity and its amenity. They suffer from a common grievance in its pollution. That grievance is created by the action of men engaged in the same trade using the same machinery and materials, which conduce to the same injurious results, and this the pursuers seek to obviate by a single judicial act equally restraining all who have produced it.

We have had many inapt illustrations and delusive analogies in the course of the argument, and I have been quite unable to appreciate the force of the distinction taken to-day between the case of persons sending pollution through the same pipe and of others sending it, with the same result, into the river. If there may be, as was conceded, joinder of the pursuers and defenders in the one case, I cannot imagine why they should not be joined in the other.

Then, as to the junction of defenders, much the same course of reasoning appears to me to apply. For this there is not, undoubtedly, the same clear authority as warrants the junction of pursuers, and in the absence of it the Judges rely on the want of any rule restraining them from the permission of a proceeding which they deem—and I conceive rightly—for general and individual interest alike, enabling all parties fully to secure their rights in the cheapest and most facile manner. If there be no authority in favour of that proceeding there is no authority against it. In several instances, as in the Breadalbane case¹ and Lord Forbes' case,² we find defenders joined without objection, and there may be many such cases of which we have no account. The very generality of a practice may prevent the record of its common application. And in such a state of things it is not too much to say that the judicial affirmation of its existence and its nature is entitled to the highest consideration.

I do not trouble your Lordships with observations on the expediency of the

¹ Breadalbane v. M'Gregor, July 14, 1848, 7 Bell's App. 43.

² Lord Forbes v. Leys, Mason, and Co., Jan. 13, 1824, 2 S. 603.

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course of which the appellants complain; it has already been demonstrated by my noble and learned friends. The convenience of having all persons affected by a process of this kind at once before the Court seems very manifest, and the extreme difficulty of working out such a process, in the absence of the majority of them, with justice to all, is equally so. The cases might wear a different aspect if the pursuers sought damages instead of seeking declarator or interdict.

The argument *ab inconvenienti*, so strongly urged for the appellants, appears to me, as to the Lord Chancellor, to tell the other way. No doubt, if parties are numerous and issues complicated Judges may find their duties onerous, and juries may run the risk of applying for or against one party the evidence properly applicable to another. But these are inevitable incidents, affecting every day the most serious civil and criminal trials, and the evil must be mitigated as best it may by the guidance of the Judges and the intelligence of the jury. On the other hand, as I have said, it is surely for the advantage of the satisfactory administration of justice that those who complain of a common injury, and those who are charged with the commission of it, should all be enabled to assert themselves before the same tribunal, especially when that tribunal has ample power to prevent any individual wrong by the shaping of separate issues and the regulation of the course and conduct of the trial.

On the whole, I have no doubt that the appeal should be dismissed.

LORD BLACKBURN.—My Lords, I am also of opinion that the appeal should be dismissed. I apprehend that the important question is, what is the Scotch law and practice as to joining parties, either pursuers or defenders? And as to that I think this much has been shewn clearly enough in the course of the argument, that the law and practice of Scotland with reference to that matter is different from that of England. If I were called upon formally to deliver an opinion upon it I should be inclined to say that the Scotch practice was better. Certainly it is not at all inconsistent with natural justice; but at all events it is different, and it is by the Scotch law and practice, and not by the English, that this matter has to be decided.

Now, I find that the Lord Justice-Clerk, in delivering judgment upon the point of conjoining the three actions, states, and no doubt perfectly accurately, that from the earliest times in Scotland it has always been the course as much as possible to bring all actions that have any *contingentia* with one another together, and let them be tried together, and disposed of together. The consequence of such a conjunction must frequently be to unite pursuers, or to unite defenders, who, according to the English practice, would not be united as plaintiffs, and would not be united as defendants.

Then, my Lords, comes the question whether in this particular case it is competent, according to the Scotch law, to join together in one suit these different pursuers, they being several different heritors who have properties on different parts of the river Eak, and claiming a declarator that the river is to be kept clear of pollution, and asking for an interdict to be granted against the defenders, several paper-manufacturers on different parts of the river Eak, who do separately (for I quite agree that there is not the slightest evidence of their acting in concert) pour polluting materials into the river, so that the pursuers are, as they allege, injured by their acts in the process of that manufacture. Now, as to the joining of the different pursuers together, I agree with what has been said by my noble and learned friend the Lord Chancellor, that the authority is

very strong indeed, that where you have different pursuers with one interest as against one defender those several pursuers may unite their cases. No. 2.

Authorities have been produced of instances where several defenders were sued together. But those cases are not nearly so strong or so numerous as the cases of conjoint pursuers; and if I had been called upon before this case was decided to say whether such a rule of practice of Scotch law was made out I should have felt considerable hesitation about it. But when I look at the decision which was come to unanimously by the Court below in this case it is so perfectly consistent, in my mind, with justice, that I have no hesitation in saying that I should act upon it. Nov. 30, 1876.
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I only wish, my Lords, clearly to guard against being supposed to say that I think that according to the Scotch law it can at all be said that any pursuers may join together. Still less can it be said that a pursuer may join any defenders together. I think what is laid down by the Court below furnishes a very good rule, at least so far as this case is concerned. It is necessary that the cause of action about which the pursuers complain should be, to some extent, a united one—it is necessary that there should be some *contingentia*. I will not now inquire how much *contingentia* there must be, but some there must be. In like manner, with defenders, it must be shewn that there is some *contingentia* in their acts. I think, when you come to look at it, you get the answer to the question what is the test, as far as this matter goes, very well indeed from what was said by the Lord Justice-Clerk, who said—"The object of this action is to protect the river Esk from pollution by the operations of the paper-makers upon the river. It appears to me that that simple statement of fact, and of the object of the action, at once suggests the extreme propriety and expediency of the proprietors who are injured being all here, on the one hand, and the paper-makers who are said to inflict injury being all here, on the other hand. No doubt, if there were any rule in our practice which rendered it incompetent for parties having all a common interest in a stream to pursue an action against parties who all contribute exactly in the same way to the pollution of the stream we must give effect to that rule of practice. But I know of no such rule." I may observe that some part of the argument at your Lordships' bar depended upon the word "exactly" in the sentence. The different paper-makers upon different parts of the river Esk who put refuse into it at places which are miles distant from one another may not, in one sense of the word, be said to be doing "exactly" the same thing, but in the ordinary use of the word it has that effect given to it, and that is the sense in which the Lord Justice-Clerk uses the term. He then proceeds to say—"And therefore I am bound to look upon this as a question depending upon general principles. I think the case will be most fully and fairly tried by having all the parties called who are interested on the one side or on the other."

Now, my Lords, I think, confining that test to the cases to which it properly applies, it enables us to say that the process of the Scotch Courts is perfectly just—that if two pursuers or two defenders are so to be united in one action they must have a *contingentia* uniting the two, connecting them with each other, and it must go so far as to shew that the whole case will be most fairly and properly tried, and justice will be best done—indeed that it cannot well be done otherwise—by all the parties being brought into the action. Applying that principle to the present case I do not think any one can dispute that the real question raised in it was, whether or no the pro-

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prietors of land along the banks of the Esk had a right to prevent the paper-makers from polluting the river, each paper-maker doing it separately at his own mill, but the general effect being to produce one nuisance to the heritors. I think no one can doubt, looking at the nature of the proceeding, that it was one in which justice as well as convenience made it in every way desirable that all the parties interested should be brought before the Court together, and their cases tried in one action. I do not think it necessary to inquire whether there are other cases in which it might be done, but it seems to me that here it was rightly done; and if it is once established that here it was competent to bring the first action, so it seems to me self-evident that the Court were quite right in conjoining the other actions with it. I do not think it necessary to say anything upon any other point.

LORD GORDON.—My Lords, in this case I happened to be counsel for the parties—first for one set of parties, the appellants, and afterwards for the other, the respondents. I do not know, therefore, that it would be expedient that I should take part in the expression of opinion in this case further than by saying that I concur in the views which have been expressed by your Lordships with reference to the import of the opinions of the Judges of the Court below, as to the procedure and practice which ought to regulate these matters. The question is one which depends peculiarly upon Scotch procedure and practice, and it has come before a tribunal composed chiefly of Judges from the other parts of the United Kingdom than Scotland. Due weight has been given to the opinions expressed in the Court below in this matter, which is a matter regulated by procedure and practice, and the result of the opinions expressed by your Lordships is clearly in accordance with the views which have been expressed by the Judges in the Court below. The Judges in the Court below were unanimous upon the point. No difference of opinion existed either on the part of the Lord Ordinary or on the part of the Judges of the Inner-House; and it certainly must be very gratifying to us in Scotland to find that, without expressing entire approval of the views which regulate the procedure and practice in these matters in Scotland, your Lordships are of opinion that there are great conveniences in following such procedure and practice.

I will only observe that in looking over the proceedings I do not find that it is alleged that any injustice has resulted from the combination of parties at the trial. On the contrary, I find that the appellants had recourse to two proceedings, which were open to them for impugning the verdict if they thought proper. The first was an exception to the law as laid down; that, however, was not insisted upon; they apparently departed from their right to proceed in that way, and it is not now before your Lordships. The other was an application for a new trial upon the ground of the verdict being contrary to the evidence, but with respect to that it appears that the order was discharged with the consent of the appellants themselves. I do not find, therefore, upon the papers before the House, any allegation that there was any injustice resulting from the adoption of the course which the Court followed in accordance with the practice which regulates them in these matters.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

SIMSON, WAKEFORD, & SIMSON—WHITE-MILLAR, ALLARDICE, & ROBSON, W.S.—
J. & J. GRAHAM—GIBSON & STRATHERN, W.S.

JOHN WILSON AND ANOTHER, Pursuers and Appellants.—

Cotton, Q.C.—Lee.

JAMES WADDELL, Defender and Respondent.—

Benjamin, Q.C.—Balfour.

No 3.

Dec. 1, 1876.
Wilsons v.
Waddell.

Mines and Minerals—Incidental Damage from Mineral Workings to adjoining property—Damnum absque injuria—B and C were lessees of the minerals under adjoining lands. A seam of coal, which was worked by both, cropped out to the surface within B's holding, and dipped towards C's holding. B worked out, in the usual course, the whole of the seam let to him, the result of which was that the surface in the neighbourhood of the outcrop, which was previously water-tight, sank into silt and cracked into fissures, through which the rainfall on that part of the surface flowed into the coal waste and thence down into C's workings. *Held (aff. judgment of the Second Division)* in an action at the instance of C against B, that B was under no obligation to preserve or restore the surface for the benefit of C, so as to prevent the rainfall from passing into the latter's workings.

(In the Court of Session, *ante*, vol iii. p. 288.)

The facts of the case sufficiently appear from the judgment of Lord Blackburn.

At giving judgment,—

Ld. Chancellor
(Cairns).
Ld. Penzance.
Lord Black-
burn.
Lord Gordon.

LORD BLACKBURN.—My Lords, in this case the Lord Ordinary decided in favour of the defender, on the ground that the evidence did not shew that the defender had done anything wrong as against the pursuers. The Second Division of the Court of Session affirmed this judgment, Lord Gifford agreeing with the reason of the Lord Ordinary, but Lord Ormidale and the Lord Justice-Clerk intimating that they were disposed to hold, on the evidence, that the defender had so acted as to make himself liable for the damage sustained by the pursuers, had it not been for the pursuers' own acts, which their Lordships thought to have been of such a description as to bar and preclude their claim for reparation.

Your Lordships, on the 23d November, heard the counsel for the appellants, who argued the whole case fully and ably, maintaining, first, that the conduct of the defender was such as to make him liable to the pursuers for damage; and, second, that the ground on which Lord Ormidale and the Lord Justice-Clerk based their judgment could not be supported, as the pursuers had done nothing to preclude their claim to reparation.

Your Lordships have not thought it necessary to hear the counsel for the respondent, who might have furnished arguments to shew that this second point furnished a good defence. It would not, therefore, be proper to say more than that if it had been necessary to decide this point the counsel for the respondent would have been called upon to argue in support of the ground on which alone these two learned Judges below based their judgment.

But, my Lords, it is not necessary to decide anything on this point if your Lordships are satisfied that what is alleged and proved does not make the defender liable to the pursuers. And after hearing the able arguments of the counsel, and carefully considering the judgment of Lord Ormidale, I think that what is alleged and proved does not establish such a liability; and, I believe, all the noble and learned Lords who heard the case are of the same opinion.

I will now state the facts in the case, which are scarcely in dispute. The pursuers and defender are both lessees under the same landlord—Mr Houlds-

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worth—of the minerals under two adjacent portions of the Coltness estate. The seam of coal called the Ell coal crops out to the surface in the defender's holding. It lies at a high inclination, dipping towards the pursuers' holding, and, where it enters it, is at a depth of many fathoms below the surface, so that any water which fell or percolated into the defender's holding would necessarily, by force of gravitation, descend to the pursuers' holding, unless stopped by the minerals or soil from doing so. The soil above this coal is stiff and impervious to water, so that whilst it was undisturbed the greater part of the rainfall flowed away over the surface, very little of it filtering down towards the seam, which was in consequence a very dry seam, the impervious strata above, whilst undisturbed, forming what may be called a roof practically water-tight over the coal. But the defender altered this state of things. He worked the Ell coal, carrying away the whole of it, and as a necessary result the surface sank. At the upper part, where the seam cropped out to the surface, the subsidence, over a space of about five acres, was so great that the surface sank into silt, and cracked into open fissures, through which the rainfall on these five acres flowed freely down into the defender's workings, and the coal in those workings having been removed, it flowed down towards the pursuers' holding. There is evidence that part of this water was removed before reaching the pursuers, but there seems no doubt that a considerable quantity of water, which whilst the roof remained in its original state—a water-tight roof—flowed away over the surface, did descend to the pursuers' mines, and put them to additional expense in pumping it out.

My Lords, the question in the case seems to me to be whether this was *damnum absque injuria*, which the pursuers must protect themselves from in such way as they can, or whether the defender when working the upper part of the mine was under any obligation to the pursuers, as owners of the mine on the dip, to preserve or to restore the impervious roof, which, whilst it existed, prevented a great part of the rainfall from descending.

I think it right to observe that it is not shewn that any water goes down these cracks except the natural rainfall on the surface. Your Lordships have not to consider what difference it might make if the bed of a natural stream had been tapped by the defender's operations, and you have no need to form or express any opinion on the points discussed in the recent cases of *Smith v. Fletcher*, L. R., 7 Exchequer, 305, and 9 Exchequer, 64; and *Crompton v. Lea*, L. R., 19 Equity, 115.

I may also observe that no point has been discussed at your Lordships' bar as to any difference in favour of the defender in consequence of his holding under the same landlord as the pursuers and by lease prior in point of time to the pursuers'. The case has been argued, and I propose to consider it, as if the pursuers held under a different landlord, or were themselves the owners both of the soil and the minerals towards the dip. And, in this view, the question seems to be, whether there is any servitude on the owner of the upper mines, for the benefit of the owner of the mines on the dip, to preserve either the surface or the adjacent minerals as water-tight as the undisturbed state of the strata?

My Lords, no authority has been cited either in a Scotch or English Court in favour of the doctrine that there is such a servitude.

The general rule of law in both countries is that the owner of one piece of land has a right to use it in the natural course of use, unless in so doing he interferes with some right created either by law or contract; and as a branch of that law, the owner of the minerals has a right to take away the whole of the

minerals in his land, for such is the natural course of user of minerals, and that a servitude to prevent such a user must be founded on something more than mere neighbourhood. In *Rylands v. Fletcher* (L. R., 3 E. and I. Appeals, 338) in this House, the present Lord Chancellor said that the occupiers of a close "might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if in what I may term the natural user of that land there had been any accumulation of water either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving or by interposing some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature. As an illustration of that principle I may refer to a case which was cited in the argument before your Lordships, the case of *Smith v. Kenrick*¹ in the Court of Common Pleas."

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I think it unnecessary to cite other authorities, as *Rylands v. Fletcher*² is not only one of the most recent, but is also in this House. And I do not understand Lord Ormisdale to express any dissent from this doctrine, but to proceed on a ground which I will mention presently. I may observe, however, that I cannot see any principle on which an obligation for the benefit of the owners of the coal on the dip to restore the surface to its natural state of water-tightness can be founded which would not equally give rise to an obligation to make the underground workings as water-tight as they were before the coal was removed; nor can I see any distinction between the rainwater falling on the surface and that which filtered down into the coal-seams. Lord Ormisdale, however, does make a distinction. He says—"The water was not the natural product of, and did not arise in, the defender's mine, but was foreign water, so to speak, introduced into his mine from the surface through operations of the defender carried on in an unusual, unreasonable, and improper manner."

My Lords, the evidence was that the coal at the upper part of the seam could not in any way be removed without breaking the surface in the way in which it was broken, and that this was the usual and proper course of working such coal. But there was some evidence which led Lord Ormisdale to the conclusion that, though the defender was perfectly justified in causing the holes and sifs, "yet in not filling up or securing the sifs or holes his operations were not usual, reasonable, or proper." There is no doubt that if a duty was cast on the defender to fill up or secure these holes or sifs he has neglected it.

My Lords, I do not stop to inquire how far the practice of miners could cast an obligation on the owner of the upper mine, which would not otherwise exist; but it is unnecessary to determine anything on this point, as I think your Lordships will agree with me in thinking that the evidence goes no further than to shew that generally the owner of the surface made it matter of bargain, for the benefit of the surface, that when mines are worked out the surface should be restored. Where such a stipulation exists the owner or occupier of the surface has a right to complain if it be not restored, but that gives no claim to anyone else. And, in the present case, the owner of the surface preferred that it should remain unrestored.

¹ *Smith v. Kenrick*, Feb. 14, 1849, 7 Scott's C. B. Rep. 515.

² L. R., 3 H. L. 338.

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My Lords, for these reasons I am of opinion that the judgment complained of should be affirmed, and that the appeal should be dismissed, with costs.

LORD CHANCELLOR.—My Lords, at the close of the argument of the appellants in this case your Lordships intimated that you would consider whether you would desire to hear the respondents. The result of that consideration has been that there is no doubt in the mind of any of your Lordships as to the course which should be taken with regard to this appeal. I have had the advantage of considering the observations which have just been made by my noble and learned friend, and I have only to say that I entirely agree in the course which he has proposed.

LORD PENZANCE and LORD GORDON concurred.

INTERLOCUTORS complained of affirmed, and appeal dismissed, with costs.

W. ROBERTSON, Westminster—HENRY BUCHAN, S.S.C.—FLUX & COMPANY, London—JOHN GILL, S.S.C.

No. 4.

Mar. 6, 1877.
Lockyer v.
Ferryman, &c.

EDMUND BEATTY LOCKYER, Pursuer and Appellant.—*Campbell Smith—Macalpine.*

AUGUSTUS HAMILTON FERRYMAN AND OTHERS (Sinclair's Trustees),
Defenders and Respondents.—*Lord-Adv. Watson—Southgate, Q.C.*

Res Judicata—Husband and Wife—Declarator of Marriage.—In 1842 A raised an action of declarator of marriage, and in the summons, as originally framed, laid his case principally on *de præsenti* acknowledgment, though the summons contained some ambiguous expressions which might be read as averring promise and cohabitation. Afterwards on revival he added a distinct averment of promise *subsequente copula*. In the course of the action an interlocutor was pronounced allowing him an opportunity of proving the alleged *copula*, but he adduced no evidence. In 1846 decree of absolvitor was pronounced. In 1875 A raised an action of reduction of the decree of absolvitor on the ground of perjury and subornation of perjury, and of declarator of marriage, founding specially on promise *subsequente copula*. Held (*aff.* judgment of Second Division), that this action was barred by *mora* and *exceptions rei judicatae*.

Ld. Chancellor
(Cairns).
Ld. Hatherley.
Ld. Selborne.
Lord Black-
burn.
Lord Gordon.

(In the Court of Session, June 28, 1876, *ante*, vol. iii. p. 882.)

The facts sufficiently appear from the judgment of the Lord Chancellor.

LORD CHANCELLOR.—My Lords, I think that none of your Lordships can view this case, brought forward as it is at this time, and under the circumstances under which it is brought forward, otherwise than with feelings of considerable pain. Upwards of thirty years ago proceedings were taken in the Court of Session in an action of declarator that a certain marriage had taken place between the present appellant and a lady who is now dead. Those proceedings went through various stages, and resulted in a decree against the appellant, in substance determining that the marriage upon which he founded his case had not taken place.¹

¹ See the case reported under name A B v. C D, June 14, 1844, 6 D. 1148, 16 Scot. Jur. 500, and Lockyer v. Sinclair, March 3, 1846, 8 D. 582, 18 Scot. Jur. 290.

I must call your Lordships' attention to the particular mode in which it was sought to establish that marriage. The action did not allege a regular, but an irregular marriage. In the summons certain written documents were alleged to have passed between the appellant and the lady in question, and to have established a contract of marriage; and then the summons averred "that the said acknowledgments were interchanged with the solemn and serious intention of constituting marriage, and marriage was thereby fully constituted between the parties; that the parties when they thus made their mutual declarations of the said marriage, kissed the Bible in testimony of their understanding of the seriousness of the declaration, and their mutual resolution to adhere to it; that the marriage was thus duly completed, and the parties afterwards considered themselves as married, and conducted themselves towards each other as husband and wife, although, for the reasons before mentioned, they did not wish to make it public, till the consent and approbation of the other curators, and certain other parties, was obtained to the marriage; that the parties were much together, and when absent kept up a constant and affectionate correspondence, the whole of which was written in a style and manner that could not have been written by a lady to a gentleman in any other character than that of an affectionate wife to an affectionate husband, or an affectionate husband to an affectionate wife." And then, further, the summons alleges,—“That the affectionate intercourse subsisted between the said parties till a comparatively recent period; that notwithstanding what is above set forth the said defender, owing to the arts and importunities of her friends, has recently become estranged from the pursuer, and casting off the fear of God, and forgetting her solemn vows and matrimonial engagements, does now most wrongfully and unjustly refuse to adhere to the pursuer as her husband, and treat, cherish, and entertain him as such at bed and board, and to adhere to and cohabit with the pursuer, and to perform the other duties incumbent on her as his lawful wife.”

Now, your Lordships are well aware that with regard to irregular marriages in Scotland, by the law of that country they may be established either as marriages *per verba de presenti*, or as marriages by promise *subsequente copula*. The allegations to which I have referred in the summons in the former action went clearly and distinctly to a marriage *per verba de presenti*, but the summons also averred a promise of marriage between the parties, and it contained further averments which in some respect were ambiguous, and might be considered as merely confined to a contract *per verba de presenti*, or as going beyond it.

But, my Lords, the summons being in this form, and I will assume here that the statement at the bar is correct, that as the law then stood it would be necessary to have the whole foundation of the action stated correctly in the summons, and that that foundation could not be enlarged by subsequent pleadings between the parties,—the summons being in the form to which I have referred, it was met in the first instance by a defence on the part of the lady in which, adverting to those allegations in the summons which I have read, she said,—“It is denied that the marriage was thus duly completed, and that the parties afterwards considered themselves as married, and conducted themselves towards each other as husband and wife. What the specific acts may be to which the pursuer means to refer as supporting these averments the defender is at present at a loss to conceive, and she can therefore only meet them with a denial as general as the assertions themselves, which are altogether unfounded.” That is to say, the lady replied to this summons by saying—“You allege that we con-

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ducted ourselves towards each other as husband and wife. That is a general allegation which may comprehend in it every kind of conduct which can take place between husband and wife ; I desire to know what are the particulars to which you refer ; at present I can only deny generally what you allege generally, and in that form I do deny what you allege."—Being thus challenged a revised condescendence was submitted on the part of the appellant, in which he addressed himself to this particular matter, and having again repeated the promise of marriage which he alleged had passed between the parties, he averred further, in the most positive and distinct way, that the marriage was duly consummated, that sexual intercourse took place, and in his revised condescendence he stated particularly the dates and times when this intercourse, as he alleged, took place. To that revised condescendence there was a pleading on the part of the lady, both by way of answer to the different allegations in the revised condescendence, and by way of statement of facts on her own part, in which she, in the most positive and distinct manner, denied every one of those allegations with regard to sexual intercourse.

My Lords, in that state of things, there having been a summons which, although ambiguous, was in my opinion large enough to have covered and included in it the allegation of cohabitation and consummation of marriage, and the appellant being challenged to condescend more precisely upon the particulars of his general allegation, and having condescended by alleging the consummation of the marriage, and that having been denied, it appears to me it cannot admit of doubt that if the appellant had been so minded, and had been able to do it, he might have entered upon proof to establish that cohabitation which he thus alleged. My Lords, he did not do so ; he adduced no proof whatever upon the subject. Evidence was led, perhaps unnecessarily, on the part of the defender, but upon the part of the appellant no evidence whatever was produced, and as the case proceeded, feeling the weakness of this part of his case, he by his counsel at the bar did not insist upon this part of the case, which would seek to establish a marriage by a promise *subsequente copula*.

The Court of Session upon the other part of the case, that is to say, upon the allegation of a marriage *per verba de presenti*, held, that that which passed between the parties, had not passed with any serious intention of creating the relation of husband and wife between them. With the correctness of that decision your Lordships are not at present concerned, but that was the decision both of the Lord Ordinary and of the Court of Session. An appeal was brought against the decision to your Lordships' House, but that appeal was dismissed, it not having been brought on for argument in the proper time.

That being the state of the occurrences at the time I have mentioned, upwards of thirty years ago, the present action was raised in 1875 for the purpose of reducing the decrees in that former action. The appellant now contends, in the first place, that although there was in the former action an allegation of marriage, still no proof having been led upon the allegation in the condescendence of consummation, and it not being, as was alleged at the bar, distinctly averred in the summons that a marriage was completed by consummation following upon a promise, the plea of *res judicata* is not a valid plea to be set up to prevent the attempt now to assert a marriage by promise *subsequente copula*. And then it is said further that matters have now come to the knowledge of the present appellant which entitles him to reduce the former proceedings, and to get rid of the effect of the plea of *res judicata*.

My Lords, as to the first of those grounds I have almost anticipated what I have to say. It appears to me that in the former proceedings, the summons being such as I have mentioned, the condescendence following upon that summons being of the kind it was, if the present appellant had had it in his power to adduce evidence of the consummation of the marriage following upon a promise, he would have been entitled to do so; and if having adduced that evidence, the Court had been of opinion that he had proved his case, and had thereupon pronounced decree of declarator establishing the marriage, that would have been an establishment of the marriage which would have been binding upon both parties, and which could not afterwards have been disturbed by reason of any insufficiency in the pleadings. It might well be that if in the course of the proceedings any want of preciseness in the averments had been noticed steps might have been taken to cure or supplement that want of precision, but I cannot think that there was any such insufficiency in the summons, followed as it was by the condescendence in the shape in which we find it, as should entitle the complainer in that action afterwards to say that he had not the power of raising the whole of the case in regard to this marriage, if he had had evidence to prove it.

I doubt very much whether it is at all necessary in the present case to lay down any abstract rule as to the extent to which a sentence in a declarator of marriage is binding as against any subsequent attempt that might be made to establish the marriage upon any new or different footing. I think it is quite sufficient in the present case to say that no man who shews that at the time of his first action to obtain a declarator of marriage he had in his knowledge the whole of the facts by which he might have raised the case, whether of contract *per verba de presenti*, or of promise *subsequente copula*, and who had the power to raise them, who puts upon his record statements which prove that he had the whole of this knowledge in his possession, can be heard, because he does not attempt to prove one part of the case, to say, after the lapse of thirty years, that he is entitled to commence a new litigation, to raise again a portion of the case which, if it had any foundation, was perfectly well known to him at the time of his first proceedings.

But, now, I turn to a consideration of what are the new facts which, the appellant says, have come to his knowledge since the former action, and upon which he now claims to reopen this question. The averments, the relevancy of which is now in question, are extremely vague throughout the whole course of them; but, as I understand them, they amount simply to statements in which, referring to witness after witness who was examined on the former occasion, not by himself (for, as I have pointed out, he led no evidence), but on the part of the lady, he asserts now as to all of those witnesses that they committed perjury; and then, further, with regard to the greater portion of them, he states that they committed perjury either with the connivance or at the instigation of the lady, that is to say, that she was guilty of subornation of perjury; and upon those conjoint allegations of perjury on the part of the witnesses and of subornation on the part of the lady he seeks to have the case retried.

Now, my Lords, I must say that I think the observations of Lord Gifford in the Court of Session are perfectly well founded, that in every case where witnesses are called before a tribunal which is to judge of the facts spoken to by those witnesses, it is for that tribunal to say whether it believes or disbelieves them; if it believes the witnesses it is not for the defeated party afterwards to say,—I assert that those witnesses spoke what was not true, and upon my allega-

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tion that they spoke what was not true I ask, as a matter of right, that there should be a new trial before another tribunal so that I may take my chance of what that other tribunal may determine on the facts which may be deposed to by the witnesses. My Lords, there would be no end to litigation if that were held to be a sufficient ground and a relevant ground on which to ask for the reduction of a former decree.

But, my Lords, in this case the matter does not rest there. These witnesses gave their evidence thirty years ago, and spoke to facts as to the truth or falsehood of which the present appellant was a perfectly competent judge, for they were facts which, in one way or the other, were perfectly within his knowledge. He had the full means of judging as to whether the allegations of the witnesses were true or untrue,—he admits that he had that full opportunity of judging,—he does not say he thought their statements were true then, and he has discovered them to be untrue now, but his case is that he knew at the time that the witnesses were saying what was untrue, and that that has been his opinion from that day to the present time. But what has he been doing these thirty years if those witnesses spoke what was untrue? Has he taken any means for bringing the criminal law of the country to bear upon them, and to have it decided by process of the criminal law whether those witnesses were or were not guilty of that perjury of which he says they were guilty? He has taken no step whatever. Let it be granted that he could not in Scotland, as perhaps he could in this country, have moved to bring the criminal law to bear upon them, has he applied to the proper officer, the public prosecutor, in Scotland, to have these persons subjected to the penalties of the criminal law? He has done nothing of the kind; he has rested for thirty years; and he now makes allegations as to the perjury of these witnesses which he was just as competent to have made immediately the former trial terminated. He throws in the additional allegation of subornation of perjury on the part of Miss Sinclair. He says that that lady was either privy to this perjury or was herself one of the persons moving to have it committed; but he says that after the lapse of thirty years, when this lady is in her grave; and I think your Lordships will not consider that the vague and hardly intelligible allegation which is contained in the condescendence to the effect that the lady moved towards having perjury committed can be sufficient to place the case higher than if it stood simply upon the allegation of perjury committed by the witnesses.

My Lords, I therefore submit to your Lordships that the present proceedings instituted by the appellant are met and rightly met by the plea of *res judicata* in the former action. He has not alleged any new matter whatever coming to his knowledge which should entitle him to get rid of those former proceedings.

My Lords, agreeing entirely with the Lord Ordinary and all the Judges of the Second Division of the Court of Session, I think that the case of the appellant has entirely failed, and I move your Lordships that the present appeal be dismissed, with costs.

LORD HATHERLEY.—My Lords, I come entirely to the same conclusion, and I think it is impossible for any of your Lordships, notwithstanding the able argument which we have heard, to have the least doubt that the Court below have come to a correct conclusion.

The appellant at the time when he took the original proceedings had a full and complete knowledge of all the facts in the case as far as he alleges them.

As to that important fact which he says now was not adequately raised on the former occasion and which he wishes now to substantiate, namely, the *subsequens copula*, of course if that were true he had not only a full knowledge in his own breast of the truth of that fact, but he had at that time every interest which a man could have to establish it fully and completely, and if testimony was given which rebutted any such fact as alleged by him he was in a position at that time, and in a much better position than he could be now under any ordinary circumstances, to procure that evidence which would be necessary to establish the fact.

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But the case does not stand there. Singularly enough not only did he decline to enter into that proof, not only did he then decline by his counsel at the ultimate hearing in the Inner-House to rest upon that part of his case, but I look in vain throughout the whole of these proceedings for any attempt on his part, during the whole of the thirty years that have elapsed since the former proceedings to make out a case such as he ought to have made out to justify him in attempting the reduction of the former decree, and to enable him to get rid of the effect of the plea of *res judicata*, such a case as he ought to have taken care to enter upon immediately and with all possible speed. The case is very singular in that respect, because we find first the averment which has been read by the noble and learned Lord on the woolsack, the averment in the original summons, of the interchange of certain documents which the Court at that time held not to constitute a contract *de presenti*, and then you have it averred that upon the interchange of those documents "the parties considered themselves as married, and conducted themselves towards each other as husband and wife, although for the reasons before mentioned they did not wish to make it public till the consent and approbation of the other curators, and certain other parties, was obtained to the marriage;" and then you find, lest that averment should be considered dubious in its construction (and perhaps it might justly be said that it is so), it was made clear by what subsequently appears upon the record. The lady then in answer stated that she denied this conduct towards each other as husband and wife as far as she could understand what was averred, but that owing to the vagueness of the statement (I am giving the effect of what she said) she could not answer more positively; and thereupon that vague statement was made clear and precise by a subsequent passage in the revised condescendence (article 16) in which the appellant avers in the plainest terms the intercourse which was necessary to complete and establish the marriage. That having been averred in the revised condescendence, such intercourse is positively denied by the lady. She leads evidence, while he leads none; and this fact, which, if true, must have been within his own knowledge, which he had the greatest interest in establishing, and which it was important for him at the time to prepare himself with evidence to establish, he left wholly unconfirmed by evidence. The lady's evidence disproved it, and he waived it at the hearing, as the Judges say, although the counsel for the appellant says that that statement may be taken to mean no more than that the counsel representing the pursuer was aware that there was a difficulty in proving it upon a record so shaped. One cannot, reading the narrative of the Judges in their judgments, take that view of the waiver by counsel; but at the same time even if it were so, it would make a very slight difference with reference to the position of the present appellant, because the observation still remains that he did not attempt at that time, when all the evidence was fresh, to establish that important fact, a fact as to which he must

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But what do we find when he takes these present proceedings? We find a state of things wholly inconsistent with any such allegation as was made in the former proceedings, of subsequent intercourse and of a course of concealment having been followed owing to the position in which the present appellant stood to his father. When we come to the condescendence we find a most minute account of a most important proceeding on the part of the gentleman and his alleged wife; we have an account of their going on a marriage trip, and a phaeton being fetched by a man whose name is given, and who is now said to be dead. The appellant says,—“Desiring privacy it was arranged that neither carriage nor servant should be taken from Freswick House. Before starting, Maria Sinclair and the said Janet Sinclair or Lockyer called in their neighbour and friend, the late Mrs Burns, wife of the Reverend David Burns, Thurso, and told her that the pursuer and the said Janet Sinclair or Lockyer had taken each other as husband and wife, and that their marriage had been completed. The place fixed on for their destination was Dunbeath, thirty miles or thereabouts from Thurso, where Dunbeath Castle is situated, then the property of the said William Sinclair. Accordingly on the said 29th August, the said James Olson was sent to Mr William Tod, saddler and post-horse hirer, Thurso, to get him to send a phaeton on the following morning to Freswick House to carry the pursuer and the said Janet Sinclair or Lockyer together to Dunbeath. The phaeton could not, however, be had on that day, and was ordered for the next morning early. The said phaeton, however, was not sent at the time expected, and in consequence the said Maria Sinclair caused the said James Olson to go back to Mr Tod's premises and have the phaeton sent at once. The said James Olson went as requested, and presently returned bringing the phaeton with him. When the said phaeton was brought the said pursuer and the said Janet Sinclair or Lockyer were dressed in readiness to leave Freswick House. The pursuer and the said Janet Sinclair or Lockyer then left together in the phaeton, the pursuer driving. The said Maria Sinclair and the said Mrs Burns saw them away and bade them good-bye; and slippers were thrown at them from Freswick House in accordance with an old fashion. Their intended trip had become known in the place, and their departure from Thurso as married persons was witnessed by crowds throughout the town.” They desire great secrecy, and yet they send this man to get a phaeton, and they drive away in that phaeton in the midst of a crowd of people, and slippers are thrown at them.

My Lords, all this he knew just as well in 1839 as he knew it in 1875 when he revived these proceedings. He knew it from 1839 to 1845 whilst these proceedings were pending and before judgment was pronounced. All these facts were perfectly well known to him, and yet we do not find a single witness produced by him to prove them at that time when everything was fresh in everybody's memory. He waits till Olson is dead—he waits till everybody is dead (except the aunt Maria) who knew anything concerning this transaction, and you now have an application made after thirty years' interval to have the interlocutor reduced on the ground that it was obtained, in the first place, by perjury committed by the witnesses, and, in the second place, by subornation of perjury on the part of this lady, who has now been some time in her grave. As to any averment in this present action of the knowledge of this lady of the subornation of her witnesses to perjure themselves the only statement is this,—that the lady

on her deathbed is said to have made certain statements, which, of course, the appellant could not have any personal knowledge of, he not having been present when those statements were said to have been made, and which he cannot know except through the narration of other witnesses. Therefore it comes to this—if an application of this description was to be acceded to, a case might be tried in which a result might be arrived at unfavourable to one of the parties on the testimony of witnesses called on each side in the presence of all the parties, there being all the means of producing evidence that there would be at any subsequent time, and then at the end of thirty or forty or even I might say fifty years, a Court of justice might be asked, on the ground of some deathbed statement or some hearsay statement made by some person who had heard another person say that there had been subornation of perjury or that there had been perjury, without the slightest explanation of no single step being taken or the slightest exertion being made during the whole period of thirty or forty or fifty years on the part of the person making the application, and after the death of all those persons who gave testimony at the time when the facts of the case were established, the Court, I say, might be asked to reopen the case in order that the person who had thus originally had a full and fair opportunity of having his case tried and who had so failed, might say, after that lapse of thirty or forty or fifty years, “I have discovered since the time when the case was originally tried that some false testimony was given,—I assert that some statements have been made to me which can only be proved by the oaths of the persons making those statements,—I know nothing more of the transaction,—statements made to me after this long interval of time by which I shall be able to establish a connection between my opponent, by whom I was defeated, and some of the witnesses, by which they were induced to yield to the pressure of my opponent and swear falsely.”

It has been well established, and one is thankful that it is so well established, that there is nothing that can protect the perpetration of a fraud. The perpetration of a fraud in the obtaining of a judgment or in the obtaining of a private Act of Parliament, or in any transaction in which solemn instruments are obtained or solemn acts are done, will vitiate the whole proceedings, where it is alleged by one of the parties that the transaction was a farce, that it was not a *bona fide* transaction but a fraudulent one, no time probably would be held to be too late to open up such a transaction where it could be made out clearly and distinctly that the circumstances connected with that fraud had recently come to the knowledge of the party. But I apprehend that in that as in every other case the necessity of the rule as to *noviter inventa* applies, and a solemn decision come to after the case has been heard in the presence of all the parties, and after the testimony of the witnesses has been given, cannot be reopened unless it shall, to the satisfaction of those who are applied to to reopen the case so long ago decided, be made out that there is reasonable ground for believing that if the case were reopened facts could be established which could not have been established by any reasonable diligence by the party making the application before the time of his making such application.

My Lords, character, fortune, and all that is dear to a man, may be put in jeopardy if after such a long interval it be permitted for any pursuer to come, without any reasonable ground whatever being alleged, and ask to deal with a *res judicata*, after the deliberate settlement of it upon a fair hearing to which he was a party, and at which hearing he might, had he

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been so minded, have done all that he says now he is able to achieve, namely, the obtaining of certain statements from certain individuals as to what they might be able to depose, and had he had any reasonable ground for supposing that they could depose to those statements he might have had them examined and cross-examined in the presence of the witnesses who had deposed to the contrary, and brought the matter at that time to a fair issue, which at this distance of time can scarcely be supposed to be possible to be done.

I do not apprehend that in this particular case with which we have to deal we need go further than to say that this appellant, who had the opportunity of having the case fairly heard, who upon the very facts of the case itself, if his case be true, was acquainted with the truth of that case, who if his case be true knew perfectly to whom he had to apply to to get information from to contradict those witnesses who denied its truth, who averred a certain most important fact at the time, and whose counsel were obliged to waive any attempt to establish that fact, which was all-important to his case, and which he failed to establish, who has stood by from that time to this, cannot now, after the death of the person principally concerned, be in a position to ask at your Lordships' hands that the principle of *res judicata* should not be pressed to its fullest and furthest results. Therefore, my Lords, I am opinion that the appeal should be dismissed, with costs.

LORD SELBORNE.—My Lords, I agree with my noble and learned friends who have addressed your Lordships, and upon the first branch of the case I do not think it necessary to add anything to what they have said. On the second, I have but a few words to add. This is not an action to which the law of prescription applies. When there is *res judicata* the original cause of action is gone, and can only be restored by getting rid of the *res judicata*. There is no law of Scotland (nor I should hope of any other country) which gives forty years or any other specified period for this purpose; and it would be most unreasonable and destructive of all certainty in the administration of the law, in the status of families, and in the enjoyment of rights of any description, if it were not held incumbent on any one attempting to get rid of a solemn judgment of a competent Court on such grounds as are here alleged, to shew that he comes forward to do so with reasonable promptitude and diligence, instead of deliberately allowing such a time to elapse as must make it unjust to reopen the question, because any satisfactory investigation of it would be now impossible. In every such case the nature of the allegations, the presence or absence of such a specification of particulars as may enable a Court to judge of their value, the time at which and the circumstances under which they are brought forward, are, and necessarily must be, material upon the question of relevancy. Here, as to the greater part of the allegations, no excuse whatever is offered for the delay in bringing them forward; others are discredited by the appellant's own statement that the persons on whose assertions he relies were not willing to speak what they now allege to be truth, while those were living who could contradict them; and the rest are too vague and indefinite to be accepted as constituting grounds *prima facie* sufficient, at this distance of time, to set aside the judgments of 1843 and 1846.

LORD BLACKBURN.—My Lords, I entirely agree in the opinions expressed by the noble and learned Lords who have preceded me. I take it that when a com-

petent tribunal having had a case before them have given a final judgment upon it, it is *res judicata*, and there must be strong grounds to set it aside. After the verdict of a jury, or the finding of a Judge, there may be an application for a new trial on the ground that the verdict was against the weight of evidence, or that the parties were taken by surprise, or that there was false evidence given, but I apprehend that it never is enough simply that the party against whom judgment has been given should say, he is dissatisfied with the verdict, and that the witnesses have stated that which is false. I do not think that would be held to be sufficient even in moving for a new trial at the proper time to do it—it is necessary that enough should be shewn to make the tribunal which is to consider whether there should be a new trial think that the trial was unsatisfactory. In the present case, I think that if every averment now upon the record had been made by the pursuer on an application for a new trial at the time of the reclaiming note in 1845, the proper judgment of the Court on the application then brought before them would be, this is not a case in which we need call upon the other side for an answer.

The application is made on the broad assertion that every one of the witnesses called was perjured, on broad assertions that Miss Sinclair must have known that they were perjured, and further assertions, without proof, that Miss Sinclair must have given them money or induced them to commit perjury. All these are mere assertions without the slightest ground given to shew that they were reasonable or such as to justify a tribunal in granting a new trial in respect of them, if asked to do so. There is more than that however. The allegation in the original condescendence specifically stated that there had been sexual intercourse at particular times and places there mentioned. Mr Lockyer must have known then as well as Miss Sinclair how many times, in how many places, and at what times it took place. He now, in his new condescendence, starts statements that there was sexual intercourse at times and places which he did not mention then.

The noble Lord opposite (Lord Hatherley) read one passage in the new condescendence in which it is stated that they went to Dunbeath under circumstances which are singularly alleged as being arranged for the purpose of securing privacy, for certainly if the object had been to make the thing as public as possible means could hardly have been better devised for that purpose; but the appellant asserts that all this took place then, and that sexual intercourse took place at Dunbeath, and he asserts that the witnesses who could have proved all that are some of them dead, some of them having been, as he suggests, kept out of the way at the time. But it is a singular thing to be remembered that though he must have known that at the time of his former condescendence there is not a word alleged in that former condescendence about any living together at Dunbeath or having intercourse there, and had he come to the Court for a new trial in 1846 and said, "I want a new trial because though I alleged everything that happened on a particular day at Thurso House (which, I take it, is the same place as that called Freswick House in the present record) I now want a new trial, because I was taken by surprise and deprived of my power of proving that a vast deal happened at Dunbeath which I then perfectly well knew," the Court would not have listened to for a moment.

Then there are other things alleged. We have it alleged that in 1840, just before the appellant and Miss Sinclair separated, he brought a Lieutenant Medley over to Freswick House that he might be a witness that they were liv-

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It is somewhat late in the day for the appellant to say that he was taken by surprise, because I find that it is most pointedly and indignantly denied that there was any sexual intercourse at all. I find the lady persisting in her denial; that is all the surprise he gets. He did not bring forward any evidence, and he could not have asked for a new trial. Every other averment is of the vaguest and loosest description—statements of deathbed confessions and so on,—none of them coming to more than this: Somebody has told me that somebody said that Miss Sinclair expressed repentance on her deathbed; somebody has told me that somebody said that James Olson also expressed repentance. Those are not matters which, if they had happened, would be for a moment listened to. He also says that there were witnesses kept back by terror. Why the Sinclairs should produce such an extraordinary terrorism in the neighbourhood I do not know. He says,—There were witnesses who were kept back by terror of Sir John Sinclair and Miss Sinclair, who prevented them coming during their lives, who are now willing to come forward, but I cannot tell you their names. If it were a matter in which he was moving for a new trial he would not be listened to in making such averments.

That being so, if nothing is put forward which would be a ground for a new trial, or even for granting what in England is called a rule *nisi* to shew cause why there should not be a new trial (I suppose in Scotland there is something similar to it), nothing that would require the Court to call on the other side for an answer, can it be said that now after a lapse of thirty years a party in the position of this appellant is entitled to demand further proof?

I think Mr Smith put it very well at your Lordship's bar in this way—"I do not say that what I put forward proves that I am entitled to set aside the judgment; but what I say is enough to give me the right to go to proof and to go to trial." That was the argument used, but I cannot agree that after *res judicata*, after judgment has been obtained, it is enough to aver that the thing was wrong.

The object of the rule of *res judicata* is always put upon two grounds, the one public policy, that it is the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, it being a hardship that a man should be vexed twice for the same cause. It seems to me that both these grounds equally apply to sending down a case like this for fresh proof. Supposing Miss Sinclair were still alive it would be quite as vexatious

to her to have this case tried over again in the shape of going to proof, to see whether the pursuer could prove all these things as it would be to enter into the question *de novo*. No. 4.
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I will not say that there never might be a case in which after thirty years, from the death of the parties, the allegation might be such that it might be proper to say, go and prove it, without requiring more. I am not quite able to shape such a case, though I will not take upon myself to say there never could be such a case; but I think your Lordships will agree with me in the opinion that when after this lapse of time a person makes an application to set aside a judgment which was obtained thirty years ago, he ought to put before the tribunal to whom he makes that application at least as much as would have made a proper case for the granting of a new trial before judgment was pronounced. I think it would be safe to say that much, and, in my opinion, that is enough to decide the present case, for, as I have already said, it seems to me that nothing is here alleged that would have been ground for a new trial before judgment was pronounced, and *a multo fortiori* there is nothing alleged that would be ground for a new trial after judgment pronounced thirty years ago.

LORD GORDON concurred.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

R. M. GLOAG—WILLIAM SPINK, S.S.C.—ANDREW BEVERIDGE—HAMILTON, KINNEAR, & BEATSON, W.S.

WILLIAM M'KINNON (Hannay and Sons' Trustee), (Pursuer) Appellant.
—*Joseph Brown, Q.C.—Balfour.*

ARMSTRONG BROTHERS AND COMPANY (Defenders) Respondents.—
Cotton, Q.C.—E. Kay, Q.C.

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Compensation—Bankruptcy—Bill of Exchange.—Where certain bills were discounted by A, an indorsee, for value, and subsequently retired by him at maturity after the bankruptcy of the acceptor, partly with funds supplied by C, a person who had guaranteed B, a prior indorser, against loss upon the bills, *held (aff. judgment of the Second Division)* that A, the holder of the bills, was entitled to plead compensation upon them against a debt due by him to the bankrupt, and that the special objections (1) that A, the holder, was not the holder at the date of sequestration, nor the drawer, but only an intermediate indorsee, and (2) that the plea of compensation was really stated for behoof of C, the guarantor, who had no debt to compensate, had been rightly repelled.

Observed by Lord Blackburn,—"It has for many years been decided, both in England and in Scotland, that if the indorser became a party to the bill before the bankruptcy in the one country or the sequestration in the other he may set it off on becoming holder afterwards."

Observed by Lord Blackburn,—"There is neither authority nor principle for saying that the estate of the bankrupt acceptor of a bill has a right to require the holder of the bill to have recourse to any prior indorser before availing himself of his right to protect himself by compensation and retention in Scotland, or under the mutual credit clauses in England."

(In the Court of Session 2d February 1875, *ante*, vol. ii. p. 399.)

This action was raised by the trustee on the bankrupt estates of Hannay and Sons, ironmasters, Glasgow, which were sequestrated on 28th March 1874, against Armstrong Brothers and Company, ironmerchants, Glasgow, the partners of which were W. J. Armstrong and T. N. Armstrong.

Ld. Chancellor
(Cairns).
Ld. Selborne.
Lord Black-
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The pursuer claimed payment of a balance of £9000.

The defenders pleaded compensation in respect of bills for £13,000 accepted by Hannay and Sons, of which the defenders were the onerous indorsees and holders.

On 26th June 1872 Armstrong, Müller, and Company sold to Hannay and Sons 6000 tons of pig iron at £4, 12s. per ton.

On the same day Armstrong, Müller, and Company entered into negotiations with Thomas Vaughan and Company, which some weeks after resulted in an agreement by the former to purchase from the latter 6000 tons of pig iron at £4, 5s. per ton. The agreement was antedated 26th June 1872, and set forth the terms of payment to be "nett cash on last cash-day of the month for quantity delivered during previous month, or by Messrs Hannay and Sons' acceptance (payable London) at four months' date."

Some difference of opinion having arisen when the first payment of price became due as to the meaning of this last stipulation, and Thomas Vaughan and Company declining to draw upon Hannay and Sons direct, it was agreed that Armstrong, Müller, and Company should draw upon Hannay and Sons, and either hand over the bills indorsed to Thomas Vaughan and Company or discount them, Thomas Vaughan and Company giving them this letter of indemnity:—"October 23, 1873—In consideration of your having to-day agreed to draw upon Hannay and Sons for all pig iron delivered and to be delivered under our contract of June 26, 1872, with you, and hand such drafts over to us when accepted, we hereby agree to indemnify you from any loss in respect of such drafts handed over by us or discounted by you."

The delivery of the iron under these contracts was completed by 31st December 1873.

The firm of Armstrong, Müller, and Company was dissolved on 31st December 1873, and the firm of Armstrong Brothers and Company was formed on 1st January 1874, and thereafter carried on the business formerly carried on by Armstrong, Müller, and Company. The two firms were composed of different partners, although Mr W. T. Armstrong was a partner in both; Mr T. N. Armstrong was only a partner in Armstrong Brothers.

Seven bills drawn by Armstrong, Müller, and Company were accepted by Hannay and Sons for the price payable by them. These bills were indorsed for value by Armstrong, Müller, and Company to Armstrong Brothers.

Armstrong Brothers subsequently discounted the bills with the Clydesdale Bank. On 28th March 1874, before the bills came to maturity, Hannay and Sons were sequestrated.

The seven bills for £13,057, 10s. 4d. were subsequently retired at maturity by Armstrong Brothers. Two of these bills (amounting to £4339) were retired on 1st April 1874. Vaughan and Company advanced £4207, 10s. on 3d April 1874, and £4207, 10s. on 3d June 1874, to Armstrong Brothers to enable them to retire the bills.

The nature of the action and the proceedings are fully narrated in the opinion of Lord Blackburn.

LORD BLACKBURN.—In this case the appellant as trustee on the sequestrated estate of Hannay and Sons sued the respondents in the Court of Session for a debt due by them before the sequestration to Hannay and Sons. It is not disputed that the appellant proved a debt exceeding £11,000, and it is not disputed that the respondents proved a cross claim exceeding £2000. The controversy is as to the difference, which amounted to £9000.

As to this the respondent set up two defences. One was as to a part of the claim only, viz., £7461, 10s. 1d. It is not necessary to notice this partial defence further than to say that there was such a defence, and that the appellant denied it.

The other defence on which the House has now to decide went to the whole cause of the action. It was to the following effect:—Hannay and Sons had, while still carrying on business, accepted seven bills of exchange drawn on them by Armstrong, Müller, and Company, payable to the drawers' order. These seven bills were all drawn and accepted for iron sold and delivered to Hannay and Sons in the course of the year 1873, whilst Armstrong, Müller, and Company were still carrying on business. Armstrong, Müller, and Company dissolved partnership on the last day of December 1873, after which date the firm only existed for the purpose of liquidation. Armstrong, Müller, and Company, in liquidation, indorsed these bills, and Armstrong Brothers, the respondents, also indorsed them and delivered them to the Clydesdale Bank, who discounted them for Armstrong Brothers. On the 28th of March 1874, before any of the bills arrived at maturity, Hannay and Sons, the acceptors, were sequestrated, the bills at that date being in the hands of the Clydesdale Bank.

The respondents' contention was that under the Scotch law of compensation and retention in bankruptcy they were entitled to set off these acceptances, or so much of them as might be necessary, against their own debt to the sequestrated estate of Hannay and Sons. And as the amount of these acceptances considerably exceeded the amount of the respondents' debt, this, if made out, was a complete answer to the claim of the appellant. The appellant contended that the position of the respondents was not such as to entitle them to this set-off.

The Lord Ordinary gave judgment for the appellant for the amount claimed. The Second Division assoilzied the defenders from the conclusions of the action. It is against this last interlocutor that the appeal is brought.

It appears from the opinions of the Judges that they were of opinion that the defence depending on compensation and retention was made out, but that the partial defence, going only to £7461, 10s. 1d., was not made out.

Your Lordships have not heard any argument as to the soundness of the decision in the partial defence, nor has it been at all considered by your Lordships.

Your Lordships heard an exhaustive argument from the appellant's counsel upon the other defence, at the end of it intimating that you did not think it necessary to hear the counsel for the respondents.

My Lords, the law of Scotland on the subject of compensation and retention in bankruptcy and the history of it is clearly explained in Bell's Commentaries.¹ It is in effect very nearly if not precisely the same as the law of England as to mutual credit, though there is no enactment in the Acts relating to bankruptcy and sequestration in Scotland similar to those relating to mutual credit, which, since 4 Anne, c. 17, sec. 11, have been inserted in the English Bankrupt Acts. If there be any difference between the law of the two countries there are at least none on such a state of facts as exist in the present case. I think your Lordships refrained from giving judgment at once more from a desire to make sure that the facts as appearing in the evidence were accurately apprehended

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¹ M'Laren's ed., vol. ii. p. 118.

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(His Lordship then proceeded to give in detail the facts.)—If I have correctly stated the facts, Armstrong Brothers were indorsers of the two bills which became due on 1st April 1874, and who, on the sequestration of the acceptors, were compelled to take them up. They had a right of recourse against Armstrong, Müller, and Company, who were indorsers prior to themselves. They had an unadjusted account with those indorsers, on which the balance might or might not turn out to be in favour of the indorsers. And those indorsers held a letter of indemnity from Vaughan and Company to which Armstrong Brothers were not parties, but under which Armstrong, Müller, and Company might recover from Vaughan and Company at least part of any loss which Armstrong, Müller, and Company might ultimately sustain from the discount of the bills.

I fail to see, in this state of facts, anything that could prevent Armstrong Brothers then from setting off the bills, of which they were now holders, against their debt to the estate of the acceptors. In the Court of Session an attempt seems to have been made to argue that an indorser of a bill not in his hands and not due at the time of the sequestration, and who therefore at the time of the sequestration was not a creditor of the bankrupt, could not, on taking up the bill and becoming a creditor subsequently to the sequestration, avail himself of that set-off, but at your Lordships' bar that attempt was properly abandoned. It has for many years been decided, both in England and in Scotland, that if the indorser became a party to the bill before the bankruptcy, in the one country, or the sequestration, in the other, he may set it off on becoming holder afterwards. See as to the English law, *Collins v. Jones*, 10 B. and C. 777; as to the Scotch law, 2 Bell's Com. 5th ed. p. 128.

If indeed the holder receives payment from a prior indorser to him and hands over the bill to him, he ceases to be a creditor, and can, of course, no longer set off what is no longer a debt to him. For this,—if an authority were wanted,—*Belcher v. Lloyd*, 10 Bing. 310, is an authority. And the same effect would follow if it was made out that, though the bill was retained in the hands of the indorsee it had really been paid by a prior indorser, the fact that the indorsee retained possession of the bill being *prima facie* evidence that it was his property, and so casting the burden of proof on those who maintain the contrary, but not being conclusive.

But there is no pretence for saying that in the present case there was any evidence that on 1st April 1874 Armstrong, Müller, and Company, or their liquidating partner on their behalf, had taken up the bill in the hands of Armstrong Brothers. And, though there was an unsettled account between Armstrong Brothers and Armstrong, Müller, and Company in liquidation, which, if the balance was in favour of Armstrong, Müller, and Company, would have afforded facilities for enforcing, by compensation and retention, the claim of Armstrong Brothers against their prior indorser, that would not amount to payment; and there is neither authority nor principle for saying that the estate of the bankrupt acceptor of a bill has a right to require the holder of the bill to have recourse to any prior indorser before availing himself of his right to protect himself by compensation and retention in Scotland, or under the mutual credit clauses in England.

All these remarks apply, *mutatis mutandis*, to the other bills which became due subsequently.

But Vaughan and Company did on the 3d April and the 3d June 1874 pass to Armstrong Brothers two cheques of £4207, 10s. each, on account of Hannay and Sons' unpaid acceptances for the iron delivered in October and December 1873. And it was contended that this had the effect *pro tanto* of satisfying the claim of Armstrong Brothers on the two sets of bills which from that time became in part the property either of Vaughan and Company or of Armstrong, Müller, and Company. The counsel did not care which, and if they could have made out either it would have raised their point. And they further said that though Armstrong Brothers never parted with the possession of the bills yet that it was enough to defeat their right to a set-off if they had parted with the property in them.

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My Lords, it would be enough to say that the burden of shewing that such a change on the property in the bills had taken place lay on the appellant, and that he has failed to satisfy that *onus*, but I think that when the evidence is examined on this point it is made out affirmatively that no such change in the property did take place. It is to be remembered that T. Vaughan and Company were not, and never had been, parties to the bills, and Armstrong Brothers had not, and never had, any right of recourse against T. Vaughan and Company. Armstrong, Müller, and Company were parties to the bills, and Armstrong Brothers had a right of recourse against them; and Armstrong, Müller, and Company held the letter of 23d October 1873, under which they might call on T. Vaughan and Company to indemnify them from at least a part of any loss sustained by them in respect of the drafts discounted by them. T. Vaughan and Company were under no obligation to prevent the bills coming back upon Armstrong, Müller, and Company, but they had a strong interest to prevent the bills coming back, and by so doing they could prevent Armstrong, Müller, and Company from sustaining loss, and they had a right to require Armstrong, Müller, and Company to do all that lay in their power to prevent any loss to them from occurring.

Mr W. T. Armstrong was called as a witness for the pursuers, and Mr George Neesham, the managing partner of T. Vaughan and Company, was called as a witness for the defenders, and both swore that the two sums were advanced by T. Vaughan and Company because Armstrong Brothers required some assistance to enable them to retain the bills and set them off against the claim of Hannay and Sons' trustee, and so prevent any loss. And it is quite clear that the second payment, on 3d June 1874, must have been made with that view, for the present litigation had then commenced, and the respondents were defending the action with a view of preventing any loss, which would in part fall ultimately on Vaughan and Company, and neither party could have been so absurd as to intend to defeat the very object of the litigation.

The letters of the 2d, 3d, and 4th April 1874 shew that at first Mr W. T. Armstrong did not take the correct view of the effect of the letter of 23d October 1873, and that Armstrong Brothers (or perhaps rather their clerk, who wrote the letter of 4th April 1874) thought that the two bills were to be delivered over by Mr W. T. Armstrong to T. Vaughan and Company when he met them on the Tuesday at Middlesborough. Had this been done there would have been ground for contending that T. Vaughan and Company had become purchasers of the bills, and that Armstrong Brothers had ceased to have any interest in them. But this was not done—there is no evidence on the face of the documents that T. Vaughan and Company ever intended this, far less had bound themselves to

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this. As soon as parties understood their real position they would wish not to do this, and I see no reason at all to doubt the veracity of the two persons who managed the transaction, and who both swear it was not done.

It is quite true that the action is defended in the interest of T. Vaughan and Company, in so far that if Armstrong Brothers were obliged to prove these bills on the estate of Hannay and Sons they would come upon Armstrong, Müller, and Company for as many shillings in the pound as the difference between 20s. and the dividend, and then T. Vaughan and Company might be called upon to make good to Armstrong, Müller, and Company a part of this loss. And the Lord Ordinary seems to think that this prevented Armstrong Brothers from being interested in the bills.

My Lords, the whole Judges in the Court of Session were of a different opinion, and I think the reason is tersely and accurately expressed by Lord Ormisdale, who says—"I am not aware, and can neither find authority nor see any good reason, in equity or otherwise, for holding that the circumstance of a party having a cautioner or collateral security for his debt is destructive of his right of compensation or set-off, supposing it to be otherwise well founded."

My Lords, if your Lordships take the same view of the facts as that which I have above expressed I think you will come to the same conclusion, namely, that the interlocutor of the Court of Session should be affirmed, and this appeal dismissed, with costs.

His Lordship added that the Lord Chancellor, who had been obliged to leave the House, and Lord Selborne, who heard the argument, authorised him to say that they agreed in his Lordship's reasoning and conclusions.

LORD GORDON concurred.

INTERLOCUTORS affirmed, and appeal dismissed, with costs.

MURRAY, HUTCHINS, & CO.—J. ROSS, W.S.—GRAHAMES & WARDLAW
—WEBSTER & WILL, S.S.C.

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THE MAGISTRATES AND TOWN-COUNCIL OF ABERDEEN, (Defenders)

Appellants.—*Lord-Adv. Watson—Cotton, Q.C.—Keir.*

THE UNIVERSITY OF ABERDEEN, (Pursuers) Respondents.—

Southgate, Q.C.—Asher—W. A. Hunter.

Property—Trust—Prescription—Mortification—Act 1696, c. 25.—By deed of mortification the granter assigned certain sums to the town-council of a burgh to be invested and the proceeds applied towards the maintenance of two professors in a university. The funds were invested in lands, which were managed for many years by the master of mortifications, an officer of the corporation, in whose name the title was taken. Afterwards the town-council appointed a portion of the lands, including a strip of land on the sea-coast, to be exposed for sale by public roup. The subjects were sold for payment of a feu-duty, and to a person who afterwards declared that he had purchased on behalf of the treasurer of the town, and the latter was infeft upon charter in his favour for behoof of the magistrates, council, and community. Soon afterwards the town-council, upon a representation that they were proprietors of the ground, obtained from the Crown a grant of the salmon-fishings *ex adverso* of the strip of land.

In an action of declarator and accounting brought more than forty years afterwards by the university, with concurrence of two professors interested in the mortification, *held (aff. judgment of the First Division)* (1) that the town-council still held the lands in trust for the mortification, and that they could plead no

prescriptive right against the trust ; (2) that, having acquired the fishings in the character of proprietors of the trust-property, they were bound to communicate the benefit to the trust, and hold them for behoof of the trust ; (3) that the consent and concurrence of the two professors gave the university a sufficient title and interest to sue for arrears ; but remitted to the Court of Session to allow the parties to amend their pleadings, and to proceed with the cause with a view to ascertain how far back within forty years the accounting should extend, and on what principles it should proceed.

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(In the Court of Session July 18, 1876, *ante*, vol. iii. 1087.)

Ld. Chancellor
(Cairns).
Ld. Hatherley.
Ld. O'Hagan.
Lord Black-
burn.
Lord Gordon.

The town-council of Aberdeen were the trustees of certain mortified funds directed to be applied to the maintenance of two professors in the Aberdeen University. They invested the funds in the purchase of lands in 1704, the title being taken in the name of the master of mortifications, an officer of the corporation. After feuing out a considerable portion of the lands they, in 1797, exposed the remainder, which included a strip along the sea-coast, for sale by public roup. It was sold for a feu-duty of £50 to a person who declared himself to have purchased on behalf of the treasurer of the town, and the treasurer was infeft in the lands upon charter in his favour for behoof of the magistrates, town-council, and community. Shortly afterwards the town-council, on application to the Crown setting forth that they were infeft in the lands, obtained a grant of the salmon-fishings *ex adverso*.

In 1874 the University of Aberdeen raised this action, with concurrence of the two professors interested in the fund. They concluded for declarator that the lands and salmon-fishings were held by the defenders in trust for the pursuers as beneficiaries under the mortification, and that the sale in 1797 was null. There were also petitory conclusions for accounting.

The Lord Ordinary (Young) found that the lands were held by the defenders in trust, but assoilzied them with respect to the fishings, and farther found that the pursuers were not entitled to an accounting, reserving to the beneficiaries themselves and their representatives to sue for arrears.

The pursuers reclaimed.

This interlocutor was pronounced by the First Division on 18th July 1876 :—" Recall the said interlocutor : Find that the lands specified in the conclusions of the summons were purchased in 1704 by the corporation of Aberdeen with funds belonging to the mortifications mentioned in the first and second articles of the condescendence, and to four other mortifications : Find that the said lands were held by the said corporation till the year 1797 on titles expressing *in gremio* the several trusts subject to which the lands were so held : Find that in the year 1797 the said lands were sold by the corporation, as trustees for the mortifications, to the said corporation for its own behoof, in consideration of a feu-duty of £50 : Find that the said sale was illegal and void, and that the said lands, notwithstanding the said sale, are held and possessed by the defenders on the subsisting title thereto in name of the treasurer of the burgh of Aberdeen, subject to the trusts of the said mortifications : Find that the corporation in entering into the illegal transaction aforesaid acquired or attempted to acquire the said lands as the estate of the corporation itself, for the purpose of being thereby enabled to apply to the commissioners of His Majesty's Treasury for a grant in favour of the corporation of the salmon-fishings in the Dee *ex adverso* of the said lands, according to a practice then prevalent of the Crown granting rights of salmon-fishing in the sea to proprietors whose lands were bounded by the shore, merely on the consideration of their being proprietors of such lands : Find that, in pursuance of such purpose, the corporation, in the year 1801, presented a petition to the Lords of the Treasury setting forth that they were absolute proprietors of

No. 6. the said lands in their own right, and on that ground praying for a grant of salmon-fishings in the sea *ex adverso* of the said lands for the benefit of the corporation : Find that the prayer of the said petition was granted, and a crown-charter in favour of the corporation conveying the said salmon-fishings was expedite, which is written to the seal and registered 27th February 1804 : Find that the corporation have ever since possessed and do now possess the said salmon-fishings in virtue of the said charter : Find that the corporation, being the trustee for the said mortifications, having thus used the trust-estate, and the title thereof vested in them, for the purpose of obtaining a benefit to themselves, are bound to communicate that benefit to the trust-estate and the parties interested therein, and are bound to hold and administer the said salmon-fishings as part of the said trust-estate, and to apply the revenues and profits thereof to the benefit of the parties interested as beneficiaries in the said mortifications : Therefore find, declare, and decern, in terms of the declaratory conclusions of the summons : Find under the petitory conclusions that the concurring pursuer, Dr W. R. Pirie, is entitled to a share of the revenues and profits of the trust-estate corresponding to his tenure of the professorship of divinity and church history from December 1843, the date of his appointment, till the date of citation : Find also under the petitory conclusions that the late John Cruickshank, as concurring pursuer, was, and his representatives, who have been sisted in his place, are entitled to a share of the profits and revenues of the trust-estate corresponding to his tenure of the professorship of mathematics from or about the year 1833 till the year 1858 : Find that the said shares of the profits and revenues of the trust-estate for the said period may competently be ascertained and decerned for in the present action : Find the pursuers entitled to the expenses hitherto incurred by them," &c.

The defenders appealed.

At delivering judgment,—

LORD CHANCELLOR.—Your Lordships, having heard the argument addressed to us, desired time to consider this case further—not, I venture to think, from any doubt you entertained as to the conclusion at which you should arrive, upon, at all events, the main question involved in it, but in order that you might be better able to dispose of a subsidiary question which was raised, and, I think, raised for the first time, by the argument at your Lordships' bar.

The action, which was raised in the Court of Session against the Aberdeen town-council was an action which had both declaratory and petitory conclusions. So far as the declaratory conclusions were concerned the nature of the case may be very shortly described. The principal officers of the corporation of Aberdeen, whom I will call for brevity the town-council of Aberdeen, were the trustees of certain mortified funds which were intended to be applied for the maintenance of two professors in the Aberdeen University. These funds were laid out with others in the purchase of certain property in the neighbourhood of Aberdeen, to the south of it, and lying along the sea coast. Of that property, so far as it represented the mortified funds, the town-council were undoubtedly trustees for the university and its professors. A considerable time ago—about the end of the last or commencement of the present century—a transaction occurred, the nature of which may be described in this way : A considerable part of the property having been feued off by the town-council to various persons, one portion of the property—that adjacent to the sea coast—remained in their hands ; and as to it what I would call little else than a ceremony was gone through, by

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which they professed to sell it to a gentleman, who immediately afterwards declared that he had bought it as and held it as a trustee for the town-council. The result therefore was this, that the town-council being, as we should say, the trustee of a charity land, went through the form of selling that charity land to the corporation itself, feuing the land which was capable of producing an uncertain sum of profit for the certain sum of £50 a-year. Very shortly after that occurrence this took place—the town-council thus having become the owners of this land, applied to the Crown to grant to the town-council as the proprietors of the land, the right of salmon-fishing in the sea *ex adverso* to the land in question; and they based their application upon a narrative which represented that the town-council had acquired this land for, among other purposes, the purpose of asking for the right of salmon-fishing from the Crown; that the Crown was in the habit of giving the right of salmon-fishing to the proprietors of adjacent or riparian land; and that they supplicated the favour of the Crown as the owners of the adjacent land. Accordingly, and following the practice of the time, an Exchequer grant was made by the Crown of the salmon-fishing *ex adverso* of nearly the whole, though not quite the whole, of the coast to which I have referred.

From that statement of the case, on which I do not enlarge at greater length, because it was fully described in the able judgment of the Lord President, I think your Lordships could have no doubt that the case is one which does not admit of argument. The acquirement of the land is a transaction which could not for a moment be maintained in any Court. It is a dealing with trust-property by a trustee. The feuing out of the land counts for nothing as against those who are beneficiaries of the trust. They are entitled to disregard it, and treat it as if it never had happened. Then, again, with regard to the salmon-fishings, it is one of the first principles, founded upon no technical rule of law, but upon the highest principles of morality, that wherever a trustee, being ostensibly the owner of a property, acquires any benefit as owner of that property, that benefit cannot be retained by himself, but must be surrendered for the advantage of those who are beneficiaries under the trust. Now, it is perfectly apparent that this right of salmon-fishing was claimed by the town-council because they were the owners of the land; it is perfectly apparent that it was granted to the town-council because they were the owners of the land; it is perfectly apparent that it would not have been granted to them if they had not been the owners; and, under these circumstances, it appears to me clear to demonstration that their reception of the grant of the salmon-fishings is exactly one of those benefits which came to them as owners of the land, and must be surrendered for the advantage of those who really are the persons interested in the land. I do not delay your Lordships longer on that part of the case. I agree with every word which fell from the Lord President in describing the case, and I do not really think that the very able counsel who appeared at your Lordships' bar on behalf of the town-council were otherwise than impressed with the difficulty of the case they had to offer.

But, then, there remain the petitory conclusions of the summons. These are conclusions in which the two professors, for whose advantage these funds were mortgaged—or, rather, I should say, one of the professors and the representatives of the other, who has died—claim in their own persons to have an accounting and payment of the real value of the lands and of the salmon-fishings, over and above the feu-duty which has been paid. With regard to these petitory conclusions, one of the questions—and, as it seems to me, only one—was really argued

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No. 6. in the Court below. It was doubted whether the professors could join in this
 Mar. 23, 1877. suit for the purpose of maintaining these petitory conclusions, and the Court of
 Magistrates of Session held that they could so join ; and I own it seems to me that no real or
 Aberdeen v. substantial reason can be alleged to shew why they could not join. With regard
 University of to the practice of this country, your Lordships are well aware that it is an every-
 Aberdeen. day occurrence to find an information dealing with a charity filed by the At-
 torney-General as representing the charity, and coupled with that—the whole pro-
 ceeding being styled an information—a bill is filed by the individuals connected
 with the charity who conceive that they have some claim to personal and pecu-
 niary advantages from the charity. In principle it seems to me that exactly the
 same thing is done in the present case. In Scotland, where it is not the habit
 for the Lord Advocate to sue as the Attorney-General does in this country with
 regard to charities, the university may be taken as representing the general claim
 on behalf of the charity, and the professors joining in the petitory conclusions
 as representing the individuals who ask for the specific relief to which they are
 entitled. Therefore, so far as the Court of Session held that these petitory con-
 clusions were rightly joined, I think your Lordships will be disposed to agree
 with that view.

But then, there is also pressed upon your Lordships this further view of the
 case :—Here is an accounting directly for the profits of this land and fishing asked
 for, and there is no limit assigned to it beyond the Scotch limit of prescription,
 which is forty years ; and it was said that if the petitory conclusions were granted
 it might involve great hardships. Here, it was said, is a public body, the town-
 council, and, whatever may be said of the conduct of those who were the authors
 of this transaction in the first instance, their successors are not affected by any
 personal culpability as to what took place, and they have been dealing from year
 to year with the property of the town-council on the footing of this transaction.
 It may be that they have spent the money honestly, thinking they had a right
 to do so,—it may be that there is no property in the town-council to satisfy
 the judgment which may be given against it in reference to the arrears ; and it
 may be that the result will be that the members of the municipality and the com-
 munity generally will have to be taxed to make good money which was spent,
 not by them, but by those who went before them. I do not find that any argu-
 ment upon this subject took place in the Court below. I do not find any refer-
 ence to it in the condescendence or pleas. I do not find even in the pleadings
 or in the reasons of appeal before your Lordships' House that any specific refer-
 ence is made to the subject. There is no doubt that in England there have been
 cases where, upon reclamations made for the recovery of charity property which
 has been improperly applied, some consideration has been shewn in the decree
 with regard to the past expenditure of the charity money ; and there have been
 cases in which the accounting of the charity funds, of back rents or back receipts,
 has been limited—sometimes to the period when first misappropriation was chal-
 lenged, and sometimes to the filing of the bill for the recovery of the charity
 estate. I do not find, as far as I have been able to investigate the subject, that
 there are any authorities—and none were cited at the bar—in Scotch law on
 this subject ; and I do not wish to indicate any opinion whatever as to whether
 the doctrine, which, in the way I have described, has prevailed in England, has
 ever been extended, or ought to be extended, to Scotland. But, I think, cer-
 tainly, it was your Lordships' feeling, that it might be desirable, without in any
 way prejudicing this question, or in any way using expressions which would in-

dicate that your Lordships had formed any opinion on the subject one way or the other, that this matter shall if possible be left open for the further consideration of the Court of Session, in case it might appear to the Court of Session, on their attention being specifically directed to this point, that any modification in the general accounting should be made in view of the considerations to which I have adverted.

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Any mode your Lordships adopt for effecting this purpose ought not, in my opinion, to affect in any way the costs of the litigation in this House. It appears to me that the appeal, on the grounds on which it is brought, has entirely failed; and I should submit that the interlocutor of the Lords of Session should be affirmed, with costs; but, in order that the Court of Session may have the opportunity of having their attention drawn to the question of the accounting, I should propose to your Lordships, in affirming the interlocutor of the First Division, with costs, to remit to the Court of Session with directions, before proceeding with the accounting ordered, to allow the appellants to amend the record and the pleas with reference to the question of the liability in the accounting; to allow the respondents to make such alterations in their pleadings as may be rendered necessary by those made by the appellants, and thereafter to proceed further in the case as shall be just; with power to dispose of all questions of expense incurred under this remit. My Lords, I move your Lordships accordingly.

LORD HATHERLEY.—My Lords, with the exception of the last part of this case, as to which the noble and learned Lord on the woolsack has proposed that there should be a remit to the Court below, there really could not be entertained any doubt whatever, as soon as the facts were disclosed in the opening address of counsel. The corporation of Aberdeen appear to have been trustees for certain endowed professorships of certain funds which were placed within their control for that purpose, just as in this country many corporate bodies, notably the corporation of London, are trustees for many great public charities, holding funds entirely distinct for that purpose. The corporation of Aberdeen appears to have an officer to take charge of these funds, who is called the master of mortifications, and in him the property purchased with the sums of money granted by endowment were invested. In process of time it seemed to be thought desirable to dispose of some of the property, and other parts remained on hand. The portion remaining on hand was dealt with in this way:—The corporation, *qua* municipal corporation, fixed an upset price, and settled all the arrangements for a sale, and, when the forms of selling were gone through a person was appointed to bid on their behalf, and the whole matter was reduced to a mere matter of book-keeping on the part of the corporation. They handed over the property from their master of mortifications to the treasurer, fixing him with the payment of a certain sum yearly for the tenure of the property. That could not possibly be legal. There is, I think, no difference between the law of Scotland and the law of England in this respect. The law rests on the broadest principles of justice, and it is well settled that a person who holds a fiduciary position cannot acquire an interest of any description in the trust-estate until he has entirely denuded himself from the trust, and placed himself at arm's length from those whose interests he once represented. Therefore as regards the first and main portion of the case there can be no doubt.

A subordinate question then arises as to whether or not the fishings, being acquired subsequent to the purchase made, as alleged, out of the municipal funds,

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could not be held independently of any principle that might be applicable to the general bulk of the property. Something might be said for that, and two cases were cited which seemed to have some degree of bearing on the one before us till all the facts were carefully weighed. But when you come to look at the representations made to the Crown, it is distinctly seen that the very object of obtaining the trust-property was to have from the Crown a grant of these fisheries, because the Crown had laid down for itself the principle that they would make these grants to persons holding the lands adjacent to the sea. It was as owners of the trust-property that the fisheries were given to the council, and the two cases cited at the hearing have no bearing on the case we have now to decide. It was supposed from the special facts of the two cases cited that a distinction had been drawn, taking them out of the general rule that a trustee cannot possibly derive any benefit from the property he holds in trust. But I am sure that the Judges in these cases did not mean to impugn the general principle I have mentioned, and their ruling could not be applied to a case in which, clearly, and from the very statements of the parties, the benefit derived from the administration of the fisheries has been entirely derived from the acquisition of the trust-property, which was obtained for the purpose. The case is one of the simplest and plainest ever brought before us for decision.

The other part of the case would have afforded me some difficulty, for, in truth, we are very little provided with materials with regard to back accounting. We have not had before us any argument on that point before the learned Judges in the Court below, we have not had the point raised in any way clearly or distinctly on the pleadings before us, and, I think, the course proposed by the noble and learned Lord on the woolsack the only one well competent for your Lordships to adopt in all the circumstances of the case. As to the main portion of the case I never could have the slightest doubt.

LORD O'HAGAN.—I am in favour of affirming the interlocutor of the Court below in the manner proposed by the Lord Chancellor. I agree with your Lordships who have already spoken that there is no room for doubt on the first part of the case. A trust-estate is in question. The appellants are the trustees, the respondents the beneficiaries. The predecessors of the appellants administered their trust faithfully until 1797, when the officer, called the Master of Mortifications, who acted for them in the administration of the trust-estate, conveyed the lands, in consideration of a feu-duty of £50 a-year, to their own treasurer, after a sale at which their own provost presided. Ever since, the appellants have kept the property, and enjoyed advantages accruing from that possession. A simple statement of the facts of this strange and indefensible transaction is sufficient to stamp it with illegality. The principle forbidding a trustee to traffic in his trusts belongs to the jurisprudence of all nations. In this case, the law of Scotland, equally with the law of England, condemns the abuse of the fiduciary position, and declares that the advantage wrongfully gained by the trustee shall accrue—not to his benefit, but to that of the beneficiaries. It was urged that, whatever may have been the original weakness of the appellants' position, lapse of time has given it validity. But the trust was express. It was broken by the trustees for their own benefit, and to the injury of the *cestui qui trust*, and there is no principle in the law of Scotland which allows any lapse of time to validate a transaction so illegal. These were the opinions of the Court below, and your Lordships will have no hesitation in adopting their judgment.

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The ruling of the first point seems to rule the second, and if the lands are affected by the trust—so as, notwithstanding the nominal transfer of title, and the great lapse of time, to belong still to the beneficiaries—the fishings appear to me to be affected in the same way, and with a like result. It is plain from the statement of the case that the lands were unlawfully purchased by the trustees for the purpose of founding a claim for the fishings. The possession of land was made the ground of the claim, and was admitted as such by the Crown, and without the land, so acquired by breach of trust, no grant of the fishing would have been obtained. It is true the fishings were granted by the Crown, and that the Crown is not seeking, on the ground of misrepresentation, to rescind the grant. But, if the grant was plainly and avowedly made because of the possession of land giving rights to the beneficiaries, but no right to the trustees to whom the land was unlawfully ceded, why should not the restoration of the land to its true owners involve the restoration of the fishings, which the trustees managed to obtain on false representations? The practice of the Crown would have given these fishings to the *cestui qui* trust as the proprietors of the adjacent land, and not to the trustees, who had virtually no interest, corporate or personal, in the matter. And, if your Lordships should agree in holding that lapse of time does not alter the rights of these persons, and that what belonged to the *cestui qui* trust in 1801 now belongs to their successors, then the fishings should be held subject to the trust of the mortifications, as well as the land in virtue of which the possession of these fishings was manifestly granted. It would, in my opinion, be a reproach to the law if it were powerless in such a case to prevent a trustee from making a commodity of his own wrong, and holding property claimed only by gross breach of duty. Your Lordships, I trust, will again enforce the doctrine which a distinguished Scotch Judge, once a member of this House, laid down, that “the law will even presume that the trustee intended that the profits should go to the beneficiary, rather than presume that he intended his own aggrandisement, at the risk and expense of the beneficiary.”—(Lord Colonsay in *Laird v. Laird*, May 28th, 1858, 20 D. 981). It is plain that the judgment of the Court below should be affirmed. As to the petitory conclusions, for the reasons given by the Lord Chancellor, I think the course he has proposed is a wise one.

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LORD BLACKBURN.—I also am of opinion that, on the main question, the judgment of the Court below ought to be affirmed. On that I will say no more than that I think the reasoning in the clear judgment of the Lord President is quite irresistible.

On the minor and petitory question, as to what extent the accounting should go over, I agree with the noble Lord on the woolsack that it has hardly been properly raised on the record. The hardship is, on one side, very obvious, for this fluctuating body, the town-council, being called upon to pay forty years' arrears, is to make the occupiers of heritable property in Aberdeen in 1877 pay for the money which has been spent by their predecessors in 1837 and downwards. It is also obvious that it would be a hardship, on the other hand, if the professors or their representatives, who ought to have their money, lose it, because they did not know they ought to have had it. I do not think that question has been properly raised and considered, and it is very desirable that any rule of law to be adopted should be ascertained and considered by the Scotch Judges; and I therefore entirely agree with the course suggested by the Lord Chancel-

No. 6. lor, which, as I understand it, is to leave the Court of Session at liberty to consider the question, and to adopt what, after considering the principles of Scotch law, and the decisions in Scotland—if there be any—shall seem to them to be the just course.

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LORD GORDON.—It is unnecessary for me to detain your Lordships with many observations in a case so fully explained in the Court below. I quite adopt the views which were there expressed by the Lord President in reference to the principles which ought to govern both branches of this case. I am happy to say that your Lordships, in adopting the same view, are acting quite in accordance with the principles of Scotch law. In fact, our law is founded upon the civil law, and has adopted, to the full extent, the restriction upon any dealings on the part of trustees with trust-property. The petitory conclusions may admit of some further discussion, and, I think, an indulgence is conceded to the appellants in this case, in allowing them the opportunity of raising on this part of the case a fuller argument than they have yet prepared. It would have been a mistake for your Lordships to have dealt with that part of the case on the very meagre arguments which have been submitted to you. I therefore think your Lordships are acting correctly in giving power to the Court below to allow amendment of the record, and to decide any question of accounting.

THIS judgment was pronounced :—"That the said interlocutor . . . be, and the same is, hereby affirmed, except as regards the extent of the liability to account; and as to such accounting, and without prejudice to any question, it is ordered and adjudged that the cause be, and the same is hereby, remitted back to the Court of Session in Scotland, with directions, before proceeding with the accounting ordered by the said interlocutor, to allow the appellants to amend the record and their pleas with reference to the extent of their liability to account; and to allow the respondents to make such alterations as may be rendered necessary by those made by the appellants; and thereafter to proceed further in the cause as shall be just, with power to dispose of all questions of expenses incurred under this remit: And it is further ordered that the appellants do pay or cause to be paid to the said respondents the costs incurred by them in respect of the said appeal."*

MARTIN & LESLIE—T. J. GORDON, W.S.—WILLIAM ROBERTSON—JOHN CARMENT, S.S.C.

No. 7. ROBERT GARDNER (Pursuer), Appellant.—*Lord-Adv. Watson—Darling.*
MAY GARDNER (Defender), Respondent.—*Trayner—A. Robertson.*

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Parent and Child—Presumption of Paternity.—In an action of declarator and of putting to silence at the instance of a man against a girl who claimed to be his lawful daughter the following facts were proved :—The pursuer had, after a somewhat prolonged courtship, married the mother of the defender when she was, to his knowledge, and on her own confession, far advanced in pregnancy, but, according to her and the pursuer's statement, in consequence of intercourse with another man. When the child was born the husband and wife were living together as married people (in a hotel in Edinburgh, where they had gone for the occasion), and at the time neither of them said to any one that the pursuer was not its father. The child was removed within three days after her birth, and the pursuer paid aliment for her for sixteen years, but she saw neither her mother

* The pursuers' claim for arrears was subsequently compromised.

nor the pursuer till she was twenty-one; she then, in consequence of rumours which had reached her as to her parentage, demanded to be recognised as the daughter of the pursuer and his wife, but this was refused; the pursuer, however, sent her to school at his own expense, and supplied her with money for dress, &c. It was then for the first time stated to the defender that another man was her father. The pursuer and his wife deposed that no connection had taken place between them prior to their marriage.

Held (aff. judgment of the Second Division) that the pursuer's conduct in marrying a woman whom he knew to be pregnant, and his subsequent actings, had raised a presumption of his paternity which he had failed to rebut.

(In the Court of Session, May 30, 1876, *ante*, vol. iii. p. 695.)

The pursuer appealed.

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Lord Blackburn.

Lord Gordon.

LORD CHANCELLOR.—My Lords, this case has been argued at your Lordships' bar with very great ability. Everything which could be said for the appellant has been said by the Lord Advocate and Mr Darling. On the other hand, your Lordships have heard from Mr Trayner an argument remarkable not merely for its point and strength, but, what perhaps is more unusual, for its great conciseness.

My Lords, the case itself is perhaps one of the most remarkable that has ever come before a Court in Scotland. The action in the Court of Session is an action known to Scotch procedure instituted by the appellant for the purpose of putting to silence a claim made by the respondent to be his daughter. The Lord Ordinary, before whom the case came in the first instance, gave effect to the conclusions of the summons, and gave the relief which was asked for. On the other hand, the Judges of the Second Division, upon a reclaiming note, were unanimously of opinion that the appellant had failed to establish that he was not the father of the respondent, and therefore assolized the respondent from the conclusions of the summons, and it is against that determination of the Court of Session that the present appeal is brought.

I will remind your Lordships very shortly of some of the matters which are so freshly in your Lordships' minds. The *onus* of proof in the case lies entirely upon the appellant. He takes upon himself to establish the proposition that he is not the father of the respondent, and if he does not establish that proposition he cannot succeed in obtaining the conclusions of the summons.

Now, my Lords, the history of the case may be conveniently looked at by dividing it into two parts, and, in the first place, I will remind your Lordships of those parts of the case as to which there is no dispute or which are established beyond the possibility of dispute or controversy. I will then place before your Lordships the parts of the case as to which there is controversy. There is no controversy about this: The appellant, and his wife, who is still alive, were married in the month of August 1850; they had been acquainted for some years before the marriage; their courtship had continued for some years; the appellant, and the lady, who is now his wife, were in the habit of associating together, and frequenting each other's company; a short time before the marriage the lady made a communication to the appellant that she was pregnant. If during their intimacy any intercourse in the technical sense of the word had taken place between them that would be a communication which might not take him by surprise. But that which was done was this: With his knowledge, and apparently with his concurrence, the lady went from Tweedside, where they were both living, to Edinburgh, to consult a Dr Thatcher, a physician in Edinburgh of some note at the time. The physician told her, although, according to her

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evidence, she had herself little doubt before of the matter, that she was with child, and it appears that, being made aware that a marriage was contemplated, he suggested that the sooner the marriage took place the better. The result of the interview with Dr Thatcher was communicated to the appellant. The appellant was not satisfied, but he himself went a day or two afterwards to see Dr Thatcher, and heard from Dr Thatcher that which the lady herself had heard. The appellant says that he gave Dr Thatcher to understand that he was not the father of the child. But, my Lords, I cannot take that as any statement which could be received that he had made to Dr Thatcher any clear and distinct communication on the subject. In the absence of a clear and distinct communication, the circumstances of the case and the manner in which Dr Thatcher was consulted, must have conveyed to the mind of Dr Thatcher that the relations between the appellant and the lady who had come to him were those which would have fixed the paternity of the child upon the appellant. However, Dr Thatcher seems to have told the appellant, as he told the lady, that the marriage had better take place as soon as possible, and the marriage did take place in about six weeks, as I understand it, after this time, namely, in August 1850.

The appellant then took the lady to the farm where he lived, his own home, and about six weeks after the marriage, the time for her delivery being imminent, they went to Edinburgh. They went to a hotel in Edinburgh, the appellant and the lady going there apparently not otherwise than as husband and wife ; and on the morning after they arrived at the hotel the lady was taken with labour of childbirth, Dr Thatcher was sent for, and the child was born. That is said to have been on a Tuesday, and on the Thursday the child was given into the care of a nurse and taken away from the hotel. After some time the appellant and the lady left the hotel, and apparently returned to their own home. From that time until the year 1872, a period of twenty-two years, neither of them saw the child. The child, a girl, grew up. There is not any clear evidence as to what she was generally called, or what she was intended to be called, but from the circumstance apparently of one of the garments, a plaid, which had been put around the child at first having been marked with the name of "Gardner," that name seems to have gone with her, and more or less to have been the surname by which she was occasionally, at all events, called. The appellant, however, regularly, for a period of sixteen or seventeen years, supplied, through Dr Thatcher, the sum requisite for the maintenance of the girl, and the supply of that maintenance was discontinued when the girl was sixteen or seventeen years of age, not from any repudiation of the obligation to supply it, but because at that time it was the expressed opinion of the appellant that she had come to an age when she might be able to support herself ; and accordingly she appears to have supported herself by working in a manufactory. However, in the year 1872, having been led by circumstances to which I need not refer, to suspect that the appellant and his wife were her father and mother, the girl, who was then of the age of twenty-one, went to the place where they were resident, saw her mother, and introduced herself as her child, and apparently laid claim both to the appellant and her mother as her parents.

My Lords, I pass rapidly over what passed during the succeeding three years. It is clear that at that time, the claim being made by the girl to be the daughter of the appellant as well as of his wife, that claim was, in the first instance, disputed ; but there is this remarkable fact, that during those three years, there being repeated meetings with her, and she being placed by the appellant in a school where her

education might be improved beyond the point to which it had reached, the appellant supplied during those years ample funds for her education and for her maintenance, funds amounting to between £120 and £130, it is said, in one year. A correspondence continued during that time, in which he directs his letters to her by the surname of "Gardner," and she addresses him as her "father," or her "dear," or "dearest father," and at one of these meetings which occurred, it must be remembered, whilst the controversy still continued as to whether he was or was not her father, it is admitted that he offered to portion her, to provide her with a sum of £1000, payable at his death, and with an income in the meantime of £40 a-year, and that this sum was refused by her because it was not coupled with an acknowledgment of her as his daughter.

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Now, my Lords, if the case rested there, and your Lordships had nothing more to deal with than the facts which I have stated, the marriage to a woman avowedly pregnant, and near the time of her delivery, by a man who had been courting her, and keeping company with her, and her delivery taking place in the way that I have mentioned, and the child provided for by the husband, although reasons for the secrecy might easily be discovered, from the desire of preventing, at all events, in the first instance, a scandal which might be occasioned among the connections of a married woman, still the facts which I have described would raise, I agree, with regard to Scotch law, not a presumption *juris et de jure*, but a presumption of fact so strong that the man was the father of the child, that it would be a presumption extremely difficult to rebut or controvert. Speaking of Scotch law only, and putting aside the much stricter presumption which in the case of English law would be drawn from those circumstances, I take the expression of Scotch law by Lord Gifford to be one which is accurate in itself, and which, indeed, was not challenged in the argument of this case. Lord Gifford says,—“A certain presumption of paternity arises from the bare fact that a man knowingly marries the mother of an illegitimate child previously born. But this is a very weak presumption. In the absence of all other evidence all that can be said is probably that it is more likely than not that he is the father. Such presumption would be greatly strengthened if previous to the marriage the mother of the illegitimate child had been the mistress or concubine of the man who afterwards married her, and had cohabited with him at or about the time of conception, and the adoption or acknowledgment of the child as his by the husband would probably make the presumption almost conclusive, though still capable of being rebutted by contrary proof. Where, as in the present case, a man marries a woman who at the time of marriage is in a state of pregnancy, the presumption of paternity from that mere fact is very strong, and is, perhaps, in almost all such cases, in entire accordance with the actual truth. Still farther, where the pregnancy is far advanced, obvious to the eye, or actually confessed or announced as in the present case, to the intended husband, a presumption is reared up which, according to universal feeling, and giving due weight to what may be called the ordinary instincts of humanity, it will be very difficult indeed to overcome. The man who marries a woman in the condition in which Mrs Gardner was on 29th August 1850, the date of their marriage, when she was seven or eight months gone with child, says almost as emphatically as he could do by the most express words, ‘I am the cause of the pregnancy, and the father of the expected child.’”

Now, my Lords, those facts to which I have up to this time referred are what I have termed the facts of the case, as to which there is either no dispute

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or no serious controversy. Now, let me remind your Lordships of what are the statements upon the other side brought forward for the purpose of getting rid of these facts. The statements are those of the appellant and of the mother. They are statements which, when I mention them, will appear to your Lordships to depend entirely in their nature upon the evidence of the appellant and the mother alone, and they are statements which cannot be directly and distinctly, at all events as to the material part of them, checked or controlled by opposite testimony. The material statement of the appellant and of the mother, as to which there is the difficulty which I have referred to of checking their testimony, is this—they say that before marriage they never had carnal intercourse; that is the statement of both. They state, further, that before marriage, and immediately before the consultation with Dr Thatcher, the lady told the appellant that she had met on the moor, near her brother's house, some months before, a man whom she termed a low person or a blackguard, who had, in substance, violated her person, and she attributed to this cause her pregnancy in the conversation which she had with the appellant. My Lords, that is her statement, and that is her husband's statement. She further states, and her husband states to the same effect, that about a year after the marriage, being in a state of weakness and illness, I think upon the occasion of the birth of a stillborn child, she made a further disclosure to her husband not consistent with that which she had made before marriage, that she told him upon that second occasion that she had had before marriage connection with a man whom she knew and named, Laidlaw, a shepherd of her brother's, and that it was Laidlaw who was the father of the child in question.

Now, my Lords, I must pause here for the purpose of referring to the first of these statements, the statement after which the appellant says he married this lady. It is a statement which I am bound to say appears to me, as it is given, to be one of the most improbable statements, one of the most difficult of belief, that it is well easy to imagine. The statement is this, that a lady, in a respectable position of life, made this statement to the appellant, also in a respectable position of life, before marriage, that she had been forced and ravished, and he made no further inquiries about it than to ask her by whom, and she said she did not know—a low person, a blackguard, and that thereupon all inquiry on his part ceased, and that he in a temper of romantic attachment married the lady under those circumstances, in order to shield her from the scandal which would arise from her pregnancy becoming known, and the birth of her child being made public. My Lords, it does appear to me that upon the mere statement of that story, without more, it is so contrary to the mode in which mankind generally act, that, although it is impossible to say that it cannot be true, it is not too much to say that it is in the highest degree unlikely; and very strong corroboration of that story would be required, or, at all events, it would be necessary to see that those upon whose testimony that story is to be accepted have always spoken with great accuracy, with great consistency, and in a manner which shews that their recollection and their accuracy of speech is entirely to be accepted.

My Lords, I will ask your Lordships to consider the evidence in a moment by those tests; but I am anxious, in the first place, to put aside what appears to me to be of comparatively minor importance in the case, but which yet seems to have occupied a good deal of the attention of the Court below,—I mean the episode, if I may term it so, with regard to Laidlaw. He has been called as a

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witness in the case, and in form he denies that he had carnal intercourse with the lady, but his evidence is open to considerable observation, and it is said that it cannot be reconciled with the statements which he appears to have made in letters which were put into his hand, and upon which he was cross-examined. My Lords, I should prefer, in the view I take of this case, to assume, although I only put it by way of assumption and not as stating that it is a conclusion at which I have arrived, that there was evidence which might be held to establish that there was intercourse with Laidlaw before the marriage, but I repeat that I do it merely by way of assumption for the purpose of what I have still to say. My opinion is that that is only a part of the case, and by no means the largest part. It may well have been that there was intercourse with Laidlaw, but the question remains, the great question in the case, Was there or was there not intercourse between the appellant and the lady who afterwards became his wife? because, if there was, there is then at once the means of accounting for the chain of circumstances to which I have already referred, and from which would flow the presumption of which I have spoken.

Now, my Lords, I have said that the question of whether there was or was not this intercourse before marriage depends upon the testimony of the appellant and of the lady. There was the possibility of intercourse—there was the opportunity for it, there was everything in the conduct of the parties which would lead you to suppose, unless the contrary is clearly made out, that there had been that intercourse, and the treatment of the child was on the footing of the child having been a child of the appellant.

But is the testimony of the appellant and of the lady to be accepted as negating the fact of that intercourse? Now, my Lords, there unfortunately your Lordships have what I must term the opposite of clear, consistent, and unhesitating testimony. In the first place, I refer to the evidence of the lady. She stands convicted by her own confession of having made before marriage a statement which was not consistent with what she now says was the fact. She made to the appellant the statement that she had been ravished against her will by a person unknown to her. The statement she now makes is that she had a connection which cannot be described by the name of ravishment with a person perfectly well known to her. But not only is there that; there is also this further inconsistency in her testimony. In the condescendence, which professes to give a narrative of this part of the case, and which must emanate from the statements and the instructions of the lady, there is a statement, that she had connection with Laidlaw twice or oftener, and the actual places where the connection took place are mentioned. But in her testimony she recedes from that statement, and says that she had connection once, and only once, with Laidlaw, and denies any further connection.

With regard both to the lady and the appellant himself there is this further observation in regard to their evidence: In the course of that period of three years to which I have referred, between 1872 and 1875, they had frequent meetings, not merely with the girl, but with a minister of the Free Kirk of Scotland, Mr Kay, to whose congregation the young woman belonged, by whom she had been baptised, and who appears to have taken an interest in her welfare. The Lord Ordinary speaks of Mr Kay as being a partisan of the respondent. A partisan undoubtedly he was, in this sense, that he appears to have believed that the respondent was the daughter of the appellant, and appears to have thought that she ought to be acknowledged as such, and that a wrong was being done to

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her by her not being acknowledged as the daughter of the appellant. But, my Lords, there is nothing whatever that I can observe, either in the course taken or in the expressions used by Mr Kay, which for a moment would authorise your Lordships, or any Court, to hold that there was any reason why the evidence of Mr Kay should not be accepted according to its literal effect, or which could impute to Mr Kay any motives for departing from the strict line of truth in the evidence which he has given. My Lords, if the evidence of Mr Kay is looked at, as I think it must be, as evidence entirely worthy of credit, it appears to me that from that evidence it is proved to demonstration that both as to the appellant and as to the lady they, in the course of the communings between Mr Kay, the appellant, the lady, and the young woman, made at different times during the period that I have referred to statements which are at variance with the evidence which they now give. And when I look at the evidence which they now give, and the cross-examination they are subjected to, I cannot, more especially as to the appellant himself, find that they are prepared to do more than profess a want of recollection as to whether they made to Mr Kay the statements which he says they made, or whether they did not make them.

My Lords, that being so, the statements of the appellant and his wife being, as it seems to me, in the highest degree improbable, they being statements as to which they have not been consistent at different times, and being statements, especially, which are highly inconsistent with expressions which have fallen from them during the period between 1872 and 1875, when the question of the pater-nity of this young woman was in the first instance raised, I come to the conclusion that I cannot, as against what is the presumption arising from the conduct in this case, accept mere declarations, even on oath, of the appellant and his wife against the legitimacy of this young woman. These, my Lords, are the grounds upon which I arrive at the conclusion which was unanimously arrived at in the Court of Session. I cannot find any fault with that determination, and therefore I submit to your Lordships that this appeal should be dismissed, with costs.

LORD HATHERLEY.—My Lords, in this very painful case I have come to the same conclusion as that which has just been expressed by the noble and learned Lord on the woolsack. The burden of proof in this case of the proposition that this girl Mary is not the child of Robert Gardner, the pursuer in the action, who seeks to restrain her from claiming so to be, is thrown upon him, and the Judges of the Second Division have come to the unanimous conclusion that he has not discharged that burden, and has not proved that this Mary is not his child. The Lord Ordinary came to a different conclusion. I must confess that I greatly regret that a case of this kind should not rather be submitted to a jury than brought before the Judges sitting as Judges both of fact and of law. However, that is the course of practice, and we have to deal with the case as we best may.

The remark caught my attention once or twice, I think, in the course of the Lord Advocate's able address to us, that we had not the advantage which he said the Lord Ordinary had, of seeing the demeanour of the witnesses; but, my Lords, there is something in this case which, with regard to the more important witnesses, certainly diminishes the regret I might otherwise feel at not having been able to observe their personal demeanour when they were examined before the Court. We know that as regards two of the principal—I may say the two principal—witnesses in the case, Mr and Mrs Gardner, not only is Mr Gardner,

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the pursuer, but both he and Mrs Gardner are, in the circumstances which have occurred in the case before it was brought into Court at all, affected with the deepest possible interest in the result. The most grave interests are at stake as regards them, depending upon the result of the case which they seek to establish, because, not only is it a question concerning the conduct of Mr Gardner before marriage towards the lady who was his affianced spouse, but it concerns also the representations which they have made from time to time, and the conduct which they have exhibited towards this girl, who is the offspring undoubtedly of one of them, the lady. On the other hand, a man has been called named Laidlaw, of whom I think, without having had the opportunity of seeing him, enough appears upon the face of his testimony to make me say that I put him wholly out of the case as a witness of credit with regard to anything to which he may be brought to depose. There are, however, some witnesses whose evidence is undoubtedly of importance, who are not subject, as it appears to me, to any possible impeachment as to veracity; and the only possible impeachment as to the exactness and correctness of statement with regard to one of them, Mrs Hutchinson, rests upon the question whether or not her memory can carry her back with sufficient accuracy to a period of considerable remoteness, namely, 1850, when these transactions to which she deposes took place. But with regard to her, and with regard to the clergyman, Mr Kay, certainly nothing appears upon the face of the evidence for us to consider in respect of veracity. I can hardly conceive what imputation can be made upon Mr Kay's veracity, unless it be an observation thrown in by the Lord Ordinary in the course of his note in deciding upon the case, that he has shewn some warmth as a partisan in the cause of the defender. But he has no interest in that cause, either pecuniarily or otherwise. There was some slight suggestion of a possible motive that might have actuated him if there had been an attachment or an engagement between him and the defender; but that I put aside. I think there is nothing which can be imputed to him which ought to shake our confidence in his veracity.

Then, how does the case really stand when you have thus considered the condition of the witnesses? As regards the law of the case a great deal has been said during the course of the discussion upon presumptions of law and maxims of law. With regard to presumptions as being applicable to this case I think that the presumptions being, as is allowed by the Judges, and as is allowed by the counsel at the bar, certainly not *de jure*, whatever may be said as to their being presumptions *juris*, it really comes only to this, that we are to look upon these so-called presumptions simply as deductions which sensible men make from the facts which are laid before them as evidence, open, therefore, to rebuttal by the same class of evidence—that is to say, oral testimony—as that by which the propositions they are supposed to point to are demonstrated and proved; in other words, by a contest of evidence such as I consider there is in this case, and I approach the case with that view.

That being so, my Lords, let us look at what the natural probabilities of the case are with regard to the facts disclosed. The facts disclosed, independently of the oral communications made from one person to another, are these :—You have a gentleman who has for many years been paying courtship to a lady, now his wife, Mrs Gardner. You have the fact that shortly before the period which seems to have been arranged between them for a marriage she is found to be pregnant, at a time when, of course, it was impossible that it could have occurred in an honourable or reputable manner. She is, notwithstanding that, married,

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having gone before the marriage to consult a medical man, and it being declared by the medical man that she is undoubtedly near her confinement, and after the marriage she is taken first to an out-of-the-way place at the seaside and then to a hotel in Edinburgh, where, with a good deal of privacy, which the landlord describes by the expression that the matter was shrouded in mystery, she is confined. We find that the persons engaged with regard to that confinement, the medical man who was consulted before the marriage, and the person who attended her during the confinement, were all retained, if I may use the expression, and paid, by Mr Gardner, who had married the lady a few weeks before the confinement. We then find a fact upon which too much stress ought not to be laid, but a fact of some little consequence in the matter, namely, that the child, when brought into the world, very scanty clothing having been provided for it, is wrapped up in a plaid, which undoubtedly is known to have had the name of Mr Gardner upon it; there was "R. Gardner" in the corner of the plaid. Being wrapped up in that plaid the child is carried off by Mrs Hutchinson, and is never again seen during childhood by either Mr Gardner or the undoubtedly mother, Mrs Gardner. The child, however, was maintained to the age of sixteen, and by whom? By Mr Gardner, who did not cease to maintain the child until the time had come when she was able to maintain herself. He does not seem to have thought it necessary to proceed after that with her maintenance, but up to that time the child was maintained by him. The child had not obtained, so far as we can see in these proceedings, any repute, either by name or otherwise, as being the child of Mr Gardner. This part of the case is left in some uncertainty still. The child was baptised by the clergyman who has given his evidence in the matter when she was about sixteen years of age, soon after the time when she went to work at a mill in Loanhead, when she became a member of his congregation. She was baptised simply as Mary, but from that time she seems to have commenced writing a series of letters to Mr Gardner, in which she called him first "dear Mr Gardner," and afterwards "dear father," and signed herself as "Mary Gardner," to which he responded, addressing his letters to her as "Mary Gardner."

Now, my Lords, putting all these circumstances together, there would have been very little doubt indeed as to the paternity of the child, if matters had rested there. But then we are met with a very extraordinary story, which is disclosed by the testimony independently of these external and admitted facts.

We are told that before the marriage Mrs Gardner confessed to her intended husband that she was pregnant, and she stated to him (that appears to be the result of the whole of the evidence) that the pregnancy occurred in this way: That she met, as she expressed it, a blackguard, on a certain hill, near the place where she resided, Cademuir Hill, and that this blackguard forced her, and that the consequence of that was the state in which she found herself. He says that she was in such a state of agitation and distress at being obliged to make this communication, and that she was, as he believed, so attached to himself, as he explains it, that he was afraid that if the marriage were then broken off she would destroy herself; and he accordingly made up his mind to the most singular and unexampled piece of heroism to cover her discredit, by marrying her at once, and then endeavoured, in order not to be fixed any more than could possibly be helped with the burden of a child who was not his own, to keep the story secret, and to shroud it from the rest of the world until the time came when by living

as man and wife, and not having this child brought before their notice, and the time being come, as he afterwards expresses it, when she could maintain herself, this disgrace of the wife would, as he thought, be obliterated during all the rest of their lives.

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That in itself is an extremely singular story, and what marks the singularity of it more than anything else, I think, is, that he says that when he went to the medical man at Edinburgh and heard what he had to say upon the state of the lady, the appellant gave him to understand that he was not the father, and after he had given him to understand that the medical man recommended him, by way of protecting her, if that were his wish, to hasten the marriage, to lose no time in getting the marriage performed, because she was very near her confinement. I confess that that is a view of the case which I have never been able to follow as consistent with the ordinary rules of probability; but it seems to have received the sanction of some of the learned Judges in the Court below, though not of all, and certainly not of the Lord Justice-Clerk, who appears to have taken the same view as I have taken of that part of the case, namely, that it requires a very considerable stretch of charitable allowance to suppose that this was a really true and correct narrative, namely, that being told that the lady is to have a child which is not his own, the medical man whom he consults tells him the best course he can take is to marry the woman as soon as possible.

Now, what the appellant says he did thereupon is also singular. This is what he states,—“She went in to him” (the doctor), “and I also went in a day or two afterwards to call upon him. (Q.) Did Dr Thatcher say to you that if you were the man you ought to marry her at once? (A.) He advised the marriage to go on”—(observe, this is not cross-examination; it is examination in chief by the pursuer’s own counsel)—“at least I think he did. (Q.) Did he say that the girl was in the family way, and that if you were the man you should marry her at once? Don’t take these words from me, but was anything of that kind said? (A.) He did not say if you are the man, but he recommended that the marriage should go on. (Q.) He recommended that somebody should marry her? (A.) He said that she was in that way certainly, but I led him to understand that I was not the father. I don’t think that at the time when I went to see Dr Thatcher the time of our marriage had been fixed.” Now, one could understand it as it was first put to him in the question by counsel, that Dr Thatcher might have said “if you are the man,” meaning by that, the father of the child, “you had better marry her at once.” But I confess I cannot so easily comprehend the story when he distinctly takes care to say Dr Thatcher did not say “if you are the man,” but he says—“I led him to understand that I was not the father” of the child.

The matter resting there, you are told by Mr Gardner, the pursuer, that he heard, in the first instance, from his wife only, the circumstance of her having been so dealt with and treated by a blackguard on the hill, and that he did not ask any more questions. He does not say whether that was because he thought it hopeless to look after this blackguard or not, nor does he tell us what he said, though he does not seem to have inquired whom she communicated with and told about this which had happened to her. Now, my Lords, I have looked into the evidence to see who were living in the house with her at the farm where she resided, and I find that there was her brother. I find that with her brother there was her sister, and there were two maid-servants, as well as this man Laidlaw, whom she fixes upon now, not a stranger or a blackguard on the hill

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Then he says that in the following year Mrs Gardner became very seriously ill, and being alarmed at the condition she was in she named to him the man, and fixed upon Laidlaw as being the man. I need not enter into the details of that part of the case. It is very observable, as my noble and learned friend the Lord Chancellor has remarked, that in the condescendence she not only admits that she had this intercourse with this man, but she states it to have occurred twice or more. Yet, although she must have given that information, for her husband would never have thought of inserting it gratuitously into the condescendence, thereby throwing an additional stain upon her character, nevertheless, when she comes to be examined, she says that some attempt was made in a barn, but it was unsuccessful, and therefore there was only once intercourse with this man. This story having been told to Mr Gardner we do not find then that anything is done upon it. Laidlaw is never communicated with at any time, either by Mr or Mrs Gardner; but matters go on as I have described before,—matters beyond the reach of any cavil at the testimony go on after this second communication made to Mr Gardner. He continues as before to maintain this child, and maintains her up to the time when she is sixteen years of age.

Now, when you come to the other and the later part of the story, from the time when some question was raised by this girl about her paternity, you then come to Mr Kay taking the case up, and when Mr Kay takes up the case you find that he gives a distinct and plain narrative, a very precise and circumstantial narrative, of what took place in the several visits and conversations which he had with Mr Gardner upon the subject. I have read the evidence over more than once, and it does seem to me, my Lords, to be given very naturally—in natural sequence, and in a manner consistent with probability—very contrary, in that respect, to the extraordinary statements which have been made on the part of the pursuer with reference to all that had previously occurred. He mentions that at the first meeting Gardner came to him, saw him at Loanhead, where Mr Kay was living, and said that he “came to affirm nothing, and to deny nothing.” That was an extremely likely position and a prudent position probably for Mr Gardner to take. Then he says,—“As sure’s death, I’m no her father.’ I caught him and said,—‘Then your wife’s the mother, at least,’ and he hesitated, and said ‘Y-y-yes.’ That was the substance of the conversation. (Q.) Was anything said on that occasion about the meeting with Mrs Gardner and somebody else on the hill? (A.) Yes. He said that Mrs Gardner had been met by a man upon the moor”—(having said that he was not the father, and having admitted that Mrs Gardner was the mother he felt it necessary that there should be some explanation of that state of facts)—“and that he was a poor working man, and that he had forced her, and that having forced her she was in this condition. I put the question to him”—(which Mr Kay would be sure to do)—“‘Where is that man?’ He said he did not know. I asked ‘Is he in the neighbourhood of your place, or in the neighbourhood just now?’ He said—‘No, not just now.’ ‘Could he be found?’ I asked—‘No,’

he said. 'Where was he?' I asked. He said he thought he was not in this country at all, and that owing to his conduct with Mrs Gardner he had become a dissipated man."

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Why should I suppose that Mr Kay has been inventing all that conversation? It is in itself extremely probable that the conversation should take that turn—it is what one would expect, that if anything at all was said about the man, Mr Kay would be persevering in his inquiries as to what had become of that man. I am asked to disbelieve Mr Kay, who has no possible interest in the matter beyond the interest he has taken in it as having taken up the case, as it is called, of the girl as a friend; I am asked to disbelieve him in a matter which cannot be a matter of memory, for this took place only a few years ago. It is not a question of memory, and he distinctly and positively states that he put to Mr Gardner a series of questions of the most explicit kind, and he gives the answers which were rendered to those questions, and if those questions were asked and those answers were rendered the statement which Mr Gardner made to Mr Kay was a deliberate falsehood, for he knew (according to his story) that Laidlaw was the man, and he knew where Laidlaw lived; he knew that he had not fled the country, or anything of the kind, but was easily to be met with if necessary.

My Lords, you have, on the one hand, two certainly contradictory stories told by Mrs Gardner,—first, that which she narrated to her husband, and afterwards that which is narrated in the condescendence,—the first being that she was forced by a blackguard, of whom she knew nothing, upon the hill, and the second being that she had had intercourse with Laidlaw, and that indeed she had made an appointment with Laidlaw to meet him upon the hill. That is as regards Mrs Gardner. Then you have, as regards Mr Gardner, these deliberate falsehoods told to Mr Kay with a view evidently of screening himself, and defeating further investigation by an attempt to throw Mr Kay off the scent, and to induce him not to see Laidlaw, if he had been able to find out at that distance of time who the person was. He tried to put him off the scent by what can be called nothing else than a set of deliberate falsehoods.

I do not think it necessary to go further into the case, because you have both Mr and Mrs Gardner contradicted in their testimony.

Balancing the testimony on the one hand and on the other, I cannot think that we could possibly arrive at such a conclusion as would lead us to say that Mr Gardner has proved that he is not the father of the child.

My Lords, the only remaining point is this: If Mr Gardner had been up to the very end of the courtship in Australia as he was before of course the case would have been an extremely different one from that which is now presented to us, but we must remember that during all those months before the marriage, which are important in this inquiry, the courtship was going on, and during all that time Gardner had continual opportunities of visiting this lady in her own house; he says that sometimes he saw her in the kitchen, but more frequently in "the room" in the house. Once he paid a visit there; he says that was in 1847—some time before these events occurred. He also says that he did not often walk out with her; but I think he was walking out with her when the conversation took place in which she first communicated to him the fact of her being pregnant. He says it was not often the case that he was there,—at the same time he was there during the course of this continued courtship with this lady. Now, we know that this lady,—we have been told it by herself,—was a person of very loose character. She was a person who, while receiving the

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addresses of an honourable lover, could admit the addresses of a person in a very inferior station in life, and therefore it may well be thought that she was not a person of the most delicate feeling. We have the fact that she had most abundant opportunities of acting with Mr Gardner in a way which might result in the production of this child. It is not made out to my satisfaction at all that even supposing there was this connection with Laidlaw it was that connection with Laidlaw which caused the birth of Mary. You have the fact that Laidlaw was never asked to maintain her, and that Mr Gardner always did maintain her up to the time she was sixteen years of age. You find her writing to Mr Gardner—always with contradiction, it is true, but not with the indignant reproof which would have been the case if Mr Gardner's story were true—and calling herself "Mary Gardner" and calling him "dear father." You find decided declarations of his enough, but nothing of that character which one would expect to find when so outrageous an attempt, if the attempt really were outrageous, was made.

My Lords, looking at all the conduct of the persons in the case it is quite impossible for me to come to the conclusion that the pursuer's statements have been proved, and that this action can be maintained by the pursuer on the ground of his having established the facts. The *onus* of proof was upon him, and that *onus* he certainly has not discharged.

LORD BLACKBURN.—My Lords, I am of the same opinion. I think in the present case the question is not so much one of law as one of evidence, and the conclusions to be drawn from the evidence as to one point, which I will state directly. The question is, whether or no Mr Gardner, who is the pursuer, has sufficiently established that Mary Gardner, undoubtedly and admittedly the daughter of his wife, undoubtedly and admittedly born after wedlock, is not his child. That is the issue which he has taken upon himself to establish. The Lord Ordinary thought that he had established it. The Judges of the Second Division unanimously thought that he had not established it, and the question now upon appeal is, whether it has been established or not.

Now, my Lords, I take it that we cannot express what I think is really the leading point here in better words than those which were used by Lord Gifford, namely :—"Wherever an avowed and open courtship has taken place, and there have been opportunities of access, and thereafter the man marries the woman in an advanced state of pregnancy, knowing that she is so, and hurrying on the marriage, as happened here, for that very reason, I do not say that the presumption of paternity is absolutely conclusive, but I do say it is almost as strong as such a presumption can be." Such are the words of Lord Gifford, and that, I apprehend, is correct. That is my opinion, and I think it is what any man, who knows what would be the ordinary way in which human beings might be expected to act, would say. The inference to be drawn is that a man must, when he married under such circumstances, have believed that he was the parent of the child, and consequently, for otherwise there could be no mistake about that matter, must have known that he had had connection with the mother at such a time that she who was to his knowledge with child when he married her might have been with child by him. I think, my Lords, the conclusion from that is excessively strong—almost irresistible.

In the present case all these circumstances are admitted to exist. Mr Gardner and the lady, Miss Brodie, afterwards his wife, were in the habit of seeing each

other during a long courtship, and it is idle to suppose that a woman working on a farm in Scotland, and a man, a farmer in the neighbourhood, had not under those circumstances ample opportunity of having intercourse together. Then she, thinking she is with child, consults him ; that is admitted. He causes her to go and see Dr Thatcher, and upon Dr Thatcher's advice, that she is with child and that they had better hurry on the marriage, they do hurry it on and are married. About seven or eight weeks after the marriage, when she is about to be delivered, they go together to Edinburgh, where they were not known ; they go to a temperance hotel where they sleep together ; they live as man and wife in one room, and there she is delivered of a child, Dr Thatcher knowing that they were married, but, I should think, from the circumstances, the people in the hotel not knowing whether they were married or not, but probably from what happened, especially from the child being removed, believing that they were not married. There she was delivered of a child, which child was, through the instrumentality of Dr Thatcher, carried away and disowned, and the birth kept a secret, as far as they could keep it a secret, from their own neighbourhood. Than that there could not be a stronger *prima facie* case within the meaning of what I have quoted from Lord Gifford, that Mr Gardner really was the father of the child thus born and sent away, that he and his wife did wish to conceal the fact that that child had been born, and that they, or she at least upon her own confession, for she admits that she was the mother, acted the unnatural part which they did. As to the wife that is clear, and if Mr Gardner was the father he also acted a very unnatural part in concealing his paternity.

My Lords, if the case stood there I think nobody could have doubted that the *prima facie* presumption that the appellant was the father was fully established. I do not think that that presumption is met merely by proving that some one else had intercourse with the woman, so that that some one else might be the father of the child. That is a very important step, but I am far from thinking that that is sufficient by itself. I think, in order to rebut such a case as this, it is necessary to establish, to the satisfaction of the tribunal which has to try the question, that the husband, the man who has made this very strong case against himself towards admitting that he was the father of the child, had not had intercourse with the mother at such a time that he could be the parent of the child. I do not think that the presumption of parentage is nearly so strong in such a case as it would be or ought to be if the time when the child was begotten was after the parties were married and were husband and wife. But when it is proved (supposing that to be the case) that the man who afterwards became the husband had connection with the woman who afterwards became his wife, so that he might be the parent of her child, I do not think you can in that case, any more than in the case of a child both begotten and born during matrimony, enter into an inquiry, which would be a very indelicate one, and one in which it would be almost impossible to prove the fact as to which of the two was the actual father of the child. Nevertheless, if you shew that another man had connection with the woman at that time, you take a considerable step ; you remove one of the things which would have been a great difficulty in your way in shewing that the man who afterwards became the husband was not the father. As to the husband's not having had connection before marriage, what would be sufficient proof of that must, I apprehend, not depend upon any technical precise rule, but must depend upon whether it is made out upon the facts existing in the particular case.

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Now, here we have the distinct oaths of both the husband and the wife on a matter on which certainly, I think, they cannot be mistaken. They both positively swear that before they were married there never was intercourse between them at all. It is a very painful thing, my Lords, where there are distinct and positive oaths of that sort, for any Judge or tribunal to say,—I cannot believe those direct oaths; nevertheless, it must sometimes be done. There are frequently things sworn to which are so improbable that one does not believe them. It is one of the commonest things in the world in a criminal case to have the most positive oral evidence given on oath to establish a matter which neither the jury nor the Judge can believe although it is sworn to. In this case I cannot act upon this evidence. I do not know that it is necessary to say that I disbelieve the appellant and Mrs Gardner to such an extent that I should find them guilty of perjury, if I were upon a jury trying them on such a charge; but I disbelieve them to this extent,—I cannot believe their testimony so as to act upon it in this case, and I will proceed to state why:—

There is an extremely strong presumption, through the whole history of the case, that Mr Gardner, when he married a woman whom he knew to be with child, believed that he was the father of the child; that he knew that circumstances had occurred which might have made him the father of the child, and therefore believed it. That strong presumption, arising from his conduct, has to be explained away. The story which Mr and Mrs Gardner tell to explain it away is this,—that she whom he had been courting, and whom, according to his account of the matter, he had never ventured to take the least liberty with, came to him and told him she feared she was with child, and that some months before she had been assaulted by a blackguard upon the hill; that she had never mentioned it to anybody (that is what the statement amounts to in effect) up to this time, when she came to him and told him this story. It is a most startling thing for one's notions of human conduct that a betrothed bride should go and say this to her betrothed husband—that she should state this to him who was about to be her bridegroom, of all persons. She had female relatives and others to whom she could have told it. But if she did state it it is a startling story, which must have made an impression upon his mind. One would think he never could have forgotten what passed at that interview. He says upon hearing it he had the very romantic generosity that, in order to save her character entirely, he married her, believing her to be with child by this ruffian who had ravished her.

My Lords, I cannot say that I think that that is a story which one would believe without very strong evidence, and those who tell that story ought to tell it in such a manner as to produce a strong impression of their veracity. Is that so here? The appellant swears that, and Mrs Gardner swears that. Mrs Gardner said it in the first instance, as appears clearly by her own statements. Now, if she told him that story as she said she told it to him, she told him a direct and downright falsehood. There had been no rape or anything like a rape. It was not an unknown man who had assaulted her upon the hill, but her own brother's shepherd, whom she had appointed to meet her there. She was evidently a loose woman, and very likely therefore to have yielded to Mr Gardner if he had wished it. That is no imputation upon him, but it is upon her. It appears, then, that she told a falsehood when she told this story in the first instance to Mr Gardner, upon which, according to their account, he acted, and I think myself that that shakes her credit to such an extent that I can hardly act upon her

evidence. I know how constantly it occurs when there is any question as to what women may have done in matters connected with their fame that they do tell falsehoods. There is no one who has ever tried a case of seduction, there is no one who has ever tried a case of criminal prosecution for rape, who can fail to be aware how in such cases there is a prodigious temptation to a woman to stretch the truth. Upon that ground alone I must say that I think I could not act upon Mrs Gardner's evidence.

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Mr Gardner's is a different story. Mrs Gardner admittedly has done the unnatural part of throwing off her own child in the way it was done; he, on the other hand, according to the story, has been rather generously sheltering her, and supporting until up to fifteen or sixteen years of age a child which was not his, and which he had at first reason to believe was produced by a man who had ravished the woman to whom he was engaged. But when he comes to tell his story even now the question is whether he gives it in such a way as to be believed. I think, as I said before, that if a man had received such a communication from his betrothed bride as is stated he never could to his dying day, or at least until he had got into his dotage, have failed to remember minutely every particular which had taken place. He comes now into Court to swear that she did tell him this, and he is cross-examined upon it, and I will ask your Lordships to observe how he meets the questions that are put to him. He says—"My age at that time was about forty-five or forty-six years. She did not at that time tell me who the father was. I asked her. (Q.) What answer did she make? (A.) That she had been waylaid by a blackguard on the hill and abused. I cannot tell whether she gave any description of the blackguard who had waylaid her. (Q.) You must try to recollect. Do your best to recollect the description Mrs Gardner gave you of the man who waylaid her. (A.) She said she had been waylaid by a blackguard on the hill and abused. I cannot say whether she described the man's personal appearance, or dress, in any way. (Q.) Did she tell you that he was a man muffled up in a plaid? (A.) I cannot answer that question? (Q.) Did she tell you that he was a poor labouring man. (A.) She called him a blackguard. (Question repeated)—(A.) She did not tell me, so far as I remember." Now, is it credible that a man should have that state of memory (there is no suggestion that he has got into his dotage) as to such a communication, if it was true. I must own I think he could not.

Then the cross-examination goes on in such a way as to shew what it is meant to be founded on, namely, an account which Mr Kay asserts that he had heard from Mary Gardner as being an account which she says her mother, Mrs Gardner, had given her in an interview she had with her. The Judges in the Court below, I observe, think it so improbable that Mrs Gardner should say anything of the sort to Mary at that time, or under those circumstances, that they disbelieve her having said anything of the kind. I must own, for my part, I think that what Mrs Gardner said when she saw Mary might have been, and probably was, utterly untrue,—might, in fact, have been a romance brought out at the moment. I do not see anything so very improbable in her telling her daughter Mary almost any story which came into her head at the time, and taking a pledge of secrecy from her about it, which is what Mary says she did. However, putting that aside, Mr Kay was told by Mary that Mrs Gardner had told her in confidence that the man who had assaulted her upon the hill was Mr Gardner himself. Mr Kay, having this in his mind, pressed Mr Gardner upon the story of his having assaulted her, and so on. It is upon that that he is pressed in cross-examination, and he describes the

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state of his memory as to this conversation which he had had with Mr Kay within a year or two, much more recent in date than the other. I do not think that the circumstances would impress it so strongly upon a man's mind as the other. I can more believe that he did not recollect what he had said to Mr Kay two or three years ago than that he did not recollect what his wife had told him before their marriage twenty-four years previously. After being pressed about it he is asked—"Do you recollect a meeting at which Mr Kay turned round to you and said that you and your wife gave different descriptions of the man—that the one said he was a gentleman and well dressed, and that the other said he was a poor labouring man? (A.) I never said that, and I could not say that he was a gentleman. I could not say whether he was a gentleman or not. What she said to me was that she had been met by a blackguard, and I concluded from that that he was some common individual. (Q.) The question I wish you to answer is this, whether on any occasion in Mr Kay's house he checked you and your wife for having given contradictory descriptions or different descriptions of the same person? (A.) I don't remember the conversation with Mr Kay. (Q.) Did any such thing occur, or do you not remember any conversation in which such a thing occurred. (A.) Yes; that is what I mean to say. (Q.) Did you tell Mr Kay that the man who was the father of this girl was out of the country a long way from here. (A.) Well, I can't remember. I don't remember what I may have said regarding the individual. (Q.) Then your mind is a perfect blank as to what you may have said to Mr Kay on that subject? (A.) I can't remember it. (Q.) Did you not admit to Mr Kay, in his house at Loanhead on the 24th March 1874, that you had tried to force your wife. Did you not say that you had once, at least, tried to force Mrs Gardner before your marriage? (A.) I did not say so, nor did I say anything to that effect; and I did not do it; nothing of the kind ever took place. (Q.) Did you ever hear that the man who had met Mrs Gardner on the hill had been muffled up with a plaid? (A.) I cannot say. (Q.) Did she tell you whether she had seen his face or not? (A.) I am sure I cannot say." Now, Mr Kay swears positively that having pressed Mr Gardner at that interview about the story which, according to Mary Gardner, Mrs Gardner had told her, Mr Gardner then admitted that on one occasion he had attacked his wife and attempted to have connection with her by force before marriage. Mr Gardner, it is true, denies that, and denies it in the way which I have read, but I really do not see why Mr Kay should be disbelieved upon that point. The story is a very curious and strange one altogether, but taking the way in which Mr Gardner answers the questions that are asked him (I cannot express it otherwise than as shuffling), and the extreme improbability of the story he tells, I cannot believe that the communication was made to him, and that he believed it in the way that he has said. I cannot believe that before he was married he was told and believed that his wife would be a pure person had she not been ravished by a man whom she met accidentally on the hill.

The question at once suggests itself, why should Mr Robert Gardner, the pursuer, enter into this conspiracy to send this child, whom he believed to be his own daughter, out of the way at the hotel, acting an unnatural part in so doing, and, having entered into it, now carry it on by swearing that which I must, in my view, consider false. I can only say that it is very strange. The motive does not seem to me sufficient; but there was a motive. He is, or was at the time, an

elder in the church. That is a position in which the character of a man would suffer very much—as the character of a woman would suffer in England—by the supposition that he ever had illicit intercourse with a person of the other sex. That would afford a motive. I should not have thought that it would afford a sufficient motive, I confess, but I find that it is stated by Mr Kay and agreed in by Mr Gardner that he, in order to keep the secret, offered to give £1000,—no small sum—and that that £1000 was refused unless he accompanied it by an acknowledgment that Mary was legitimate. The offer was refused, and that circumstance was thought by both sides to be of importance. I certainly should not have expected that. That is one of the things they are all agreed upon, and therefore I believe that that must have been the case. I cannot see any reason why he should have offered this large sum and scrupled so much upon the legitimacy unless he thought the imputation upon his character would be extremely severe. It was not for the purpose of protecting his wife's character: that was gone. The very commencing of this process, the bringing out the whole story, shews at once that he could not have any scruples now about protecting his wife's character. The real ground must have been that he wished to protect his own character.

Besides the story he tells, and the story which Mr Kay tells, all agreeing in that, I find an immense confirmation of it in the letter which Mary Gardner writes on the 1st of July 1874. This offer of £1000 was made in March 1874, but it seems to have stood over. It is admitted that the question of legitimacy was the thing that was in the way; and on the 1st July 1874 the girl writes to him a letter which is full of ill spellings; there is scarcely a word in it that is not very ill spelt, shewing to my mind clearly that it was her own composition, and that she had no assistance when she wrote it. Here is what she writes:—
 “My dear father,—I received your note this morning. You say that you cannot submit longer to my doing so-and-so. I do not quite understand you, but if it was for me saying in my note that you did wrong in going to such a man as Laidlaw, I say again that you did more ill to yourself than to me. You say the time will come when I will be obliged to acknowledge Laidlaw as my father, but I say that that time will never come. You nor no man will ever forst me to say the thing I know to will to be falst. John Laidlaw is no more my father than he is yours. Do not think that money will tempt me; no, it is not your money I want; it is the truth, and it will come out, and that ere long. God cannot and will not let such a sin run on longer. However, be things as they may, I hold you as my father; you know you are that by all the laws in Braton.”
 That is the strongest confirmation of the story that is told by both Mr Kay and the girl, and Robert Gardner, that he had offered her £1000, and that it was refused upon the ground that he would not accompany it by an acknowledgment of her legitimacy. It is not what I should have anticipated as being likely, but it seems to have been the fact. Now, what, I ask, could have been his object in offering the £1000 unless it was that he thought the imputation upon his character, separated from his wife's, was a very serious one? And if he did think that, there is a motive for all the course of conduct which he pursued.

My Lords, I do not think it necessary to go further into the case. What I proceed upon is this: I think here there was a strong *prima facie* presumption of facts made out that this child was the child of the appellant, and I do not think that that is rebutted, for the reasons I have given. I do not think it is a case for the application of any technical rules as to what evidence is admissible.

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I do not think it is necessary to go so far as to hold that Mr and Mrs Gardner must have said that for which one could convict them of perjury, but I do go so far as to say that I cannot act upon their testimony.

LORD GORDON.—My Lords, there is no dispute as to the law applicable to this case, I think, in the Court below, or among any of your Lordships. Lord Gifford, whose judgment has been referred to, says that “the presumption arising from conception, or possible conception, during marriage, is a mere presumption, which may be rebutted and overcome by clear and satisfactory contrary evidence. The law of Scotland has never made or treated this strong presumption as a *presumptio juris et de jure*. It must yield to evidence, and I think the law of Scotland has always been that the presumption may be overcome, not only by evidence that it was physically impossible that the husband of the mother could be the father of the child, but by every species of moral evidence sufficient to satisfy a reasonable mind that the child was begotten by some else than the husband.”

The question, therefore, comes very much in the shape of an issue, to try whether Mary Gardner was the daughter of the appellant, and, while one may almost regret that the question has not been submitted to a jury, who might have seen the witnesses who gave their evidence, it is right that your Lordships should understand that the reason which, I presume, influenced the Court, was, that according to the old law, these matters were treated before the Judges, acting as a Consistorial Court, and that there was a mere right of appeal to the Court of Session. I have not looked into the Act of 1868 since the present question arose, but it does occur to me that under the Act of 1868 it might have been possible to have brought this question before a jury. At the same time, the Court would be influenced to a great extent by the consideration that it is not desirable that questions of this character should come before a jury, and thereby become the subject of publication and general discussion; therefore they have reserved such questions rather more for the consideration of the Court, as it has been done in this case.

Now, the question is this, whether there has been proof that satisfies the Court which has to dispose of the case that Mary Gardner is not the daughter of the appellant. Upon that point there is no doubt that there is a strong presumption in favour of the paternity, where the child is born after marriage between the parties. In this case there is no doubt whatever that Mary Gardner is the daughter of Mrs Gardner. That is admitted. The way in which it is attempted to be made out that she is not the daughter of Mr Gardner is that an account is given of an occurrence that took place at Cademuir Hill in 1849 or 1850, and it is said that Mrs Gardner was made the subject of a violent rape or attack upon her, and that this child was the result of that. My noble and learned friend the Lord Chancellor has stated, I think with very great clearness, that in such a case as this it is absolutely necessary that the statement which is placed before the Court, and attempted to be supported by evidence, should be of a very clear, distinct, and consistent character. Now, tested by that consideration, I cannot say that the statements which were made in the first instance by Mrs Gardner to Mr Gardner, or even those placed on the record, are of that character. I think that it is not possible to read Mrs Gardner's evidence, or Mr Gardner's evidence, so as to shew that there was a satisfactory account given to him of the occurrence to which I have referred. Then we come to this, that the case is attempted to be made out by statements and by evidence which

are not consistent, and which are contradictory to one another, and that really it is not a reasonable statement or attempt to prove the case of the pursuer, and upon that ground I venture to think that your Lordships are quite right in coming to the conclusion which you have arrived at.

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May 17, 1877.
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Gardner.

I am sensible that very great care has been bestowed not only by the Court below, but by your Lordships, in the consideration of this very extraordinary case,—because it is extraordinary in this respect, that the husband and the wife concur in statements which tend to repudiate responsibility for this child. I venture to differ from my noble and learned friend who spoke last (Lord Blackburn) with reference to the perhaps rather strong terms in which he appeared to express himself as regards the import and effect of the evidence of these witnesses. As to Mr Gardner, I have an impression that he did conscientiously believe that Mrs Gardner had, upon the whole, made a disclosure to him of the position in which she was placed, although, looking back upon it afterwards, it does appear incredible to us. But I would rather place the case upon this, as the Court below have done, that this is a case in which the pursuer has failed to prove that he is not the father of Mary Gardner. The Judges below express hesitation. Lord Gifford, in particular, whose judgment has been quoted with such approval, both with reference to the statements in point of law, and also with reference to the evidence in the case, says that he looks upon it as a case of very great difficulty, and that he has arrived at the result after very great hesitation. His Lordship says,—“It is only with great hesitation, and after very anxious consideration, that I have come to concur in the opinion now expressed by all your Lordships.” But I think that, having regard to the very serious consideration it has received in the Court below, and before your Lordships, especially after the able pleadings which we have heard from both sides, your Lordships can have no hesitation whatever in approving of the judgment which has been proposed by my noble and learned friend the Lord Chancellor.

INTERLOCUTOR complained of affirmed, and appeal dismissed, with costs.

GRAHAMES & WARDLAW, Westminster—GILLESPIE & PATERSON, W.S.—ASHURST, MORRIS, CRISP, & Co., London—LINDRAY, PATERSON, & Co., W.S.

DAVID FORRESTER (Defender), Appellant.—*Harrison, Q.C.—Bowring.*
WARIN AND CRAVEN (Pursuers), Respondents.—*Benjamin, Q.C.—R. E. Webster.*

No. 8.

June 5, 1877.
Forrester v.
Warin and
Craven.

(SEE Court of Session report in the present volume, 190.)

In this case Warin and Craven, sugar merchants in London, sued David Forrester, Glasgow, for damages for breach of contract in failing to take delivery in November 1874 of a quantity of sugar sold to him by the pursuers.

The defender pleaded (1) that the pursuers having failed to implement their part of the contract, he was not liable in damages; and (2) that if he was liable, the measure of his liability was the difference between the contract price and the price of sugar at the date when he refused to take delivery, and that he was not liable for the additional damage occasioned by the pursuers having delayed to resell the sugar till January 1875, when the market had fallen.

The First Division decided the first point against the defender, and the second in his favour.

The defender appealed.

The House, after hearing counsel for the appellant, affirmed the judgment.

CLARKES, RAWLINS, & CLARKE—WEBSTER & WILL, S.S.C.—WRIGHT, BONNER, & WRIGHT
—J. & R. D. ROSS, W.S.

No 9. SIR JOHN RICHARDSON (Defender), Appellant.—*John Pearson, Q.C.—Badenach Nicolson.*

June 29, 1877.
Richardson
and Others
v. Baroness
Gray.

REVEREND ARCHIBALD FLEMING AND MRS FLEMING (Defenders),
Appellants.—*Southgate, Q.C.—Cotton, Q.C.*
BARONESS GRAY (Pursuer), Respondent.—*Lord-Adv. Watson—Kay, Q.C.*

Ld. Chancellor
(Cairns).
Lord Black-
burn.
Ld. O'Hagan.
Lord Gordon.

(IN the Court of Session July 14, 1876, *ante*, vol. iii. p. 1031.)

In this case appeals were taken to the House of Lords by Sir John Richardson and by Mrs Fleming.

The House affirmed the unanimous judgment of the First Division.

The law Peers did not find it necessary to decide between the alternative views of the Lord President and Lord Ardmillan on the one hand, and Lord Deas and Lord Mure on the other, upon the only point in which there was a difference of opinion in the Inner-House, and in other respects adopted the same grounds of judgment.

CONNELL, HOPE, & SPENS—MURRAY, REITH, & MURRAY, W.S.—ANDREW BEVERIDGE—
HAMILTON, KINNEAR, & BEATSON, W.S.—GRAHAMES & WARDLAW—
HOPE, MACKAY, & MANN, W.S.

No. 10. THE DUKE OF ROXBURGHE AND OTHERS, Appellants.—*Lord-Adv. Watson—Asher.*

June 29, 1877.
Duke of
Roxburghe
and Others
v. Millar.

Church—Allocation of Area—Excambion—Quoad Sacra Parish.—Where the original parish church, in a parish from which a part had been disjoined and erected into a parish *quoad sacra*, was excambied for a new church voluntarily erected by one of the heritors, *held* (rev. judgment of the Court of Session) that in the absence of stipulation in the contract of excambion the sittings fell to be allocated as in the old church.

Ld. Chancellor
(Cairns).
Ld. Hathorley.
Ld. O'Hagan.
Lord Black-
burn.
Lord Gordon.

(IN the Court of Session June 1, 1876, *ante*, vol. iii. p. 728.)

This was an appeal at the instance of the Duke of Roxburghe and others against a judgment pronounced on 1st June 1876 by the First Division, with three Judges of the Second Division, by which (*diss.* Lord Deas and Lord Mure) they affirmed a judgment of the Sheriff (Pattison) of Roxburghshire.

No party appeared to oppose the appeal.

LORD CHANCELLOR.—My Lords, the question in this appeal is as to the propriety of two interlocutors, dated the 30th of April 1875 and the 2d of June 1876. By the second of these interlocutors the First Division of the Court of Session affirmed the former interlocutor which had been made by the Sheriff, and by this former interlocutor the Sheriff had found that in the division and apportionment of the area and sittings of the new parish church of Jedburgh the heritors of certain lands disjoined from that parish and erected into the parish of Edgerston *quoad sacra* were not to be considered as heritors of the parish of Jedburgh.

Until about the year 1874 the parish church of Jedburgh was in the old abbey of Jedburgh. In this old church the area and sittings had been divided and apportioned, many years before 1855, between the heritors of the parish of Jedburgh and the provost and magistrates of Jedburgh. In 1855 part of the lands of the parish of Jedburgh were disjoined and erected *quoad sacra* into the parish of Edgerston, but no alteration or re-arrangement of the division and apportionment of the area and sittings being at that time made, or being competent, the church continued to be, as it had been before, the property of the

heritors according to the former division, a property which they, of course, held for the benefit of the parishioners. No. 10.

Up to a certain point there does not appear to be any difference of opinion between the learned Judges of the Court of Session. The Judges agreed that if a new church had become necessary, and had been built at the expense of whatever heritors were liable to build it, any heritor would have been entitled to apply to the Sheriff to have the area of the new church divided among whatever heritors had at the time by law the right to that area. On the other hand, the learned Judges appear to agree that if the nature of the work done was merely an extension of the old church, or repairs of the old church, there would not be this right to a division or apportionment *de novo*; and they further appear to agree that if one church were to be exchanged for another church then already built, a thing which must in practice be of rare occurrence, the area of the church taken in exchange would fall to be divided in the same way as the area of the church given in exchange had been divided and enjoyed. It is necessary to consider with some accuracy the facts of this case, with a view to determine the precise character of what was done as to the old Jedburgh church.

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In the year 1868 the church wanted repairs; various estimates were given as to these repairs, beginning with the sum of £900, which was said to be sufficient to repair the church without increasing the number of sittings, and rising to £4500, as sittings might be increased or other work done. In this state of things the late Marquis of Lothian, the owner of Jedburgh Abbey, and of the property on which it stood, and himself one of the heritors of the parish, entered into an agreement with the heritors, with the consent of the presbytery, to build a parish church for the parish, on a site to be acquired by him to the satisfaction of the heritors and of the presbytery, and to enter into a contract of excambion by which Lord Lothian should convey to the heritors the new church, to be held as the parish church of Jedburgh, and the heritors should convey to Lord Lothian the old parish church and the materials of it.

This agreement was carried into execution. The plans of the church were approved, the ground was procured, and the church was built, and a deed, termed a contract of excambion, was executed between the present Lord Lothian, as the successor of his father, and the committee of the heritors of the parish. It is quite clear that this committee was appointed by and represented all the heritors of the parish of Jedburgh, as well those whose lands were disjoined *quoad sacra* as those whose lands were not so disjoined. The deed is dated the 25th of November 1874; by it Lord Lothian conveys to himself, and the committee of heritors, as trustees for the heritors of the parish, the new church and the ground on which it was erected, and in consideration thereof the committee of the heritors, as representing all the heritors, convey to Lord Lothian the old parish church and the materials, with liberty to remove the materials; preserving, however, the abbey as a ruin, and giving access to the public, and undertaking not to apply it to any ecclesiastical purpose.

It appears to me that this transaction is neither more nor less than a substitution, to all intents and purposes, by Lord Lothian, with the consent of the heritors, of the new church in the place of and in exchange for the old, and that the transaction and its effect is correctly described in the resolution of the committee of heritors passed on the 22d of December following the date of the last deed, which was in these words—"The meeting, after hearing Mr Millar's report as to Sheriff Pattison's difficulties regarding the apportionment of sittings

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in the new church to the portion of Jedburgh parish attached to Edgerston *quoad sacra* church, are unanimously of opinion that the excambion would not be carried out as originally intended if that portion of the parish be not allowed sittings in the new parish church in the same manner as in the church in the abbey."

It is an unfortunate circumstance that in this appeal your Lordships have not had the assistance of the argument of any respondent. The judgment of the Sheriff does not appear to have been pronounced on the application of any heritors having an interest to exclude the appellants, and before the Court of Session no heritors appeared to support the judgment of the Sheriff. At the same time, a question of very great and general interest appears to have been raised in the Court below, namely, whether heritors who are the owners of lands disjoined *quoad sacra* continue liable to rebuild the parish church of their original parish? The Sheriff appears to have held that the heritors of disjoined lands would be no longer liable to rebuild the old parish church. The Lord President, Lord Neaves, Lord Ormisdale, and Lord Gifford treat this point as one which it is unnecessary to decide. Lord Deas considers that the heritors of disjoined lands would continue liable. Lord Deas and Lord Mure, however, considered that in this case there was no ground for a new division and apportionment, inasmuch as Lord Lothian had merely substituted a new church, to be held in all respects *in statu quo ante* of the old parish church. As Lord Deas says, the question, what would have been the respective liabilities and rights of parties if a new church had required to be erected at the expense of the heritors, did not and could not arise.

My Lords, I concur in the opinion of Lord Deas and Lord Mure. Whenever a case arises of a new parish church being built by assessment in a parish where a part of the lands have been disjoined *quoad sacra*, it will have to be decided among what heritors the area is to be divided, and the Court will, in that case, have the advantage of knowing, in the first place, that which cannot be immaterial, upon what heritors the assessment for the new church has fallen. That question, in my opinion, does not arise in the present case.

On the whole, I have to advise your Lordships that the interlocutors should be reversed so far as appealed against, and that this House should declare that after setting aside seats for the minister and elders and for the beadle and the poor, the division and apportionment of the seats in the parish church of Jedburgh recently erected ought, so far as the circumstances of the case will admit, to follow and be regulated by the division and apportionment thereof in the former parish church, for which the new parish church was substituted by way of exchange.

LORD HATHERLEY concurred.

LORD O'HAGAN.—My Lords, in this case we have not the guidance of any authority in the Scottish law. The very learned and elaborate argument of the Lord Advocate failed to furnish any. Neither have we any proved practice in the legal or ecclesiastical arrangements of Scotland which we might follow safely. The circumstances with which we have to deal are peculiar and abnormal, so far as your Lordships are informed, and do not seem to have antecedents in the past on which to found an authoritative usage. Nor, finally, is there anything in the documents which can be vouched to determine the novel point arising now

apparently for the first time. The parties to this exchange did not anticipate the difficulty, and failed to provide for it, as they might have done, by using express words, and we can only gather from their general relations to each other, and the facts out of which the excambion grew, the purposes which they entertained, and the rights they meant to establish. In this state of things the embarrassment of decision is increased by the conflicting judgments of the learned Judges of the Court of Session.

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Looking, however, to the reasoning on behalf of the appellants, which unfortunately is here, as it was in the Court below, *ex parte*, and ascertaining as well as I can the intentions of the parties from the terms of the instrument of the excambion, I have reached the conclusion that the views adopted by Lord Deas and Lord Mure are entitled to the approval of your Lordships.

The parishioners of Jedburgh accepted the offer of Lord Lothian, and agreed to abandon to him the ancient church, then needing repairs, which they were bound to make, and to receive in lieu of it another as commodious for the purpose of public worship, and subject to no necessity of burdening the parish with outlay of any kind. There is nothing in the transaction or the documents which explain it indicating that the new church was not to be to all intents and purposes a substitute for the old, or that any rights which had attached to the seat-holders in the latter should not equally belong to them when the substitution took place. Such rights the appellants unquestionably had. They were ancient rights, and were established, some of them personal and some of them held in trust. They agreed to the excambion, which they might have resisted, but there is no pretence of proof that they ever thought of compromising those rights, or consented to anything beyond the exercise of them in another building at another place. How can we impose a condition which was unknown when the bargain was made? If on the day when Lord Lothian got possession the appellants were entitled to sittings, how did they lose their title to equivalent accommodation in the substituted church? Or how did the accident of their interest in the *quoad sacra* parish work a forfeiture to their claim to privileges legally vested in them and never surrendered? There was no abandonment of those privileges by contract, and we have heard of no law which would destroy them *in invitum*.

This is substantially, I think, the view of the dissentient Judges of the Court of Session. It commends itself to me as most in accordance with such evidence as is before us, and with such light as we can gain from an *ex parte* discussion, as well as with the reason of the thing. I am glad to know that it has the assent of one of my noble and learned friends who has had the opportunity of forming a closer acquaintance with Scotch law and practice than can belong to the majority of your Lordships. His very satisfactory opinion I have had the opportunity of perusing, and it dispenses with further details of the reasons on which it is sustained.

I concur in thinking that it would be inconvenient and hazardous to express an opinion on points not essential to be determined in this case, in which we have only heard a one-sided argument, and I therefore advisedly abstain from offering any opinion as to the principles on which sittings should be allocated to individual heritors in Scottish churches, or as to the extent and nature of their interests in those sittings; or as to their continuing liabilities when their properties or parts of their properties may be brought within the bounds of a *quoad sacra* parish. These may be important public questions, and should be decided

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on contentious discussions and full consideration, which they would not receive from your Lordships in this case. I am of opinion, with great deference to the majority of the Court of Session, and such hesitation as must be suggested by their great authority and by the nature of the *ex parte* argument before your Lordships, that the judgment of the Court of Session should be reversed.

LORD BLACKBURN.—My Lords, it seems to me that it is not desirable to decide in this, an *ex parte* appeal, more than is absolutely necessary; and I take a view of the effect of the excambion which renders it unnecessary to express any opinion on the other points discussed in the Court below.

I take it that the rights and duties of the heritors of a parish in Scotland are not the same with reference to an old parish church repaired and with reference to a new parish church erected *de novo*. The 17 and 18 Vict. c. 91, sec. 33, enacts that parochial assessments are in future to be made on the real rent, “provided always that when the area of any parish church heretofore erected has been allocated among the heritors according to their respective valued rents as appearing upon the present valuation-rolls all assessments for the repair thereof shall be imposed according to such valued rent.” This enactment seems to me to imply that the old allocation shall continue so long as the church is merely repaired. If the church was destroyed by fire, or otherwise it became the duty of the heritors to provide a new one, the assessment would be according to the real rent, and a new allocation would seem to be just; whether it would be required by law or not I do not say. In the present case the old parish church of Jedburgh was not in such a state as to make it necessary to do more than repair it; and consequently, if the heritors had proceeded to do all that they were bound to do and no more, no new allocation would have been required, except in so far as any changes in the arrangement of the church would render it requisite to have a new arrangement as to the way in which the old possessory rights should in future be enjoyed.

I do not think it necessary to form an opinion on the question whether, on the severance of a part of the old parish *quoad sacra*, without any alteration in the fabric of the old parish church, it would have been competent to anyone to require a new allocation. If that could be done at all it would seem that it could not be done by such a proceeding as the present, under which it was only competent to regulate the possessory rights, not take away those existing. If, in the supposed case of the old parish church being repaired, those heritors whose lands lie exclusively in the *quoad sacra* parish of Edgerston had wished to raise the question whether they were liable to repairs of the old parish church, they must necessarily have given up their claim to the old allocation, but if they were either compelled by law, or without suit were willing, to pay their share of the assessment to the repairs, I see no reason why they should not do so and keep their old allocation.

The very special circumstances of this case seem to me to raise the question whether the new church erected by the Marquis of Lothian is to be considered as given by him in lieu of the old church such as the heritors were bound to make it, *i.e.*, thoroughly repaired, and subject to all parties continuing to possess rights equivalent to those which they had possessed under the old allocation, or whether the new church is to be considered as given in lieu of a new church, which the heritors were not bound to erect, but which, if they had erected it, would probably have been subject to a new allocation, in which latter case the

novel and important points discussed in the Court below and at the bar must be decided. No. 10.

Lord Deas in the Court below dissents partly on the effect of the excambion. Lord Mure bases his dissent from the judgment below exclusively on the effect of the excambion. June 29, 1877.
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The majority of the Court below have not bestowed so much attention on this point as I think it deserves. They seem to have thought that as there could be no doubt that what Lord Lothian built was a new church, it followed necessarily that everything was to be the same as in the case of a new church built by the heritors, and that the special circumstances made no difference—that, in short, in legal effect Lord Lothian is necessarily to be taken as building a new church as agent for the heritors.

This, I think, does not follow in point of law. Lord Lothian and the heritors might, with the assent of the Presbytery, have agreed that the new church should be occupied as the old one was, or they might have agreed that there should be a new allocation, and if they had by apt words expressed either intention in the excambion I see no reason why that intention should not have effect.

Unluckily it appears not to have occurred to anyone that any such question could arise till the meeting of the heritors on the 22d December 1874, and the excambion which had been executed in November 1874 contains no express provision on the subject, all that is said being that the new church was “to be held as the parish church of Jedburgh in all time thereafter,” which is quite consistent with either the old allocation being applied to the new church or a new allocation being made.

But on looking at the extraneous facts I think it sufficiently appears that the new church was to be given in lieu of the old church as it then was, or at most in lieu of what it would be when repaired, which would be subject to the old allocation, and not as a new church built by the heritors, who, as far as appears, had no intention voluntarily to incur the heavy expense of building a new church, which they were not bound in law to do. The reports of the architects are made entirely with reference to repairing the old church, not as to building a new one. And the Presbytery, on the 6th October 1868, in giving their assent to the proposed scheme, stipulate that the size of the new church should be such as to contain a number of sittings not less than those contained in the present church, which the Presbytery understand to be 1200. This was a very proper stipulation if the church was to be considered as in lieu of the repaired church. They make no reference whatever to the number of the inhabitants of the parish, which would have been the proper subject for consideration if a church was to be erected *de novo*; and in fact it appears that, whether the inhabitants of the portion of the parish now disjoined *quoad sacra* be included or excluded in reckoning the examinable inhabitants, the number for which accommodation ought, according to the usual rule, to have been provided for, if it were a church erected *de novo*, considerably exceeds 1200.

It is useless to look for authorities on this question. Such liberality as Lord Lothian's is rare, and no question such as this has ever risen before. It must be decided as a case of the first impression; and with every respect for the able Judges who formed the majority in the Court of Session I think they have not given sufficient attention to the special circumstances of this case.

I prefer to say nothing on the general question, as it is unnecessary for the

No. 10. decision of the case ; and the above view of the effect of the excambion is sufficient to justify a reversal of the decision of the Court below and the declaration and judgment proposed.

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LORD GORDON.—My Lords, the appellants in this appeal are the Duke of Roxburghe, the Marquis of Lothian, the Countess of Home (who, I regret to say, has died since the cause was heard, but her husband, the Earl of Home, was also a party, for his interest, and may still be held to represent the interests of the deceased Countess in virtue of his right of courtesy), and Mr Rutherford of Edgerston, who are designed as being “all heritors of the parish of Jedburgh.”

The circumstances out of which the appeal arises are these :—In the year 1855 a portion of the parish of Jedburgh along with portions of other adjoining parishes were disjoined *quoad sacra* from their respective parishes, and erected into a parish *quoad sacra* under the provisions of an Act passed in 1844 (7th and 8th Victoria, chapter 44), which received the name of Edgerston. All the present appellants are proprietors of lands in this disjoined portion of the parish of Jedburgh so erected into the *quoad sacra* parish of Edgerston ; but the appellants, the Marquis of Lothian and the Countess of Home, are also proprietors of other lands in the parish of Jedburgh which were not disjoined from the parish of Jedburgh.

For many years down to the year 1874 the parish church of Jedburgh consisted of a portion of the old abbey of Jedburgh. Sittings in the church were about eighty years ago allocated to the then heritors of that parish, and amongst others to the predecessors of the present appellants. There seems to be no doubt that the allocation then made was in all respects regular, and that the predecessors of the appellants were legally entitled to the sittings which were allocated to them. These sittings were retained and were possessed by the appellants and their predecessors as pertinents of their several properties down to the time when the old parish church was excambed for the new church, to be immediately referred to.

In the year 1868 it was found that the old church of Jedburgh required very considerable repairs, and the heritors obtained a report on the subject by architects, with a view to having the necessary repairs executed. It is of some importance to observe that the heritors did not then contemplate the erection of a new church, but only the repair of the existing one. The abbey of Jedburgh, in so far as not occupied as the parish church, belonged to the late Marquis of Lothian, and it occurred to his Lordship that it would be desirable to remove the old parish church, which in its then state interfered with the beauty of the ruins of the abbey, and he proposed to the heritors that if they would convey to him the old church and all their rights therein he would erect a new church on another site, and convey it to the heritors in lieu of the old one. This proposal was acceded to by the heritors of Jedburgh, with consent of the Presbytery of the bounds as the ecclesiastical guardians of the parish, and was carried into effect. The then Marquis of Lothian died a few years after, but his successor, the present Marquis, erected at his own cost a suitable new church, and thereupon a contract of excambion was entered into, by which his Lordship, on the one hand, conveyed to the heritors the new church, and, on the other hand, “in consideration” thereof the heritors conveyed to the Marquis the old church and all their rights therein. The contract of excambion is before the House, but I do not consider it necessary to read it in detail to your Lordships.

The heritors having thus acquired the new church, which, as already explained, was not built at their expense, took into consideration the allocation of the sittings therein amongst those entitled thereto. It does not appear to have been necessary that judicial proceedings should have been instituted for that purpose. The sittings in the old church had been allocated by voluntary arrangement among the heritors and others entitled to sittings in the year 1793; and in 1834 there was in like manner, by voluntary arrangement, a partial rearrangement of the sittings, and it was quite competent to allocate sittings in the new church acquired by the excambion by the same means. But instead of proceeding in this manner the heritors presented a petition to the Sheriff of the county, praying him to proceed with the division of the area or seating of the church amongst the heritors of the parish in terms of law.

The petition, as being a proceeding for the regulation of possessory rights, was undoubtedly competent. But I think that the Sheriff had not power under it to deprive those who had legal possession of sittings in the old church of any share in the allocation of sittings in the new. I think the two cases of *Smith and The Magistrates of Hamilton*, referred to by the Sheriff in the note to his interlocutor, shew that, as Mr Duncan expresses it in his work on *Parochial Law*, p. 222—"When the result of a division, if made, would be to invert a long-continued adverse possession, the action should not be brought in a summary form, as by petition." Then the proper form in which to investigate and determine an adverse claim, and the right of adverse possession, is not by way of petition to the Sheriff, but of summons, it may be of declarator simply, or of reduction and declarator combined. In *Smith v. Crawford*, 22d June, 1826, 4 Shaw, 738, the Lord Ordinary (Lord Eldin) held "that the application to the Sheriff to invert the possession, after the long possession that had followed on the division of the church, was incompetent," and this judgment was confirmed by the Inner-House. And in the case of *The Magistrates of Hamilton*, 23d June 1846, 8 Dunlop, 844 (18 Scot. Jur. 456) Lord Medwyn said (p. 854) that the long possession of a gallery by the magistrates "gave them a right to occupy this position in the present church till at least they are dispossessed by a much more formal process than a petition to the Sheriff to divide the area of the existing church on account of its being new seated."

In the course of the proceedings before the Sheriff in the present case a question was raised, whether those heritors whose lands were disjoined *quoad sacra* from the parish of Jedburgh, and now formed part of the *quoad sacra* parish of Edgerston, were entitled in the division to a proportion of the area of the church and sittings corresponding to the valuation of the lands so disjoined from Jedburgh and forming part of the *quoad sacra* parish. The Sheriff held "that in so far as regards the dividing and apportioning of the areas and seatings of the new parish church of Jedburgh recently erected the heritors of the lands so disjoined and erected into the parish of Edgerston *quoad sacra* are not to be considered as heritors of the parish of Jedburgh," and that the sittings "fall to be allocated and divided among the other heritors of the parish (excluding as aforesaid) according to their valuations as appearing in the valuation-rolls." The Court of Session affirmed the Sheriff's judgment, and your Lordships are now called on to decide whether the Sheriff and the Court of Session were right in the judgments so pronounced.

There seems to have been much discussion before the Sheriff and in the Court of Session, and there was also a learned argument before your Lordships' House,

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on the general question whether heritors in the position of the appellants, who were proprietors of lands which had been disjoined *quoad sacra* from one parish and erected into a parish *quoad sacra*, remained liable for the expense of repairing or re-erecting the parish church of the original parish, and were entitled to a proportion of the sittings therein? But it occurs to me that the decision of this question is not necessary to the decision of the point before your Lordships; and further, that in an *ex parte* case such as the present (for as such the cause was treated by the Court of Session and also at your Lordships' bar, there being no party at your Lordships' bar to resist the appeal), it would not be right to decide a question of so much importance. I therefore suggest that it is not advisable to express any opinion whatever on that question.

I may, however, remark that the judgment of the Sheriff was founded upon the decision of the case of Drummond v. The Heritors of Monzie, Moneidie, Crieff, and Others, in 1773 (Morison's Dictionary, p. 7920), in which the Sheriff held it to have been decided "that the heritors of lands annexed *quoad sacra* are not liable to contribute for upholding the fabric of the parish kirks from which they are disjoined." But the Judges of the Court of Session, who had carefully examined the proceedings in that case, were of opinion that it was not properly reported, and was inapplicable as an authority in the present case.

There was another point discussed at the bar of your Lordships' House, viz., that on which the Lord President and some of the other Judges in the Court below rest their opinions. His Lordship held that the allocation to heritors of sittings in a parish church is not an allocation for their own behoof, but merely in trust for behoof of the parishioners residing on their respective estates; that these parishioners have themselves no civil right to such sittings, but are only entitled to the use of the parish church for the purposes of worship and administration of ordinances, these rights, in his Lordship's view, being merely *inter sacra*; and his Lordship holds that where, as in the present case, lands have been disjoined from one parish and erected *quoad sacra* into another, the persons residing on these disjoined lands lose all their rights in the original parish church, and have no right to church accommodation except in the church of the parish to which they have been annexed; and that therefore, there being no persons in the disjoined portions to be benefited by an allocation of sittings, the heritors thereof are not entitled to participate in the division.

But, my Lords, the opinion so expressed by the Lord President was strongly controverted by the appellants' counsel, and it was contended that the principle was that sittings in parish churches were allocated to heritors not merely for behoof of those resident on their respective properties, but also for behoof of the parishioners generally, who were entitled to the use of any sittings which might not be required for those resident on the properties of the heritors to whom the sittings were allocated.

My Lords, the point so raised is one of considerable difficulty as well as of importance. I think if it had been raised in a competent process with reference to the allocation of sittings in a new church where subsisting rights were not interfered with, it would have been very fit to be considered and decided. But, my Lords, I am inclined to think that the point cannot be competently raised here, to the effect at all events of depriving heritors of their sittings which

they have legally held for a long series of years, and I think that the question cannot be held to have been very satisfactorily raised, considering that it has only been discussed *ex parte*. I am further of opinion that its decision is not necessary to the disposal of the question before the House, which, in my view, is one only relating to the mere regulation of the existing possessory rights of the heritors. I therefore avoid expressing any opinion on the points so ably dealt with by the Lord President and some of the other Judges.

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I may state that I do not consider that your Lordships' judgment in the case of *Hutton v. Harper*, March 9, 1876 (L. R., 1 Ap. Ca. 464), decided last year (*ante*, vol. iii. H. L. 9) affects the question raised in the present appeal. In that case the point raised was one relating to the proclamation of banns, which was considered by the Court below, and also by your Lordships, to be a proceeding or right purely *inter sacra*, and not affecting civil rights.

It was contended on behalf of the appellants that as, at the time when the old church was excambied for the new they were in the occupation of sittings in the parish church of Jedburgh, and as their possession of these sittings was to be ascribed to an undoubted legal title, their right to sittings must be regarded according to the fair and legal import and effect of the contract of excambion. I think this contention is entitled to great weight, and that it affords sufficient grounds for the decision of the question before the House.

I think the question must be decided now in the same way as it would have been if it had arisen with reference to a re-allocation of sittings in the old parish church of Jedburgh, if that had been necessary in consequence of the reseating or repair of the church. The appellants were legally possessed of sittings in the old church, which they retained for twenty years after the erection of the *quoad sacra* parish of Edgerston, and which, I think, they would have been entitled to retain in the old church, and if a re-allocation had become necessary I think they would have been entitled to participate in it in proportion to the sittings they originally held. I think it makes no difference in their rights that the subject of allocation is not the old parish church but the new. The new church was given and accepted in exchange for and in lieu of the old, and the rights of the heritors in the new must, in my opinion, be dealt with in the same way as they would have been if a question had arisen in regard to the old church.

It is stated by the late Mr Dunlop in his work on Parochial Law, p. 43, that "if a certain state of possession have subsisted for a long period, although there be no evidence of a regular division, such will be presumed to have taken place, and the Court will not sanction any alteration notwithstanding a change of circumstances in regard to the property of the parish." And he refers to several cases in which it has been decided that possession of sittings in a church gave the possessors a right on a re-allocation to equivalent accommodation.

It was so held in the case of *Smith*, before referred to, and in the case of *The Magistrates of Hamilton* the point was very fully considered. The question there occurred with reference to a gallery which the magistrates had occupied for more than a century under an agreement with the Duke of Hamilton. The heritors contended that the magistrates did not possess an absolute and exclusive right of property in the gallery, and that, on the contrary, any use they had had did not flow from any right of property, but was merely *ex gratia* of the Hamilton family, of whose portion of the area of the church the gallery formed a part. But the Court held that the corporation could not be dispossessed of their gallery. The Lord Justice-Clerk (Hope) said—"If they got the gallery in this church

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simply by agreement with the Duke of Hamilton in 1734, still that was by an agreement made known to all, and in lieu of the seats they had in the old church ; and after possession for more than a century I am of opinion that they are entitled to maintain their seats even after such repairs as had been made, and which might give rise to a division of the rest of the area that had been so materially altered." Lords Medwyn and Cockburn expressed views to the like effect ; while Lord Moncreiff, though differing from their Lordships in the result at which they arrived, stated,—“ Where a new division becomes necessary, if specific legal rights had been previously established in individuals or corporations, these will be duly regarded and preserved in the division.”

I so entirely concur in the opinions expressed by Lords Deas and Mure in the present case in regard to this matter that I take the liberty of quoting a few sentences. Lord Deas in his opinion says—“ The one church has been excambied for the other, and the natural result of that excambion appears to me to be, that the parties who were previously in possession of the one should now be entitled to possession of the other. The case is not varied by the fact that the Marquis had to build a church to be conveyed by the excambion in place of being possessed of an existing church suitable to be so conveyed. It is still a case of excambion of one church for another, and nothing can be more expressive of the nature of the transaction than the word excambion itself, which is both the legal and the conventional name of the contract.” His Lordship goes on to say that “ there would necessarily be a change of arrangement rendering judicial regulation necessary, but for this the Sheriff was just as competent where the question arose upon a contract of excambion as if it had arisen in any other way. . . . I think what he should have done was simply to have regarded the new area as substituted for the old, allocating it as nearly as might be as the parties themselves had previously and immemorially allocated it, and making no further changes than the different arrangement of the seats rendered necessary. There was no expense to be allocated either for building or for repairs. All that fell to be done was to modify and regulate the possession so as to give effect to the contract of excambion.”

And Lord Mure, in concurring in the opinion of Lord Deas, says—“ Although there does not seem to have been any express stipulation in the proceedings relative to the excambion, to the effect that the appellants were to have right to seats in the new church, I think that this may be held to be implied in the transaction, because the nature of that transaction as disclosed in the deed of excambion appears to me to be that when the old church was exchanged for the new the latter was to be conveyed to the whole heritors of Jedburgh, including the appellants, as a *surrogatum* for their right to the old church, which was conveyed by them to Lord Lothian, and that they were thus to acquire in the new church rights equivalent to those which they had in the old. There is nothing in the proceedings to shew that these appellants abandoned or ever intended to abandon their right to sittings in the new church corresponding to those which they held in the old one. And the circumstance that they may be in one view no longer heritors in the parish of Jedburgh is not, I conceive, of itself conclusive against their right to claim sittings in the new church.”

My Lords, entertaining these views, I concur in the judgment which has been moved by my noble and learned friend on the woolsack.

INTERLOCUTORS, in so far as complained of, reversed, with a declaration “ that, after setting aside seats for the minister and elders, and

for the beadle and the poor, the division and apportionment of the seats in the parish church at Jedburgh, recently erected, ought, so far as the circumstances of the case will admit, to follow and be regulated by the division and apportionment thereof in the former parish church, for which the new parish church was substituted by way of exchange," and cause remitted.

CONNELL, HOPE, & SPENS—MACKENZIE, INNES, & LOGAN, W.S.

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MRS JANE ROSS OR MACPHERSON AND ANOTHER, Appellants.—

Lord-Adv. Watson—Low.

JOHN ROSS DUNCAN AND ANOTHER, Respondents.—*Thesiger, Q. C.—Blair.*

(SEE Court of Session report in present vol., Nov. 17, 1876, p. 132.)

Mrs Ross or Macpherson appealed.

No. 11.
July 3, 1877.
Ross or Mac-
pherson, &c. v.
Duncan, &c.

The LORD CHANCELLOR said there was no doubt that in receiving in evidence the statements of deceased persons the law of Scotland admitted greater latitude than the law of England, but in the present instance there was a unanimous judgment of the Court in Scotland as to such evidence in the particular circumstances of this case being inadmissible. Even if it were to be assumed that the deal persons were acquaintances of one George Ross it did not follow that an acquaintance should have any special knowledge of the family relationships of George Ross, or that everything that that acquaintance chose to say was to be treated as evidence of those relationships. The judgment of the Court below was quite right, and ought to be affirmed.

Ld. Chancellor
(Cairns).
Ld. Hatherley.
Ld. O'Hagan.
Ld. Selborne.
Lord Black-
burn.

LORDS HATHERLEY, O'HAGAN, SELBORNE, and BLACKBURN concurred.

JUDGMENT affirmed.

R. M. GLOAG—RONALD & RITCHIE, S.S.C.—WILDE, BERGER, MOORE, & WILDE—
PHILIP, LAING, & MUNRO, W.S.

EDINBURGH TRAMWAYS COMPANY, (Pursuers) Appellants.—*Thesiger, Q. C.* No. 12.
—*W. A. Hunter.*

ALEX. TORBAIN, (Defender) Respondent.—*Lord-Adv. Watson—
D. MacLachlan.*

July 6, 1877.
Edinburgh
Tramways Co.
v. Torbain.

Statute—Edinburgh Street Tramways Acts, 1871 and 1874, 34 and 35 Vict. cap. lxxxix. sec. 44, and 37 and 38 Vict. cap. lxxviii. sec. 4.—A tramway company was bound by an agreement, embodied in its Act of incorporation, not to charge passengers more than 1d. per mile or fraction of a mile (the minimum charge for each passenger being 2d.) They afterwards obtained an Act by which they were relieved of their obligation to lay certain lines, and were allowed instead to run omnibuses over these routes. This Act allowed them to charge "a sum not exceeding 2d. per mile for first-class passengers on omnibus routes and any tramway routes worked in connection therewith." *Held (aff. judgment of Second Division)* that the second Act did not alter the rates chargeable for tramway passengers who did not use the omnibus routes.

(In the Court of Session May 18, 1876, *ante*, vol. iii. p. 655.)

The tramway company having appealed, the House of Lords, after hearing counsel for the appellants, affirmed the judgment, the Lord Chancellor observing that he had seldom seen a more unfounded action, and had certainly never seen a more unfounded appeal.

Ld. Chancellor
(Cairns).
Ld. Hatherley.
Lord Black-
burn.
Lord Gordon.

ASHURST, MORRIS, CRISP, & CO.—LINDSAY, PATERSON, & CO., W.S.—SIMSON,
WAKEFORD, & SIMSON—W. H. COUPER, L.A.

No. 13. RICHARD DUDGEON, (Complainer) Appellant.—*Aston, Q.C.—Balfour—Carmichael.*

July 10, 1877.
Dudgeon v.
Thomson, &c.

WILLIAM THOMSON AND ANOTHER, (Respondents) Respondents.—*Benjamin, Q.C.—Everitt.*

Patent—Disclaimer.—When a patentee alters his patent by a disclaimer he cannot thereafter enforce an interdict which he had obtained upon the patent before the alteration, as the amended patent may be liable to objections which did not apply to the former patent, and what would have been an infringement of the old might not be of the new.

Patent—Infringement.—The patentee of a tool for expanding the ends of boiler tubes in the flue sheet claimed in his specification “the combination in an expanding tool of the following implements, viz. the rollers, roller stock, and expanding instruments, these three operating in combination substantially as set forth.” The expanding instrument was described as “a tapering plug, or its equivalent, by whose action the rollers are forced outwards in the tube. A manufacturer invented a new tool in which the rollers, being themselves tapered, were fixed at an angle with the axis of the tool, converging towards a point, so as to make the whole tool of a conical shape, and expansion was effected by screwing the tool into the tube, without any expanding instrument or divergence of the rollers. Held (aff. judgment of the First Division) that there was no infringement.

Jurisdiction—Prorogated Jurisdiction.—In an appeal from a judgment of the Court of Session which decided a question of alleged infringement of patent, the House of Lords, while holding that the proceedings in the Court below were irregular and did not competently raise the question, at the request of parties decided the question of the alleged infringement.

Ld. Chancellor
(Cairns).
Ld. Hatherley.
Lord Black-
burn.
Lord Gordon.

(SEE Court of Session report in present vol., Dec. 22, 1876, p. 256; and for previous proceedings 11 Macph. p. 863, and *ante*, vol. iii. p. 604 and p. 974.)

In 1873 Richard Dudgeon, the holder of a patent for “improvements in apparatus used in expanding boiler tubes,” presented a petition for interdict against William Thomson infringing the patent by using the improvements described in the specification filed on 30th August 1866, (quoted 11 Macph. p. 864.) The Lord Ordinary (Mackenzie) granted the interdict, and on 4th July 1873 the First Division adhered.

On 28th May 1875 Dudgeon filed a disclaimer and memorandum of alteration of his specification—(quoted in Court of Session report in present vol., p. 257, note.)

On 30th November 1875 Mr Dudgeon brought a note of suspension and interdict against William Thomson and Company infringing the patent. The petitioner alleged that William Thomson was the sole partner of the firm.

The First Division, on 17th March 1876, sisted the process to give the complainer an opportunity of presenting a petition and complaint for breach of the previous interdict granted by the interlocutor of Lord Mackenzie dated 31st January 1873, adhered to on 4th July 1873, which the Court held to be the proper remedy (*ante*, vol. iii. p. 604.)

Mr Dudgeon then, with consent of the Lord Advocate, presented a petition and complaint for breach of the said interdict against William Thomson and Benjamin Donaldson, whom Thomson had assumed as a partner.

After a proof the First Division, on 22d December 1876, found that there had been no infringement of the patent since the date of the interdict (Court of Session report in present vol., p. 256.)

Mr Dudgeon appealed against this interlocutor.

LORD CHANCELLOR.—The appellant at your Lordships’ bar is the owner of a patent which was dated in the month of March 1866, and the original specifica-

tion of that patent was modified very largely by a disclaimer and memorandum No. 13. of alteration dated in the month of May 1875. But, my Lords, during this interval of nine years, between the date of the original patent and the date of the disclaimer, proceedings had been taken by the appellant against one of the present respondents in the Court of Session in Scotland, and the result of those proceedings, founded as they were upon the patent as originally specified, was that an interlocutor was pronounced by the Lord Ordinary and affirmed by the Court of Session against that respondent.

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My Lords, that interlocutor followed the terms of the conclusion of the summons. The Lord Ordinary sustained the reasons of suspension, and suspended and interdicted in the terms of the note of suspension and interdict. That was on 31st January 1873. Now, the terms of the note of suspension and interdict were these: It prayed that the respondent should be interdicted, in particular, from "making, vending, or using in whole or in part the improvements in apparatus used in expanding boiler tubes described in the specification filed on 30th August 1866, in pursuance of the proviso" in the letters-patent, "and, in particular, from making, vending, or using any apparatus for expanding boiler tubes constructed or used in the manner described in the said specification or in manner substantially the same, and from infringing the said letters-patent in any other manner of way." My Lords, that, as I have stated, was in the year 1873. Then came the disclaimer and alteration of the specification in May 1875, and with regard to the particulars of that disclaimer and alteration at present it is not necessary to say more than this, that the disclaimer and alteration modified very largely the original specification, and modified it in matters which were closely connected with, and, indeed, were inseparable from that which is the subject of the present contest at your Lordships' bar.

After the disclaimer and alteration of 1875, Mr Dudgeon, the appellant, considered that his patent was being infringed by the two respondents together, and he applied to the Court of Session upon that subject. In the first instance he appears to have commenced a fresh action against the respondents, but after some time that action was sisted; and, apparently encouraged or recommended by the Court, he proceeded against the respondents, not in the fresh action, but by way of an application to enforce the interdict which had been granted in the former action, and, accordingly, that application came before the Court and was refused upon the merits.

Before I pass to what I shall afterwards consider as the merits of the case I must point out to your Lordships that, according to my judgment, nothing could be imagined more irregular, more contrary to what is the true character of proceedings under a patent and against an alleged infringer, than that which has taken place in the Court below in the present case. According to the statute (15 and 16 Vict. c. 83, sec. 39) after a disclaimer and memorandum of alteration has been filed in the case of a patent, unless the law officer has specially granted permission, no action can be brought by the patentee upon the score of an infringement committed before the disclaimer; but what is here done is what would be still more contrary to natural justice than would be an action for an infringement before a disclaimer. The patentee before his disclaimer had obtained an interdict from the Court. Of course before that interdict could be granted by the Court the person alleged to have infringed had an opportunity of defending himself against the interdict upon every ground of defence which is ordinarily open against a patentee. He had a right of contending, and apparently he did

No. 13. contend, that the patent was invalid by reason that it was not properly specified. He might have contended that it was invalid by reason that the invention was not new or that the invention was not useful. It would not be and could not be until after all these defences were determined against the alleged infringer that the Court could go on and consider the question of fact whether he had actually infringed the patent or not, for unless the patent had all the ordinary elements of validity in itself it could not be made the means of complaint by reason of an alleged infringement. I assume therefore that before the interdict passed all those issues going to the validity of the patent as it then stood were decided in favour of the patentee.

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But then, my Lords, look what happens after the disclaimer and alteration. The specification is altered ; in this particular case it is altered largely and most materially. The invention may have been a new invention as it stood originally, but it may not be new as it appears under the altered specification. The invention may have been useful according to the original specification, it may not be useful according to the amended specification. The original specification may have complied with all the exigencies of the law and been such as is requisite in the case of every patent, but the amended specification may be wanting in all those qualities which are required by the statute. And yet not one of those issues has been decided against the respondents in this case ; nay more, not one of those issues could be decided in the present proceedings, because when the appellant appeals to the Court to enforce its interdict granted in the former action the respondents are obliged to confess that in that former action the questions of novelty, of utility, and of sufficiency of the specification are all *res judicata*, already decided against them. My Lords, without going beyond that, and pointing out that upon the *factum* of infringement that which would be an infringement of the old specification may be none whatever of the new specification, the former considerations alone would satisfy your Lordships, I think, how extremely irregular it was in those who were engaged in this proceeding in Scotland to suppose that after the memorandum of alteration and the disclaimer the question of enforcing the old interdict could be entertained by the Court.

My Lords, I have said thus much in order that it may not appear that your Lordships have overlooked the irregularity which has taken place or are satisfied with that irregularity ; but, as the question now stands, both parties have deprecated that the course, which probably would be the strict course, should be taken, namely, that the appeal should be dismissed, leaving the parties to resort to a continuance of the second action which has been commenced in the Court of Session. They ask your Lordships, on the contrary, to determine the question which was submitted to the Court under the old interdict, namely, the question whether, taking the amended specification, there has been by the act of the respondents an infringement of that amended specification. Your Lordships, in mercy to the parties, are willing, as I understand it, to consider that question, and to determine it by way of review of the determination of the Court of Session.

Now, coming to that question of infringement, it appears to me to rest within very narrow bounds, and in order to determine it I must ask your Lordships, in the first place, to satisfy your minds as to what it is which is the principal characteristic, the essential feature, of the invention of the appellant as specified in his patent. So far as we can learn from the materials before us,

up to the time when this patent was originally taken out the mode by which the tubes of boilers were securely fastened into what, I think, is called the tube piece or the flue piece, the end of the boiler, was this : There was a circular hole made in the flue piece, and the tube to be fastened into that hole and made steam-tight was placed in the hole at right angles, and then, in order to swell out the tube and fasten it into the hole prepared for it, it appears that a cylindrical or circular wedge was introduced into the tube ; that percussion was used either upon the wedge alone, or upon the wedge in the centre with some further substances placed round it, and by percussion the tube was stretched and expanded in such a way that at last it was brought to fit into the flue piece.

But, my Lords, that operation of course had this manifest inconvenience and defect—it had a tendency, by the straining caused by the percussion, to lacerate the fibres of the metal of the tube, and, in some instances, to burst the tube ; and, in addition to that, the percussion of one tube in the flue piece had a tendency to shake and disarrange the other tubes which were fastened into the flue piece all around it. Well, my Lords, the invention of the appellant was for the purpose of obviating these inconveniences, and he addressed himself to the subject in this way : He states that it will be better in place of applying percussion to apply roller surfaces to the interior of the tube, friction rollers, which will have the effect, not by way of percussion, but by way of rolling, to flatten out and expand, to make thinner, the metal of the tube, and, in that way, gradually to expand it until it fits into the flue piece. Now, my Lords, if, in order to do this, the appellant had taken what I may term a bunch or *fasciculus* of cylindrical rollers and had placed them in the tube and had inserted in them a centre cylinder to which he gave motion so that the centre cylinder rotating would make the cylinders round its periphery (the cylinders of the *fasciculus*) rotate also, of course all that might have been done and yet the object of bringing strong pressure to bear upon the tube would not have been accomplished. The rollers would rotate but there would be no point of contact coupled with pressure upon the tube. Therefore it is obvious that the point and gist of the invention must be, not the insertion of friction rollers or circular rollers in the tube, but some mode by which those rollers can forcibly be brought to bear upon the concave surface of the tube all round so as strongly to press out the tube. And, accordingly, your Lordships will find in the specification of the appellant means distinctly pointed out for that purpose.

I will ask your Lordships to look at a few sentences both in the specification as it originally stood and in the specification as it stands after alteration, because some of the expressions in the original specification strongly bear upon the invention as it ultimately appeared. I pass over the introduction which stated “the principle of the invention, which constitutes the subject-matter of this patent, is to expand the tube by rolling the metal by the application of one or more pressure rollers to the interior of the tube.” Of course that does not describe any invention ; it only describes what is the subject-matter which is going afterwards to be explained.

I pass over a number of descriptions of different modes by which machinery might be made for the purpose of attaining the object in view, and I come to the conclusions which are drawn from the whole of these particular details. In the original specification the patentee described a tapering plug, as it was called, which was placed in the centre of three cylindrical rollers, which cylindrical rollers might either be parallel to the plug and to each other or might be placed slightly

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No. 13. askew to the centre plug so that they might somewhat vary the effect of the screw. But having described that tapering plug which was to be introduced into the midst of these three cylinders, and as it proceeded and worked its way forward was to expand and push out these cylinders, because these cylinders were to have bearings so arranged that they were not rigidly to be kept in their places but might be forced out radially—having described that, he says “although a tapering or wedge-formed plug is preferred as the expanding instrument.”

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Now, my Lords, I stop there to observe that that must mean the instrument expanding the cylinders, not expanding the tube, because what is spoken of is, not the whole of the tube but the plug and the plug only. “Although a tapering or wedge-formed plug is preferred as the expanding instrument, the invention is not limited to the expanding instrument of that form, as circumstances may render expedient the use of an expanding instrument of different form; when a tool is sufficiently large an arrangement of toggle-jointed levers may be inserted in it for the purpose of expanding the roller in place of a tapering plug.” I read that sentence as saying,—I do not limit myself to the particular expanding instrument in the centre of the cylinders which I have described, the tapering plug; you may have an instrument which will attain the same result, that is to say, the result of expanding or driving out the cylinders, in another way, such as an arrangement of toggle-jointed levers, but the result must be the same as will be achieved by the tapering plug.

I ought to say that that sentence which I have read disappears in the alteration, but this which I am now going to read is continued there,—“In all the above-described modifications of the roller expanding tool at least one roller is combined with a tapering plug (or its equivalent, by whose action the roller is forced outwards in the tube.)” In the specification as altered “at least one roller” is struck out, and “rollers” substituted, so that it runs—“In all the above-described modifications of the roller expanding tool rollers are combined with a tapering plug (or its equivalent, by whose action the rollers are forced outwards in the tube), and with a stock or holder, by which the roller is prevented from twisting sidewise as they are turned round in the tube.” Then he continues,—“These three instrumentalities” (this is struck out in the amendment) “are all that are absolutely essential to the construction of the roller expanding tool, but the cutter and ratchet handle constitute with the said instrumentality or implements useful combinations which are supplementary to the aforesaid fundamental combination.” Then he proceeds,—“What is claimed, therefore, as the invention to be secured by letters-patent, is the combination in an expanding tool of the following implements, viz., the roller, roller stock, and expanding instrument, these three operating in combination substantially as set forth.”

Now, my Lords, I pause there for the purpose of pointing out to your Lordships that, in the first place, although, after the mention of a tapering plug there is put by way of alternative its equivalent, the interpretation of that alternative is immediately afterwards given. He says, as it were, by equivalent I mean something by the action of which the roller is forced outwards in the tube. And, then, also, your Lordships have this, under the statement that the “three instrumentalities are all that are absolutely essential to the construction of the roller,” one of the instrumentalities being the tapering plug or its equivalent. As so defined you have implied this further statement, that the tapering plug or its equivalent, as so defined, is absolutely essential to the invention. Thus your Lordships have,

when you come to the claim, an interpretation placed upon what he claims, No. 13. namely, the three things in combination, the roller, the roller stock, and the expanding instrument, the three operating in combination substantially as set forth. July 10, 1877. *Dudgeon v. Thomson, &c.*

Now, my Lords, I must say further, that not only is that, as it seems to me, the legitimate and the necessary construction of the document, but I must add that according to all the information that is before me, and according to my understanding of the subject-matter of this operation, if the patentee had here claimed the rollers and the roller stock, either one or both of them, he would have claimed that which would have made this patent perfectly useless. Nothing would have been done by means of the rollers alone, or of the roller stock alone. Moreover, so far as I am aware, it would have been extremely difficult to say that there was any novelty in a roller stock of that kind, or in rollers of that kind. The point which gave the characteristic to the whole, and which he justly called a point absolutely essential to his invention, was the tapering plug acting as an expander, driving out those cylindrical rollers placed around the plug, and thus producing that which, as I stated at the beginning, must have been the desideratum in this invention, a heavy continuous forcible pressure against the inside of the tube for the purpose of expanding it.

Now, that being the characteristic and the essential feature of the invention of the appellant, as I understand it, it only remains to consider what it is that the respondents do. What is the instrument which they sell? Your Lordships are perfectly familiar both with the appearance and with the description of it. The respondents do not in any way expand or drive out their cylinders from the centre. They have no tapering plug, and in that sense have no expanding instrument. They have not their rollers fixed in radiating slots, so that they would be capable of being expanded, that is to say, driven out from the centre. But what they have is this,—they have also what I have termed a *fasciculus* of rollers, but their three rollers, in place of being three parallel perfect cylinders, are tapering cylinders placed together, and the centre of the tool is not a tapering plug, but is itself a centre cylinder. The centre cylinder gives motion to the wedge-formed or tapering cylinders, which are placed around the centre cylinder, but the whole is worked, not by way of pressing out the cylinders against the tube, but as a complete wedge inserted in the tube, having the contour of a wedge, and expanding the tube, flattening out the tube, by working its way into the tube like a rotating wedge.

It would have been quite possible for the appellant, when he was specifying his invention, to have specified also a tool, an instrument, which would have the peculiarity of the instrument of the respondents. I have no means of knowing why he did not do so. It may have been possibly because it did not occur to him; it may have been, on the other hand, because he was aware that if he had done so he would in some way, by reason of want of novelty or otherwise, have endangered his patent. It is sufficient for my purpose that he has not described a tool of the kind which I have mentioned. There can be no doubt, as it appears to me, that the instrument used by the respondents is not the instrument described and patented by the appellant.

A great deal of the argument at your Lordships' bar has been to shew that though not the instrument described and patented by the appellant, it is what has been termed in the argument a "colourable imitation." Now, my Lords, the words "colourable imitation" are words which appear to me not very happily chosen, and calculated to create some confusion. I am quite aware that

No. 13. they are words which are used sometimes in the argument of patent cases, but I doubt very much whether the particular expression is one which has any great authority for its use. There is a well-known manner in which the word "colourable" or "colourably" is used in patent cases. I have referred to the ordinary form in which injunctions are granted in patent cases by the Court of Chancery, and I take from Mr Seton's book an example which appears to me to be exactly in accordance with what I recollect to be the practice of the Court in granting injunctions. It is in a case which I think came before my noble and learned friend, as Vice-Chancellor, the case of *De la Rue v. Dickinson*.¹ The injunction restrains the defendants, their agents and servants, during the continuance of the patent, from "using or employing any machines similar to the machine in the plaintiff's bill stated, or any machinery, mechanism, or mechanical contrivance made or arranged according to the plaintiff's said patent inventions, or differing therefrom only colourably or by the substitution of mere mechanical equivalents for the same."

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Now, my Lords, what I understand by that is this,—if there is a patented invention, and if you, the defendant, are found to have taken that invention, it will not save you from the punishment or from the restraint of the Court that you have at the same time that you have taken the invention dressed it up colourably—added something to it, taken, it may be, something away from it, so that of the whole it may be said, as is said in this injunction,—Here is a machine, which is either the plaintiff's machine or differs from it only colourably. But underlying all that there must be a taking of the invention of the plaintiff. There used to be a theory in this country that persons might infringe upon the equity of a statute if it could not be shewn that they had infringed the words of a statute; and I know there is, by some confusion of ideas, a notion sometimes entertained that there may be something like an infringement of the equity of a patent. My Lords, I cannot think that there is any sound principle of that kind in our law,—that which is protected is that which is specified, and that which is held to be an infringement must be an infringement of that which is specified. But, I agree, it will not be the less an infringement because it has been coloured or disguised by additions or subtractions, which additions or subtractions may exist and yet the thing protected by the specification be taken notwithstanding.

When I look at that which the respondents have in this case done, and the article which they have sold, it appears to me to be a different article from the article specified. It is no doubt a cognate invention—it aims at accomplishing the same purpose—it uses no doubt friction rollers, but it has not that thing which the patentee in this case has chosen (I have no doubt for proper reasons) to describe as one of the characteristic features of his invention, and which, as it seems to me, he might have almost said was *the* characteristic feature of his invention, because, as it seems to me, it was that without which his invention would have been absolutely *nil*.

Now, my Lords, those are the grounds upon which, dealing with this case as the Court of Session have dealt with it, and assuming, as your Lordships are willing to assume, that this question of infringement may be decided in these proceedings, I come to the conclusion that the view taken by the majority of

¹ Seton on Decrees, 3d ed., p. 911.

the Court of Session was the correct view of the case, and that a violation of this interdict, even as applying to the altered specification of the appellant, has not been made out. I therefore submit to your Lordships that the appeal should be dismissed, with costs.

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LORD HATHERLEY.—My Lords, I entertain the same opinion as that which has been expressed by my noble and learned friend on the woolsack.

First, with regard to the course which has been taken in this case through inadvertence, I think in the Court below, as to the continuance of the interdict after the disclaimer by the appellant of some portion of his invention, that course is one which we cannot pass by in silence, because, if you look to the very terms of the disclaimer which we have put before us, you will see at once how unjust it is that an interdict granted in a totally different state of circumstances should be continued when such a change of circumstances has taken place. The statute expressly states, with reference to a disclaimer, which in itself was a considerable privilege granted to patentees, that, as a condition of the disclaimer being entered, it should be necessary to take care that there should be no proceeding in respect of any alleged infringement or breach of the patent anterior to the disclaimer unless the Attorney General should certify that it was fit and proper that such proceeding should be had.

In the very disclaimer which we have before us the reasons of the disclaimer are stated to be these: "Whereas it has been alleged that before the date of the said letters-patent certain experimental tools had been made for expanding the ends of boiler tubes somewhat similar in action to those described in the specification," therefore he disclaims them. That, in other words, means that it has been alleged that his patent is not new, and I think one may assume, this disclaimer having taken place, that that which is alleged is not very far from being the fact. At all events, it was an admission on his part that there was that allegation, and that he was not prepared to maintain the contrary, and therefore he thought fit to disclaim.

Now, my Lords, this observation arises upon that with regard to the interdict which has been granted. The interdict had been granted upon a specification of patent which, as the noble and learned Lord who preceded me has said, was not disputed in respect of novelty; but if the Court had been informed of as much as the patentee appears afterwards to have been informed of with respect to these allegations and the nature and substance of them, it might very well have held, and in all probability would have held, that the patent on which it was asked to grant an interdict was a patent which was void for want of novelty.

The patentee's next statement in the recital is,—“Whereas experience has shewn that such tools, in consequence of such disadvantage, are of small practical value;” and then again, “whereas experience has shewn that the supplementary combinations,” which he refers to in words, “are not of any great practical value;” in other words, he has been informed that his patent was for a thing which was useless, and which, therefore, might be avoided upon those two grounds. He says he has been so informed—of course that does not tell you that he acquiesces in that, or that he has acted upon it, but he has acted in making his disclaimer in consequence of apprehensions excited in his mind both as to novelty and as to usefulness with regard to his invention.

However, it is very satisfactory that we have not to determine the case upon

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these grounds, for our doing so would only put the parties to more expense and inconvenience than they must have been already subjected to, as all parties unfortunately are in these heavy patent litigations. Consequently, with more satisfaction, I approach the substantial merits of the case.

My Lords, I have come to the conclusion that that which the respondents are proved to have done in constructing their machine is not an invasion of that which the appellant has chosen to protect by his letters-patent. Now, let us see what has been claimed by the patent. When the disclaimer has been duly recorded you find the appellant claiming this: He claims that which he describes in full, namely, certain rollers whereby the metal tubes are expanded by rolling. The combination that he prefers is that of three rollers and a tapering tool, which, by its insertion between these rollers, does two things—it communicates motion to the rollers, and it also, by its tapering form, gets “swallowed up,” as it has been termed both by the Court and by some of the witnesses, in the process of its rotating motion, as it proceeds by that rotating motion to enter in between the rollers, and gradually assumes a larger diameter; that larger diameter necessarily presses upon the rollers, which are also at the same time set in motion, and so, pressing against the rollers laterally, forces these rollers from the centre against the sides of the tube more and more as it advances in between them. This appears to have been an ingenious invention, and something, apparently, very superior to the former mode of expanding boiler tubes by the means of swages put in, and the insertion of an instrument in the midst of those swages for the purpose of forcing them out, that forcing being effected by means of a hammer.

The appellant mentions certain modifications in the disclaimer, and having stated what portions of his patent he has disclaimed, he proceeds to state, in one uniform consecutive narrative, what remains of his patent after the disclaimer. He uses these words towards the close:—“In the above described modifications of the roller expanding tool rollers are combined with a tapering plug (or its equivalent, by whose action the rollers are forced outwards in the tube), and with a stock or holder by which the rollers are prevented from twisting sideways as they are turned round in the tube.” Then he says,—“What is claimed, therefore, as the invention to be secured by letters-patent” (it is plain and simple enough), “is the combination in an expanding tool of the following implements, namely, the rollers, roller stock, and expanding instrument, these three operating in combination substantially as set forth.”

Now, my Lords, there can be no doubt whatever that the appellant has described, first of all, a compound thing, namely, an expanding tool,—he has described equally distinctly the three separate parts of that compound thing, and he claims those three separate parts in combination. He does not claim them separately; he would have been very unwise if he had done so, because I apprehend expanding metal by rolling it is a very old process indeed, and the use of friction rollers is also a very old invention. But the ingenuity consists in this case in the introduction of cylindrical rollers capable of being pressed out laterally by means of making the journals to move in a slot, and, whilst so capable of being pressed out, introducing amongst them that which will gradually drive them out from their centre nearer and nearer to the tube to be expanded, because there is a gradual tapering form in the plug which effects this operation. These are three perfectly distinct things, and the expanding instrument is as plainly as possible in that claim distinguished from the thing called

the expanding tool in the former part of the patent, which is the whole machine in its complete form. Therefore, the three parts are the rollers, the roller stock which support the rollers in order that they may be so operated upon with safety by the expanding tool, and the expanding instrument, the thing which produces the expansion by forcing them outwards, "these three operating in combination substantially as set forth."

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When that is compared with the original letters-patent before the disclaimer if there was any doubt at all about the meaning, that doubt would be at once resolved by seeing that he says something very similar there. In the letters-patent of 1866 he says: "In all the above described modifications of the roller expanding tool" (that is, the whole instrument), "at least one roller is combined with a tapering plug (or its equivalent, by whose action the roller is forced outwards in the tube), and with a stock or holder, by which the roller is prevented from twisting sidewise as it is turned round in the tube. These three instrumentalities are all that are absolutely essential to the construction of the roller expanding tool." He says there that he has a combination, that that combination is what he describes it as being after the disclaimer, just as he had done before, namely, the three instruments, the rollers themselves, the roller stock (that which holds the rollers together) and the tapering tool. "But," he proceeds to say, "the cutter and ratchet handle" (which are afterwards disclaimed) "constitute with the said instrumentalities or implements useful combinations which are supplementary to the aforesaid fundamental combination. What is claimed, therefore, as the invention to be secured by letters-patent is the combination in an expanding tool of the following implements, namely, the roller, and roller stock, and expanding instrument, these three operating in combination substantially as set forth." Those are the very words in the claim in the patent after the disclaimer has been made, and coupled with the preceding portion of that paragraph in the patent of 1866 you see plainly and clearly, if there were any doubt at all on the subject,—to my mind I confess there was no doubt before,—what is the nature of his claim. It is a claim of those three things in combination, and the question now is, whether or not that combination has been infringed by the respondents.

Now, my Lords, I am content, as to that part of the case, to refer to the view taken by the Lord President, which appears to me very neatly and clearly to express what the differences are. He says,—“The question comes to be whether the tool now used by Thomson comes within the description of the original patent. The tool lately used by Thomson certainly differs from Dudgeon's tool in some very remarkable particulars, and the question is, whether these variations take it out of the patent. In the first place, the rollers of Thomson's tool are not made to diverge from the axis of the tool, and therefore it is by no such divergence that they are made to press against the tube,” the fact being that the rollers of the respondent Thomson are themselves made of a conical form, with a varying diameter; and the consequence is that the whole tool itself (as distinguished from the dilating instrument, which is the tapering plug), has a wedge-like form, and is pushed forward in the tube and enters into the tube, instead of a central tapering plug being used which causes the cylinders to diverge, and which tapering plug alone enters into the tube that is to be dilated.

Then he says,—“No doubt Thomson uses rollers, and to make these rollers work he is obliged to use a roller stock, but with these two points the resemblance comes to an end. Thomson's rollers are fitted in a different way for a

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A good deal of ingenuity has been used upon a model which was shewn to Mr Bramwell by picking out parts of the patent (I do not intend to enter into it in detail) with a view to shew that you may so arrange matters that, according to the patent which the appellant has now obtained, you may, by some contrivance, also take care that the tapering plug itself should, under certain modifications, be swallowed up as it were into the body of the tool, that is to say, between the cylinders, and that the tool as a whole should be pushed forward, as is done in Thomson's arrangement. But that evidently was not the form which was ever adopted or has ever been used by the appellant, and, in fact, as far as there is any evidence on the subject some of the witnesses appear to say that they do not think such a form could be made useful. It is enough for me to say that there is nothing of the kind shewn to have been practically used, and that I do not think that such a thing could be fairly and properly pieced out from those portions of the specification which were selected for that purpose.

It appears to me, my Lords, to be plain that all that Dudgeon, the present appellant, has claimed is that combination which he has formed of the three things that he has described, and of which everything is an essential part, the plug being as essential as the rest, and the introduction of a cylinder instead of a plug at once puts an end to any notion whatsoever of its being a tool for the purpose of enlarging the tubes in which Dudgeon's instrument is introduced, because if you were to introduce a cylindrical plug instead of a tapering plug it is quite plain and manifest that you would produce no action whatsoever upon the sides of the tube,—you would communicate what Mr Aston has two or three times told us is life and energy to the machine; but I apprehend if he had taken out a patent merely for the purpose of communicating life and energy to a machine by the introduction of a cylindrical roller between other rollers he would have found that the patent would have been of very little use or service to him. That patent would have been for an invention which, I apprehend, has existed for many years, indeed long before the existence of this patent. It could only be pieced out in the way I have mentioned by saying,—If you take off the collar and do that which the rest of my patent rather indicates is not the course to be taken, you may, by putting the rollers on cylinders which you use as rollers askew, so contrive as to form a combination by which, when the

cylindrical plug is swallowed up by the others, and the others are askew, you may get an instrument something like that which Thomson has invented, or at least has used. I am not speaking of its novelty,—novelty is not necessary to Thomson,—but something which Thomson has used, and which he seems to have used very effectively.

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It appears to me that nothing of that kind is contemplated in the original patent. The original patent over and over again, both before and after the disclaimer, states that this tapering plug is the great and necessary ingredient or one of the three necessary ingredients of the combination. That plug has not been taken by Thomson; Thomson therefore has not made the same combination, neither that combination nor anything like it in fact, in his arrangement. His is a totally different arrangement—that by which the whole tool itself as distinguished from the tapering instrument is made to have a wedge-like or conical bearing, and having that wedge-like or conical bearing is introduced into the tube and is so made to have the effect and perform the operation required. The circumstance that you may by the introduction of that cylindrical roller set the whole in motion does not make it an infringement. The appellant cannot say to Thomson, You are not at liberty to use a well known means of propelling any cylinder or roller with both a progressive and an expanding motion, and my patent is a protection against your adopting that form of communicating motion to rollers. I apprehend there is nothing of that kind claimed in the patent. If there had been anything of that kind claimed, the patent certainly, as it appears to me, could not have been sustained. I think therefore it is quite clear that what Thomson has done is no invasion of anything that the appellant is entitled to claim as being within the protection of his letters-patent.

LORD BLACKBURN.—My Lords, I am also of the same opinion, and I agree with what has been said by the noble and learned Lords who have spoken before me, that there has been a mistake or misapprehension in the manner in which this question has been raised in the Court below. Whilst the old specification remained as it originally was there was an interdict against infringing it in any way, and as long as it remained as it originally was it would have been a very idle and vexatious thing to commence a new action in the same Court for an infringement of that patent for which an interdict had already been granted; and therefore the right course would have been to say, that interdict standing, raise your question upon an action for a breach of that existing interdict, and to that it would have been a perfectly good answer to say,—What I have done is no breach of that interdict for it is no infringement of the patent as then explained and defined by the existing specification. But there had been a disclaimer which altered the specification, and by altering that specification altered the patent for which it had been granted. I will not repeat the reasons which have been given by both the noble and learned Lords who have preceded me for saying that when that was the case it was not right to make an application for a breach of the interdict which prohibited the infringement of the old patent with the old specification, but that there ought to have been a proceeding for a new breach of the new specification of the patent in which the same question which has been now raised, which seems to have been the real question between the parties, could have been raised, namely, whether or not what was done by the defenders was really a breach of the patent as defined and ascertained in the new specification. The same question was really raised but it was raised in an

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irregular manner, and I perfectly agree with what the noble and learned Lords have said that we ought not to allow it to pass with the supposition that the House of Lords sanctions that irregular manner of proceeding, although, at the application of the parties, we give an opinion and advise the House as to what the decision in law should be upon the question which goes to the merits, and which, if it had been properly raised, would have been still the same question, namely, whether what the defenders have done is or is not an infringement of the patent as defined and ascertained by the existing specification.

Now, my Lords, as to that I agree with what was said by the noble and learned Lord on the woolsack, that the question is whether it is an infringement of the patent, a taking of a part of the property in the use of that invention which has been given by the letters-patent. The phrase "colourably" is very apt to mislead in these cases. If part of the property in the invention be really taken, there is an infringement, however much that may be disguised or sought to be hidden. If that is detected by the patentee, and if what is taken is really part of his property, given to him by the letters-patent, he has a right to proceed against the infringer, however ingeniously the colours may have been contrived to try to conceal the fact that there has been a taking of part of the property. But for all that it is not correct to say that doing anything that answers the same object is necessarily an infringement of the specification; we must look at what is shewn in the specification. The term and condition of the patent is that the patentee shall "particularly describe and ascertain the nature of the invention and in what manner the same was to be performed." Accordingly, we look at the specification to see what is the nature of the invention for which the patent has been taken out as described and ascertained by the specification.

It may be that the question arises whether the particular thing is or is not within the specification. That question arises in the present case. It is said that the tool made by the respondents comes within the specification and is an infringement of the patent. In such a case it is the interest of the patentee to give the specification as wide a meaning as he can give it, in order to make it take in the thing done by the alleged infringer. It might have been that it was the other way, and that the thing was known to be old, and then of course the patent might have been upset by shewing that it included an old thing. Then the position of the parties would have been reversed, and the interest of the patentee would then have been to argue that the true construction did not include this. But whether it is for the interest of one side or the other I apprehend the duty of the Court is fairly and truly to construe the specification, neither favouring the one side nor the other, neither putting an unfair gloss or construction upon the specification for the purpose of saving a patent if it is said that the patent is void, nor putting an unfair gloss or construction upon it in order to extend the patent and making it take in something which you may think was an unhandsome taking of the fruits of his invention from the patentee, if it is not really an infringement of the patent.

Now, my Lords, taking that view, we come to what I take to be the real question upon the merits. Waiving the prior matters which I have previously mentioned the real question upon the merits is, what is the true construction of this specification as it stands. I have already pointed out that the words of condition have nothing about claiming. You may have a perfectly good specification without the word "claim" or the thing "claim" in it at all, but never-

theless a claiming clause is commonly inserted at the end of a patent, and that is of immense importance in enabling us to construe the specification, and to see, looking at the whole specification, whether a thing is included in it or not.

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Now, my Lords, I turn back to this passage in the specification. I do not intend to go through much which has been said before me upon the mechanics, for I assume that that is in the minds of the noble Lords already. In every one of the instances which the appellant gave, in every one of the machines which were worked, there was a tapering plug, or in the case where there were toggle-jointed levers which was afterwards disclaimed there was there a matter which forced apart the external pressure rollers which were brought in contact with the sides of the tube. That being so, he says, "in all the above described modifications of the roller expanding tool" (that is the name he gives to his whole tool), "at least one roller is combined;" in his amended specification, having struck out the words "one roller," he says "rollers are combined, with a tapering plug (or its equivalent, by whose action the rollers are forced outwards in the tube), and with a stock or holder by which the rollers are prevented from twisting sidewise as they are turned round in the tube." So it stands in the disclaimer. Then he goes on: "What is claimed, therefore, as the invention to be secured by letters-patent is the combination in an expanding tool of the following implements, namely, the rollers, roller stock, and expanding instrument, these three operating in combination substantially as set forth."

My Lords, I think upon that, as it stands after the disclaimer, there can be no reasonable doubt in construction that what is meant by the expanding instrument is that which was previously called, in the earlier part, "a tapering plug (or its equivalent, by whose action the rollers are forced outwards in the tube)." That is the meaning of "the expanding instrument" in the combination of those three which he claims, and he claims that combination only. The word "therefore" shews it even there. But when we take, as I apprehend we are entitled to take, the old specification before the disclaimer, in order to see what it means, that becomes still clearer. I say we are entitled to take it, for the object of a disclaimer is merely to take out and renounce part of what had been claimed before, and it would vitiate the new specification if, by striking out that part, you gave an extended and larger sense to what is left, so as to make it embrace something which it did not embrace before. I do not think that is done here. After having mentioned the three, the original specification said,—“These three instrumentalities are all that are absolutely essential to the construction of the roller expanding tool; but the cutter and ratchet handle” (that is, a thing which is disclaimed) “constitute with the said instrumentalities or implements useful combinations, which are supplementary to the aforesaid fundamental combination.” What is claimed, therefore, is the combination. I do not think that, looking at that, anybody could doubt for a moment what he means when he says that the combination he claims is “the aforesaid fundamental combination,” and that aforesaid combination is in express terms said to be the three instrumentalities which are all that are absolutely essential, and the three instrumentalities which are all that are absolutely essential include a tapering plug, or its equivalent, by whose action the rollers are forced outwards in the tube. It seems to me that when you look at that, it is said as plainly as it could be said by any words which could be used for the purpose that the person who drew the specification meant to claim these three instrumentalities in combination, one of them being a tapering plug, or some other instrumentality, which forced

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outwards the external rollers which were in contact with the tube. That is the thing which is described, that is the combination in all the machines which he makes, and it seems to me to be clear, therefore, that that is what the claim is confined to.

Now, what is made by the defender is no tapering plug at all. It does not force the rollers outwards. What he does is having the rollers upon, not a tapering, but a cylindrical plug. He has made those rollers tapering in themselves, and the whole tool is drawn in and produces a pressure, certainly bringing about the same result, in pressing the sides of the tube so as to make it steam-tight. But that was old enough; it had been done long before. The defenders produce that result, but they do not produce it in the same way as the appellants.

I do not mean, my Lords, to overlook an argument which has been used as to something being suggested in the specification, though it is admitted, that it is nowhere in terms pointed out. It is put thus: After having described the machine with a tapering plug, which, as it went in, would force the rollers apart, the appellants says,—“The tapering plug may have a shallow flat screw thread formed upon its surface, so that it will draw itself inwards as it is turned by hand; but such a thread is not essential to the successful operation of the instrument. Or, in place of such a thread, the slots which hold the journals of the rollers may be slightly skewed, so that the axes of the rollers will be slightly skewed to the axis of the tube, the effect of which is to cause the tapering plug, when turned in one direction, to draw into the tube, and when reversed, to loosen itself between the rollers.” Now, there he states, Take your tapering plug, which goes in, and put upon it the thread of a screw, so as to make it what is commonly called a male screw, and it will draw itself in between the rollers. But you need not do that, for if you put the slots so as to make the roller slightly askew the effect of that will be to make the inside of those rollers become what is commonly called a female screw, and they will consequently draw in the plug just as much as a male screw would have done, and probably that would in fact be the effect. With regard to the questions about friction, I think we need not consider what Mr Bramwell says on that point, although it has been repeated in the argument.

It is quite true when you say “I have made the rollers slightly askew so as to form a female screw in the inside,” it necessarily follows to any one who has once thought of the matter that putting a roller in that way will make the outside of it a male screw, and consequently if you think a little further it will follow that if it be put in the tube and turned that male screw outside will draw the whole tool into the tube, just as the female screw inside draws the conical plug into the inside. That is true enough, but I do not think that that suggestion, which very possibly may have given a hint to the defender as to what he was to do, could, taken by itself, be at all said to “particularly describe and ascertain the nature of the invention.” I think this remote hint given in one part of the specification would not be enough to do that. If the person who drew the specification had thought of it, which very likely he did not, he might have brought it in, if he had not been afraid, as very likely he was, with some good reason, that he would make the patent bad by claiming too much. What was in his mind I do not know,—whether he thought of it and deliberately said, “I will not risk making the patent bad by claiming this,” or whether he did not think of it at all, and therefore did not describe it.

I can only say this, when I come to the end of the specification in which he points out in words what he "particularly describes and ascertains as the nature of his invention," I find that he distinctly and pointedly says that he claims the combination, and nothing but the combination, of three instrumentalities, one of which is the tapering plug or instrument which has the effect of forcing the outer rollers asunder. It seems to me that he claims that and nothing but that, and the respondents have done what they had a perfect right to do; having avoided infringing that combination, they have produced the same result by other means, which there was nothing to prevent them from doing.

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LORD GORDON concurred.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

WILSON, BRISTOWS, & CARPMAEL—JOHN HENRY, S.S.C.—GRAHAMES & WARDLAW—WEBSTER & WILL, S.S.C.

STEEL AND CRAIG, (Pursuers) Appellants.—*Benjamin, Q.C.*—*Watkin Williams, Q.C.*

No. 14.

THE STATE LINE STEAMSHIP COMPANY, (Defenders) Respondents.—*Cohen, Q.C.*—*Mathew.*

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Ship—Bill of lading—Seaworthy ship.—A bill of lading, after the obligation on the shipowner to deliver the goods, a quantity of wheat, in like good order and condition as when shipped, contained a clause stipulating that the shipowner should not be liable for the negligence of the crew. In an action at the instance of the shipper against the owner, concluding for damages "caused by and through the insufficiency of the hull and appurtenances of the vessel, or by and through the gross carelessness and negligence of those in charge thereof for whom the defenders are responsible," an issue was sent to trial whether the wheat was received in good order and condition, and whether the shipowner had in breach of the undertaking contained in the bill of lading failed to deliver it in the like good order and condition.

The jury returned a special verdict finding that the wheat had been damaged by sea-water, and that through the negligence of some of the crew one of the orlop-deck ports was insufficiently fastened, and "that in consequence the said sea-water was thereby admitted to the hold after the ship had been five days at sea."

The First Division, in applying the verdict, held that the clause exonerating the shipowner from liability for loss caused by the negligence of his servants applied, and entered up the verdict for the defenders.

In an appeal held that the special verdict had not exhausted the case, as it did not find whether the ship was or was not seaworthy at the commencement of the voyage, and that a new trial must take place.

(SEE Court of Session report in present vol., March 16, 1877, p. 657.)

Steel and Craig, grain merchants, Glasgow, raised this action in the Sheriff Court against the State Line Steamship Company, concluding for damages in consequence of 15,000 bushels of wheat which had been delivered to the defenders in good condition at New York for carriage to Glasgow, "having been, between the 6th and 14th September 1875, by and through the insufficiency of the hull and appurtenances of the vessel, or by and through the gross carelessness and negligence of those in charge thereof, for whom the defenders" are responsible, injured and deteriorated by contact with sea-water, which, from one or other of the said causes, flowed into the main hold of the said vessel.

Ld. Chancellor
(Cairns).
Ld. O'Hagan.
Ld. Selborne.
Lord Black-
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The pursuers founded on the terms of the bill of lading, which bore,—“Shipped in apparent good order and condition 15,409 bushels wheat in bulk, &c., and to be delivered from the ship's deck, when the ship's responsibility shall cease, in the like good order and condition, at the port of Glasgow (weight, &c. unknown). Not accountable for leakage, breakage, . . . however caused. Not responsible for the bursting of bags, or consequences arising therefrom, or for any of the following perils, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or persons in the service of the ship, or for whose acts the shipowner is liable or otherwise,—namely, risk of craft or hulk, or transshipment, explosion, heat or fire at sea in craft or hulk, or on shore, boilers, steam, or machinery, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, collision, straining, or other peril of the seas, rivers, navigation, or land transit, of whatever nature or kind soever and howsoever caused, excepted.”

The pursuers averred ;—(Cond. 5) “The said injury was caused either by the insufficiency of the hull and appurtenances of the said vessel when she left New York, or by the gross carelessness and negligence of those in charge of the vessel for whom the defenders are responsible. When the said vessel left New York she was not in a seaworthy condition, in respect one of her side ports was open, or, at least, not sufficiently secured or fastened to prevent the influx of water into the hold, and the said port was allowed to remain open or insecurely fastened through the gross carelessness of those in charge of the vessel.”

The pursuers pleaded ;—The pursuers having sustained loss “through the unseaworthiness of the defenders' vessel and the failure of the defenders to fulfil the said contract of carriage and safe custody, are entitled to decree for the sum sued for.”

The defenders' answer to art. 5 of the pursuers' condescendence was—“Denied as stated, but explained that, on 6th September, when the ‘State of Virginia’ was about 1100 miles from New York one of her side ports was burst open to some extent by the heavy seas which she encountered, and water flowed into the hold through said port. Admitted also that the cause of the leak was not discovered until the water had got up amongst the cargo to the height of several feet. *Quoad ultra* denied, and reference made to the defenders' statements.”

The defenders stated ;—(Stat. 5) “When the said vessel left New York she was seaworthy in every respect. The port which was in the course of the voyage partly burst open was provided with proper and usual fastenings to exclude sea-water and prevent damage to cargo.” The pursuers' answer to this article was—“Denied, and reference made to the condescendence.” (Stat. 6) “It was the duty of the master and company of the vessel to see that the said port was properly fastened before the voyage began, and that it was not interfered with thereafter. The defenders have made every inquiry, but have been hitherto unable to discover the cause of the said side port not resisting the pressure of the seas. The defenders' information is, and they aver, that the master and crew of said steamer did use reasonable care to secure and keep secure said side port, notwithstanding which, or from the negligence, default, or error in judgment of the master, mariners, or other persons in the service of the ship ^{and} employed in the stowage of the cargo at New York, for whom the defenders, in the absence of stipulation to the contrary, would be responsible, the particular person in fault being to the defenders unknown. the port before mentioned, in the course of the voyage, from the perils of the sea or navigation, was burst partly open as before mentioned, and the

damage alleged by the pursuers happened to the wheat." And then follows this statement :—" After the cargo was loaded the inside face of the said port could not be seen or got at without taking out the cargo."

The case was appealed to the Court of Session for trial by jury.

The issue adjusted and subsequent proceedings in the Court of Session are narrated in the Court of Session report, *post.*, p. 657.

In the discussion in the First Division on the application of the special verdict the argument turned exclusively on the effect of the exemption clause in the bill of lading, and the question of seaworthiness was not raised.

The pursuer appealed to the House of Lords.

LORD CHANCELLOR.—Your Lordships have had the advantage in this case of a long and interesting argument upon points which are no doubt of great commercial importance. There is some difficulty in the case by reason of the course which it has taken in the Court below; but I think when your Lordships consider the whole of the facts, so far as they appear, and the arguments which your Lordships have heard, there cannot be much doubt as to the result at which your Lordships should now arrive.

The question arises upon the shipment of a considerable quantity of wheat at New York in one of the State Line steamers named the "State of Virginia." The appellants are the indorsees of the bill of lading of that wheat; but, having regard to the provisions of the Bills of Lading Act (18 and 19 Vict. c. 111, sec. 1), they are onerous indorsees, and they stand in the position of the original shippers. They have whatever right of action the original shippers had, and I may speak of them as if in point of fact they had been the shippers of the wheat. Now, my Lords, on the shipment of the wheat a bill of lading was given, and I will, in the first place, direct your Lordships' attention to that bill of lading. The bill of lading contained in it an affirmative portion and also a portion which we may call a negative portion, or rather a portion which, by way of exception and curtailment of some antecedent liability created by the earlier part of the bill of lading, endeavours to protect the shipowners from certain consequences. The affirmative part of the bill of lading is this—It states that the wheat in question, marked and numbered as in the margin, has been shipped, and is "to be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good order and condition, at the aforesaid port of Glasgow." It is an engagement, therefore, to carry and to deliver at a certain port in this kingdom the wheat so shipped on board. My Lords, what is the meaning of the contract created by those words, supposing they stood alone? I think there cannot be any reasonable doubt entertained that this is a contract which not merely engages the shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation and an engagement—a contract—by the shipowner that the ship on which the wheat is placed is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to undertake and perform. Reasonably fit to accomplish that service the ship cannot be unless it is seaworthy. By "seaworthy," my Lords, I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and loaded in that way, may be fairly expected to encounter in crossing the Atlantic. My Lords, if there were no authority upon the question it appears to me that it would be scarcely possible to arrive at any other conclusion than that this is the meaning of the contract. I took the liberty of asking the learned counsel for the respondents whether they were prepared to say that if

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the owner of goods engaged room in a ship of this kind, and bringing his goods alongside at the time the ship was ready for departure, found that the ship was not seaworthy, he could not refuse the fulfilment of his promise to put his goods on board, and whether, on the other hand, he could not maintain proceedings against the owner of the ship for not having accommodation for his goods in a ship that was fit to carry them. I did not understand the learned counsel for the respondents to be able to say that that was not the relative position of the owner of the goods that I supposed and the shipowners,—that, on the one hand, the owner of the goods was not entitled to refuse to put his goods on board, and, on the other hand, the owner of the ship did not incur liability by not having a ship fit to fulfil the engagement he had entered into. But, if that is so, it must be from this, and only from this, that in a contract of this kind there is implied as part of the contract an engagement that the ship shall be reasonably fit for performing the service which she undertakes.

In principle I think there could be no doubt that this would be the meaning of the contract; but, having regard to authority, it appears to me that the question is really concluded by authority. It is sufficient to refer to the case of *Lyon v. Mells*,¹ in the Court of Queen's Bench, during the time of Lord Ellenborough, reported in the fifth volume of *East*, and to the very strong and extremely well-considered expression of the law which fell from the late Lord Wensleydale when he was a Judge of the Court of Exchequer and was advising your Lordships' House in the case of *Gibson v. Small*.² My Lords, that being, as I submit to your Lordships, the effect of the earlier part of the bill of lading, it then becomes material to consider—still upon the construction of the bill of lading—what is the effect of the latter part—the qualified or exceptional part—of the bill of lading. The bill of lading is not very happily expressed as regards its grammar and the collocation of the words, but it is not necessary to be minute in any criticism upon the collocation of the words. I will assume, in favour of the respondents, that everything which is mentioned between the words "not responsible" and the word "excepted" is meant to be matter in respect of which there is to be no liability on the part of the shipowner. But, my Lords, looking at all that is mentioned between those two termini in the bill of lading it appears to me that everything which is mentioned is matter subsequent to the sailing of the ship with the goods on board. There is mentioned there "the bursting of bags, or consequences arising therefrom, or for any of the following perils, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or persons in the service of the ship, or for whose acts the shipowner is liable or otherwise; namely, risk of craft or hulk" (which was found by the verdict, which I shall afterwards have to refer to, not to mean the risk of the ship herself), "transhipment, explosion, heat or fire at sea in craft or hulk, or on shore, boilers, steam, or machinery, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, collision, straining, or other peril of the seas, rivers, navigation, or land transit, of whatever nature or kind soever and howsoever caused, excepted." My Lords, the only attempt to give to any of those words a meaning which would refer them to what happened antecedent to or at the time of the departure of the ship was to construe the words "peril of the sea," "howsoever caused," so as to make them point to unseaworthiness, ending in a loss at sea. But it appears to me to be obvious that what is here referred to as

¹ 5 *East*, 428.

² 4 *H. L. C.* 395.

peril of the seas is, as described, something which happens on the transit, No. 14.
 whether land or sea transit, and that of course does not commence until the ship
 leaves the port. Therefore, if it be the case, as I submit to your Lordships it is, July 20, 1877.
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 that there is in the earlier part of the bill of lading an engagement that the ship
 shall be reasonably fit to perform the service which she undertakes, there is, in
 my opinion, nothing in the latter part of the bill of lading which qualifies that
 engagement.

Now, my Lords, that being the view of the construction of the bill of
 lading which I shall submit to your Lordships, let me proceed to apply it to
 what is found to have occurred in the present case. With regard to the
 pleadings, there is a statement in the fifth article of the condescendence of the
 pursuers (the appellants), that "when the said vessel left New York she was not
 in a seaworthy condition, in respect one of her side ports was open, or at least
 not sufficiently secured or fastened to prevent the influx of water into the hold;
 and the said port was allowed to remain open or insecurely fastened through the
 gross carelessness of those in charge of the vessel," and the result was that water
 flowed into the hold through the said port, and so little care was taken of the
 cargo that there were about fifteen feet of water in the hold before the fact of
 the leakage was discovered; and it is the damage done to the wheat in conse-
 quence of this influx of water which forms the subject of complaint in the
 action. There is a denial to that, but it is explained "that on the 6th Sep-
 tember, when the 'State of Virginia' was about 1100 miles from New York,
 one of her side ports was burst open to some extent by the heavy seas which she
 encountered, and water flowed into the hold through said port." My Lords,
 that will shew your Lordships sufficiently the character of the allegation on the
 one side and on the other on that point, and to that I may add, in the statement
 on the part of the defenders, art. 3, it is said—"When the said vessel sailed
 from New York on the said voyage she was seaworthy;" and to that there is a
 denial that the "vessel was seaworthy when she sailed from New York." There
 is one other statement to which I will refer, in the condescendence; but
 upon the general averment and denial the first plea in law for the pursuers
 before the additional pleas was this—"The pursuers having sustained loss and
 damage to the extent foresaid, through the unseaworthiness of the defenders'
 vessel, and the failure of the defenders to fulfil the said contract of carriage and
 safe custody, are entitled to decree for the sum sued for, with interest and expenses."

My Lords, the case came on for a jury trial in Scotland, and the jury found
 on the issue, which I need not refer to particularly, a special verdict, and
 that special verdict finds, first, the shipment of the wheat, to be conveyed in
 terms of the bill of lading set out in the schedule; finds then that the wheat was
 carried to Glasgow and delivered to the pursuers, "who are the onerous indorsees
 of the said bill of lading;" that when delivered it was not in the same good
 order and condition in which it was shipped; then it finds as follows:—That
 "through the negligence of some of the crew one of the orlop-deck ports
 of the said steamship was insufficiently fastened, and that in consequence the
 said sea-water was thereby admitted to the hold after the ship had been five days
 at sea: Find that, as the ship was loaded, the said port was situated about a
 foot above the water-line, and that if properly fastened by means of the screws
 thereto attached, the said port would have been water-tight throughout the
 voyage: Find that the said sea-water was not admitted to the hold until the
 morning of the 6th September, and that for the first seven days of the voyage

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the weather encountered was substantially as set forth in the mate's log," which forms part of the process. And then it finds that if there is damage to be recovered, it is of a certain amount.

Now, my Lords, looking to this special verdict, and looking to that alone, for the facts with which we have to deal, it appears to me that if our attention was confined merely to that special verdict there would be very great incertitude and ambiguity as to what the facts really were. There is mention of a port-hole which at the time the ship sailed was a foot above the water-line. It is stated that there were screws attached to the port-hole, by which it could be fastened, and that if fastened by means of these screws the ship would have been water-tight throughout the voyage. It is found that the port-hole was insufficiently fastened, but when and at what time is not stated in the special verdict. Consistently with this special verdict it may well have been that either of two states of things occurred. Consistently with this verdict, it might have been that there was no want of fastening the port-hole when the ship sailed; that the port-hole may have been unfastened afterwards for any particular purpose, and then left insufficiently fastened, and that all this occurred in the course of the voyage through the negligence of one of the sailors; and if so, probably that would be a matter which would be covered by the exceptions in the bill of lading as a case of negligence occurring during the transit of the goods. Or it may be, that if the port-hole (still looking at this verdict alone) was unfastened at the time of sailing of the ship, the port-hole may have been so situated, and the access to the port-hole such, as that at any moment, in prospect of any change of weather, the port-hole could have been immediately fastened; and that the ship at the time of her departure was perfectly free from any charge of not being adequate for the performance of the voyage which she had undertaken. On the other hand, there is a passage in the condescendence which, if it could be taken along with the special verdict, might raise at all events a suspicion, which in various minds might be more or less strong, that the state of things with reference to this port-hole at the time the ship sailed was such as that the state of the port-hole constituted a degree of unseaworthiness which could not at any moment, without considerable trouble, have been got rid of. My Lords, the passage to which I refer is this:—In the statement on behalf of the defenders in the action, the sixth number, it is said—"It was the duty of the master and company of the vessel to see that the said port was properly fastened before the voyage began, and that it was not interfered with thereafter. The defenders have made every inquiry, but have been hitherto unable to discover the cause of the said side port not resisting the pressure of the seas. The defenders' information is, and they aver, that the master and crew of said steamer did use reasonable care to secure and keep secure said side port, notwithstanding which, or from the negligence, default, or error in judgment of the master, mariners, or other persons in the service of the ship ^{and} employed in the stowage of the cargo at New York, for whom the defenders, in the absence of stipulation to the contrary, would be responsible, the particular person in fault being to the defenders unknown, the port before mentioned, in the course of the voyage, from the perils of the sea or navigation, was burst partly open as before mentioned, and the damage alleged by the pursuers happened to the wheat." And then follows this statement:—"After the cargo was loaded the inside face of the said port could not be seen or got at without taking out the cargo." Now, my Lords, whether the ship at the time she left New York was or was not in a condition fit to perform the service which

she had undertaken with reference to these goods—whether she was or was not “seaworthy” in the sense in which I have used that term—was a question of fact, and in the view which I have taken of the construction of the bill of lading it was a question of fact which lies at the very root of this case. But your Lordships do not find in the special verdict, as I read it, any answer whatever to that question of fact. And, my Lords, although the Court in Scotland thought themselves able to apply the verdict and to enter upon it a judgment for the defenders, and although the appellants in the first instance asked your Lordships here to reverse that judgment and to enter a judgment for them, I think it has come to be admitted in argument on both sides that if the construction of the bill of lading be such as I have submitted to your Lordships it is, there is not here now any finding upon the question of fact whether the ship was or was not seaworthy, upon which judgment can be entered either way. Therefore I fear, although I regret the result, that nothing can be done by your Lordships now but to remit this case to the Court of Session in Scotland, and to direct that a new trial shall be had. On the occasion of that new trial it appears to me that it will be the duty of the learned Judge who conducts it to obtain from the jury an answer to this question of fact, to direct the jury’s attention to those circumstances to which I have referred, and to whatever evidence may be given with reference to those circumstances, and to obtain from the jury an expression of opinion as to whether the ship at the time she left New York was seaworthy in the sense in which I have used the term. Of course, in arriving at that conclusion the precise and accurate consideration of the state of this port will become very material. It may, on the one hand, be that the port, if open when she left New York, was not occasioning any danger whatever to the ship so long as calm or moderate weather prevailed, and it may be that the port was so circumstanced that upon any approaching change of weather it might immediately have been closed and fastened down; or, it may be, on the other hand, that the cargo was so loaded that the fastenings of the port being from the inside, those fastenings were covered over by the cargo and rendered inaccessible, or rendered, at all events, inaccessible without such a removal or change of the cargo as would occupy a considerable time, and could not conveniently take place when the ship was at sea. Those are questions to which the attention of the jury should be directed, in order that they may say, after considering those matters, whether the ship at the time she left was in fact in a condition reasonably fit to perform the service of the conveyance of those goods without danger.

My Lords, the judgment of the Court of Session has been a unanimous judgment, but I do not see that, in point of fact, there was any opinion expressed by the learned Judges in that judgment which is at variance with the law as I understand it, and as I have endeavoured to submit it to your Lordships. What I mean is this;—I do not understand that any of those learned Judges would have said that if the question is, What is the construction of the affirmative part of this bill of lading? they would have placed that construction on any other footing than I have endeavoured to place it. But what it appears to me was the error, if I may respectfully say so, of those very learned Judges was this, that although at one part of the judgment they appear to recognise the construction which I have mentioned of the earlier part of the bill of lading, they seem afterwards to have been entirely occupied with the other part of the bill of lading, with the exceptions in it, and to have assumed

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No. 14. that those exceptions would be sufficient to wipe out or to destroy what was the stipulation in the earlier part of the bill of lading. My Lords, I say that for this reason: I find that the Lord President in the earlier part of his judgment expressed himself thus—"I think it is conceded on the part of the shipowners, the defenders here, that the object of the clause was to save them from all liability implied in the obligation to deliver in like good order and condition, except a liability which might arise from the unseaworthiness of the vessel. If they provided a seaworthy ship, tight, staunch, and strong, well manned and equipped for the carriage of goods, they say that, in consequence of the manner in which the clause of excepted risks is conceived they are free from all other liability." I understand the Lord President to recognise and to approve of that which he calls a concession in argument on the part of the shipowners, and I understand it to be a statement by the Lord President that the shipowners were bound to provide a "seaworthy ship, tight, staunch and strong, well-manned and equipped for the carriage of goods." And, my Lords, that is simply the proposition which I have submitted to your Lordships to be correct in point of law. I do not understand that any of the learned Judges differed from that proposition, and I again say it appears to me that the only miscarriage which took place was that, having so laid down their view of the law, they did not apply it correctly with reference to the verdict which they had before them, and with reference to the exceptions in the bill of lading. My Lords, I submit therefore to your Lordships that this appeal must be allowed to the extent of reversing the interlocutor of the Court of Session, and remitting the case with a declaration that there ought to be a new trial of the case.

LORD O'HAGAN.—My Lords, I completely concur in the observations of my noble and learned friend. I shall only say that I entirely concur in the view that a shipowner who accepts goods which he is to deliver in good order and condition impliedly contracts to perform the voyage in a ship which is seaworthy. The most persuasive reason and the most conclusive authority combine to establish that which appears to me to be a very plain proposition. In the second place, I have no doubt myself that the words of exception which are contained in the bill of lading in no degree denude the shipowner in this case from the liability so created. There remains a question of fact which is not in any decisive or unequivocal way determined by the special verdict in this case. It is therefore unfortunately necessary that the case should go back, and I entirely approve of the proposal made by my noble and learned friend.

LORD SELBORNE.—My Lords, I also entirely agree with my noble and learned friends who have preceded me as to the law to be applied to this case, and also as to the construction of the bill of lading. It was suggested by Mr Mathew in his able argument that the bill of lading covered risks by way of exception, some of which might occur during the loading of the cargo on board and the stowing of it in the ship. I cannot agree to that construction. It appears to me to be clear on the face of the bill of lading that it represents the goods as already shipped. It is given in duplicate in the ordinary course, and I also find that it is expressly stated by the pursuers in their condescendence that the wheat had been loaded on board the ship before and on the day which is the date of the bill of lading. I therefore quite agree that all the perils which are excepted are perils subsequent to the loading of the wheat on board the ship, and that they are capable of and ought to receive a construction not nullifying

and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken. No. 14.

My Lords, I also concur as to the course which it is necessary for your Lordships to take, and in the statement which has been made of the nature of the questions which will have to be investigated when the new jury trial takes place. Of course nothing that is said or done by your Lordships now will preclude the examination of the case upon the evidence of the new trial upon the substance of it. No words which may have been uttered by my noble and learned friends, or, I think, by any of your Lordships, were intended or can be taken to indicate any foregone conclusion as to facts not now before us. But we all agree that, looking to the issues raised and to the nature of the special verdict, those things are not found by the special verdict which are necessary for the satisfactory determination of the case.

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My Lords, my noble and learned friend on the woolsack has submitted his view of the opinions given in the Court of Session. I must own mine is upon that point not precisely the same with that of my noble and learned friend. It seems to me, from the language, particularly of the Lord President and of Lord Shand, that the course which the case really took in the Court of Session was this—It was assumed by those learned Lords, and I should think by all the Lords, that the contract of the shipowner was to provide a seaworthy ship, tight, staunch, and strong, well-manned and equipped for the carriage of the goods, and that if he did not do that there was nothing (I should so read the judgments) in the exceptions in the bill of lading to relieve him from that liability. But what I should myself collect is, that the learned Judges, applying themselves to the special verdict alone, and dealing with the case as if they had nothing to do but necessarily to enter a judgment for the one party or the other, found the special verdict to be insufficient to raise a case of anything more than negligence, default, or error in judgment on the part of the pilot, master, or persons in the service of the ship, and, as consistently with the special verdict that might have been during the course of the voyage, and was not found otherwise, I should conjecture that the learned Lords thought that the *onus probandi* upon that point lay with the pursuers and not with the defenders, and on that ground entered the judgment in the defenders' favour. Of course, my Lords, I agree with what has been said that that is not a satisfactory or a proper way of dealing with the case where the special verdict does not really find the material fact upon which the whole question turns.

LORD BLACKBURN.—My Lords, I entirely agree in the course which is proposed to be taken of sending the case down for a new trial, on the ground that this special verdict does not really find the cardinal fact upon which it depends, whether the judgment ought to be for the respondents or for the appellants. I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy, and I think also in marine contracts—contracts for sea-carriage—that is what is properly called a "warranty," not merely that they should do their best to make the ship fit, but that the ship should really be fit. I think it is impossible to read the opinion of Lord Tenterden, as early as the first edition of Abbott on

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Shipping, at the very beginning of this century, of Lord Ellenborough following him, and of Baron Parke also, in the case of *Gibson v. Small*,¹ without seeing that these three great masters of marine law all concurred in that, and their opinions are spread over a period of about forty or fifty years. I think, therefore, that it may be fairly said that it is clear that there is such a warranty or such an obligation in the case of a contract to carry on board ship. In the case of *Readhead v. The Midland Railway Company*,² which has been referred to, which was the case of a contract to carry passengers upon land, there had been a good deal of reasoning in the Exchequer Chamber to the effect that the obligation there was not to furnish a carriage which was absolutely perfect or land-worthy, but only to furnish a carriage which was fit as far as they could reasonably make it, which is a different kind of contract from what is now supposed. In the case of *Kopitoff v. Wilson*,³ where I had directed the jury that there was an obligation, I did certainly conceive the law to be that the shipowner in such a case warranted the fitness of his ship when she sailed, and not merely that he had loyally, honestly, and *bona fide* endeavoured to make her fit. The Court, when it came to be considered, had to see whether that did not clash with the reasoning in *Readhead v. The Midland Railway Company*, and we all agreed that it was immaterial to decide whether it did or not, because there was nothing in that case to raise the question whether there was an absolute warranty or merely a duty to furnish it as far as could properly be done. Nor, in truth, do I think that here that question would in all probability really arise, for here, if there was such a defect as would make the ship not reasonably fit to carry the wheat across the Atlantic, there can be no doubt that it must have been owing to negligence on the part of the shipowners or of their servants, and cannot be said to have arisen from that kind of latent defect which no prudence or skill could perceive. Now, my Lords, taking that to be so, it is settled that in a contract where there are excepted causes—a contract to carry the goods, except the perils of the seas, and except breakage, and except leakage—it has been decided both in England and in Scotland that there still remains a duty upon the shipowner not merely to carry the goods if not prevented by the excepted perils, but also that he and his servants shall use due care and skill about carrying the goods, and shall not be negligent. That has been determined in several cases, of which *Phillips v. Clark*⁴ is the leading one, and that decision has been followed in several cases. In the case of *Moes v. The Leith and Amsterdam Shipping Company*,⁵ decided in Scotland, the same thing seems to have been determined, namely, that where there is such an exception, if the shipowner or his servants are guilty of negligence producing the misfortune, they are liable on that account. I think myself that the proper and right way of enunciating it would be, in such a case, to say, if owing to the negligence of the crew the ship sinks while at sea, although the things perish by a peril of the sea, still, inasmuch as it was the negligence of the shipowner and his servants that led to it, they cannot avail themselves of the exception. It matters not whether that would be the right mode of expressing it or not; that is clearly established. They may protect themselves against that, and they do so in many cases by saying—these perils are to be excepted, whether caused by negligence of the ship's crew or the shipowner's servants or not. When they do so, of course that no longer applies.

¹ 4 H. L. C. 353.

² L. R., 4 Q. B., 379.

³ L. R., 1 Q. B., Div. 377.

⁴ 2 C. B., N. S., 156.

⁵ 5 Macph. 988, 39 Scot. Jur. 546.

I think that exactly the same considerations would arise here as to the implied duty—the duty which, though not expressly mentioned, arises by implication of law—on the part of the shipowner to furnish a ship really fit for the purpose. If that duty is neglected, and if in consequence of that neglect of duty, and in consequence of the ship not being fit, the ship sinks, as it did in the case of *Kopitoff v. Wilson*, or as in the case here, as it is alleged—I do not say that it is so, because that is a point not yet determined—the shipowner is liable. If, as is alleged here, a port gives way, and the seas come in and wet the wheat, and if it is in consequence of the ship having started unfit that that mischief is produced, it seems to me to be exactly like the case of *Phillips v. Clark*, where negligence not provided for by the contract occasioned the breakage or the leakage, which it was said was an exception, but which the Court determined was not an exception of which the shipowners could avail themselves, seeing that it was brought about by their negligence. So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist, then the loss produced immediately by that, though itself a peril of the seas which would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract he has provided against it.

Now, my Lords, I perfectly agree with what has been said by the noble and learned Lords who have already addressed you on the construction of this contract, that it does not provide at all for this case of an unseaworthy ship producing the mischief. The shipowners might have stipulated if they had pleased (I know no law that would hinder them)—“We will take the goods on board, but we shall not be responsible at all, though our ship is ever so unseaworthy;—look out for yourselves;—if we put them on board a rotten ship, that is your lookout; you shall not have any remedy against us if we do.” I say they might have so contracted, and perhaps in some cases they may actually so contract,—I do not know. Or the shipowner might, and that would have been more reasonable, have said, “I will furnish a seaworthy ship, but I stipulate that although the ship is seaworthy, and although I have furnished it, I shall only be answerable for the vitiation of your policy of insurance, if you have one, in case the ship turns out not to be seaworthy, and I will protect myself against any perils of the seas though the loss should be produced in consequence of or caused by that unseaworthiness.” They might have contracted in that way. I think that when this contract is fairly looked at it appears that they do not so contract as to apply it to this case. I think—and I agree there with the Court of Session—that they have here sufficiently expressed in the contract that they will not be responsible or answerable for the consequences of a loss by perils of the seas, or either of the excepted perils, even though it may be produced by the negligence of the mariners. I think that they have done that, and that is what the Court of Session appear to have thought was all that it was necessary to say. I agree with them that they have done so. But then, my Lords, for some reason or other—I cannot exactly make out what—the Court below lost sight of the fact that if there was a want of seaworthiness in the ship—using the common phrase, which is used as meaning, if the duty or obligation to make the ship reasonably fit for the voyage had not been fulfilled—if there was a want of seaworthiness in that sense, and that want of seaworthiness caused the loss, this contract did not protect the shipowners, and therefore it was incumbent upon them to see whether there was a want of seaworthiness, and whether it did produce the loss. The point was raised on the first plea in law distinctly, and then there were

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several additional pleas in law in which it was not raised, and it seems to have been lost sight of; and though the issue directed was so worded as to leave this open, it is so worded as to lead me to think that those who drew the issue were not thinking of this point (no doubt it would be open upon the issue, but it is not raised by it), and when there came to be a special verdict it was found that "one of the orlop-deck ports of the said steamship was insufficiently fastened, and that in consequence the said sea-water was thereby admitted to the hold after the ship had been five days at sea;" and then it was found that this port was about a foot above the water-line, and that the weather had been as is described in the mate's log.

Now, I cannot see that this special verdict finds whether or no there was a want of seaworthiness or reasonable fitness to encounter the ordinary perils of the voyage or not. I think that is left quite ambiguous and uncertain. I quite agree with what has been said, that it was a question of fact for the jury whether or no the vessel was made reasonably fit to encounter those ordinary perils. I think also that there are some views of the case in which, though it would still be a question of fact for the jury, there could not be much doubt about it one way or the other. If, for example, this port was left unfastened, so that when any ordinary bad weather came on and the sea washed as high as the port, it would be sure to give way and the water come in unless something more was done if in the inside the wheat was piled up so high against it and covered it so that no one would ever see whether it had been so left or not, and so that, if it had been found out or thought of, it would have required a great deal of time and trouble (time above all) to remove the cargo to get at it and fasten it, if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic. I think, on the other hand, if this port had been—as a port in the cabin or some other places would often be—open, and when they were sailing out under the lee of the shore, remaining open, but quite capable of being shut at a moment's notice as soon as the sea became in the least degree rough, and, in case a regular storm came on, capable of being closed with a dead light, in such a case as that no one could with any prospect of success ask any reasonable people, whether they were a jury or judges, to say that that made the vessel unfit to encounter the perils of the voyage, because that thing could be set right in a few minutes, and there is always some warning before a storm comes on, so that they would have plenty of time to put it all right, and it would have been put right. If they did not put it right after such a warning that would be negligence on the part of the crew, and not unseaworthiness of the ship; but between these two extremes, which seem to me to be self-evident cases as to what they would be, there may be a great deal of difficulty in ascertaining how it was here. It may very likely be a contested point as to how far the wheat was put against this port. That may be one of the contests, and there may be many others. I agree with what has been already said, that nothing which is said now about unseaworthiness is at all authoritative. Of course it is not laying down the opinion of the House, but what I have said is not even the expression of a final and concluded opinion formed by myself as an individual advising your Lordships. I merely express it as being what I think might be the case. I have no doubt what the result will be; it will be a question, taking the whole circumstances together—was

this ship reasonably fit when she sailed to encounter the perils, and was the damage that happened a consequence of her being unfit, if she was unfit? That question will have to be determined upon the whole circumstances and the whole of the evidence. I have merely indicated two extreme cases which I think are quite possible, and in one of which I think it is quite clear that nobody would say she was seaworthy; in the other case I think anyone would say she was seaworthy. These are only two extreme cases; there must be plenty of room for dispute between the two. That being so, my Lords, the special verdict not stating enough to enable us to determine that cardinal fact, upon which, in my mind, it depends whether the appellants or the respondents are entitled to judgment, I think it is impossible to decide either way, and consequently the case must be remitted to the Court of Session to ascertain, in such way as they have the means of ascertaining (a new trial is the only course which occurs to me), whether or no the ship was seaworthy at the time she sailed, and whether the loss was occasioned by the want of seaworthiness, if such want there was.

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LORD GORDON.—My Lords, I quite concur with the views expressed by the noble and learned Lords who have preceded me. I think that it is quite impossible for your Lordships to dispose of this case upon the evidence afforded by the verdict of the jury. It is curious indeed, as Mr Benjamin observed in opening the case, that in the very first plea in law this question of unseaworthiness, as affording a ground of claim against the defenders, was stated in the inferior Court—"The pursuers having sustained loss and damage to the extent foresaid through the unseaworthiness of the defenders' vessel, and the failure of the defenders to fulfil the said contract of carriage and safe custody, are entitled to decree for the sum sued for, with interest and expenses." And the very last plea in the case for the appellants, which I see is signed by Mr Benjamin, resumes this plea in the inferior Court, and sets forth that the interlocutor should be reversed, because the respondents' vessel was not, when she started on her voyage, in a reasonably fit condition, as regards a cargo of grain, to encounter the ordinary perils of a voyage from New York to Glasgow; and the damage caused to the appellants was caused by that unfitness. Unfortunately, the advisers of the appellants in the Court below do not seem to have brought before the Court the legal effect of these pleas, and the Court evidently, as it appears from the opinion of the Lord President, took this as conceded; for his Lordship says that—"If they provided a seaworthy ship, tight, staunch, and strong, well-manned and equipped, for the carriage of goods, they say that in consequence of the manner in which the clause of excepted risks is conceived they are free from all other liability." This having been taken as conceded on the part of the defenders, it unfortunately was not made a point of contest, and, as sometimes happens in cases where a keen argument is not submitted to the Court, a point which afterwards turned out to be material was overlooked. That seems to have been what occurred, first, in framing the issue, and, secondly, in framing the special verdict. I think, however, my Lords, that the course which your Lordships have indicated with reference to obtaining further investigation into the facts of the case will enable it to be properly decided. The case will raise some very important principles in point of law, but I do not propose to enter upon these now. I think it is better that they should be reserved for discussion when we have the facts fully before us than that we should state views of the case upon a hypothesis of what may be the result of a future investigation before a jury.

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INTERLOCUTOR appealed from reversed, and case remitted to the Court of Session, with a declaration that there ought to be a new trial of the issue.

SIMSON, WAKEFORD, & SIMSON—JOHN HENRY. S.S.C.—HOLLAMS, SON, & COWARD—WEBSTER, WILL, & RITCHIE, S.S.C.

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Colquhoun's
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ARCHIBALD ORR EWING AND COMPANY, (Defenders) Appellants.—
Cotton, Q.C.—Davey, Q.C.

JOHN COLQUHOUN AND ANOTHER (Sir James Colquhoun's Trustees),
(Pursuers) Respondents.—*Lord-Adv. Watson—John Pearson, Q.C.*

River—Non-tidal River—Alveus—Navigation.—Held (rev. judgment of First Division) that where the public have the right of navigation in a non-tidal river the proprietors of the alveus are, nevertheless, entitled to erect buildings thereon, unless such buildings would interfere with or obstruct navigation.

Observations on Bicket v. Morris, July 13, 1866, 4 Macph. H. L. 44.

Observations (per Lord Blackburn) on a proprietor's right to use the water of a stream flowing through his lands.

Ld. Hatherley.
Lord Black-
burn.
Lord Gordon.

(SEE Court of Session report in present vol., Jan. 26, 1877, p. 344.)

LORD HATHERLEY.—My Lords, this case is one in which the pursuers in the action complain of the defenders in respect of their having erected a bridge across the river Leven at a part of that river where they (the defenders) are proprietors on both sides. The pursuers are the trustees of Sir James Colquhoun. The defenders are gentlemen occupying a large manufactory and other works on one side of the river, and they are the proprietors of the land on both sides of the river. Before erecting this bridge they entered into communication with divers persons who might be supposed to be interested in the matter, and amongst others with those concerned with the navigation of the stream. They entered also into correspondence with the author of the present pursuers in respect of title, and from him they obtained a letter, which has been a good deal referred to in the cause, but upon which I think the case will not be found to turn. He said in that letter that provided no injury were done to his fishings and other rights he had no objection to the course they were about to take in erecting the bridge. The bridge was to be erected for the purpose of carrying a railroad over it, and the piers of the bridge were placed in the *alveus* of the river, and it is, or it was at first, alleged that they were so placed as to injure the rights of the pursuers as to fishings, and their rights also in respect of the navigation of the river. The defenders were said also to injure by these works the towing-path of the river, and in that sense, again, to injure the navigation. I think we may dismiss from our consideration, because it has not been argued at your Lordships' bar—and indeed it made no impression upon the learned Judges in the Court below—that part of the case which referred to damage done to the fishing.

The Lord President, who first gave his judgment in the Court of Session, says—"The only question is, whether the piers of the bridge complained of interfere with the navigation of the river, and upon that ground ought to be removed." And that, my Lords, is the point which, as it appears to me, it is now necessary for us to consider. The Lord Ordinary, and three out of four of the learned Judges who sat in the First Division when they inquired into this matter, were of opinion that injury was either done actually to the navigation of the

river, or that such interference had taken place with the *alveus* of the river as danger might possibly arise to the navigation of the river from the works which had been carried into effect. My Lords, that is a question, as your Lordships will perceive, entirely of fact, and it will only be as such that we can treat it. Lord Mure was of opinion that that matter of fact was established in favour of the defenders, and not against them. When I say "established in favour of the defenders," I apprehend that one may take it to be correct as a point of law, with reference to these works, that the duty is cast upon the defenders of shewing that when they have placed these works in the *alveus* they will not obstruct that right which is exercised by the public. At all events, I will assume that that burden is thrown upon them, and will consider how far they have or have not discharged it.

The river Leven appears to be a river upon which there is undoubtedly navigation, but not to any very great amount, in the course of the year. The navigation appears to be carried on in what are called scows—large barges I suppose we should call them—the largest being of about 15 feet beam, and the length being some 50 or 60 feet. This navigation has been going on for many years, and two of the witnesses called on the present occasion on behalf of the defenders are persons who have been up and down with every scow or barge which has made the voyage past the place in question since the bridge was erected. The position of the bridge in the river is this—There are upon the river Leven several mills, and arrangements are made at these mills by means of what is called a mill-lade or mill-dam for taking the water off from the river to the works which may require its assistance. That diversion is effected by means of a lade, and the water is guided into its course out of the river and down the lade by means of a weir which is erected for that purpose, of a solid construction, sloping up into the river, and having what the witnesses called a batter or a slope down from its top into the *alveus* of the river. That is the mode in which these mill-lades are formed. One of these exists some 40 or 50 feet below the bridge, so that anything passing through the bridge would within that short distance find itself abreast of, unless it went into, the mill-lade. That being so, we have further to consider what the navigable channel of the river is; and I think upon that it is established beyond a doubt that except in extraordinary circumstances, such as possibly I may have afterwards to refer to in connection with one piece of evidence, the navigable channel of the river is from a distance of 25 feet, as one of the witnesses for the pursuers, Mr Copland, the engineer, said, to the west of the easternmost pier, which is the particular pier complained of in the progress of this case as interfering with the navigation. Other witnesses, the witnesses for the defenders, said that they put it at a rather greater distance than that; some said 27, others as much as 30 feet distant from the eastmost pier. It is somewhere about that distance. As regards the depth, it is said to be, even when it is not at its highest flow, some 16 feet in that portion of the river I have referred to, which is a depth far greater than that required by any scow navigating the river. That being so, it appears that on the other side—on the eastern side—of the pier, which is the side where the lade is to be found, owing to some effect, I suppose of scour, which may have been produced from the particular arrangements of the lade, or from whatever reason, there is in fact a hole—I can call it nothing else. Some of the witnesses for the pursuers have spoken of that hole as being a portion of the river which they considered anterior to these works a navigable portion of the river. But, my Lords, on the other hand, I think it will be found

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that the evidence largely preponderates to shew that barges were never in the habit of taking any other course than the course down the western side of the pier and in the deepest channel of the river, and that so far were they from taking any other course, especially towards the east of the pier, that the witnesses tell us that it was considered dangerous to pass by on that side, because if you passed at all near to that portion of the river which would be to the east of the pier, or which the pier itself occupies, you would run a great risk of being carried into the lade, a result which of course would be deprecated by those who were skilled in the navigation of the river.

I shall now briefly refer to the evidence which makes out these points before considering what would be the effect of the law applicable to the state of facts which I consider to be established by the evidence.

I assume, and I consider, the burden of proof to be thrown upon the defenders, and I therefore look to their evidence to see how they have attempted to establish that proof. We first find a witness of considerable importance—one who, I think, is evidently quite impartial in the whole matter—Mr Alexander Neilson. He describes himself as captain of the steamship "Chancellor," belonging to the Loch Lomond and Loch Long Steamboat Company. He says—"I run the 'Chancellor' on Loch Long four and a-half months of the year, and I remain in the service of the company during the winter time in connection with other work. I have been twelve years in the service of the company. For some years we have not required to bring our steamers down from Loch Lomond to Dumbarton for repairs;" and so on. Then he says—"I have been in charge of all the steamers that have been taken down the Leven during the last sixteen years. Before that I owned gabbarts" (that is the same thing as scows) "on the Leven for about twenty years." He is a man of very large experience, and he appears to me to be a very impartial witness. He goes on to say—"I took them up and down very often, and am well acquainted with the navigation of the river. The greatest current I ever saw in the Leven was about six miles an hour. There are a great many catchwaters" (that is what is termed in our southern phrase a weir—the weirs or catchwaters are used to divert the water to the lades) "and erections in the water at the various works along the banks. There are eight separate works down the river, and they all have catchwaters into the middle of the river, and some of them pipes to take off the water. The Leven is navigable on an average for about four months in the year. In September 1875 I examined the new bridge at Dillichip" (that is the bridge in question) "on behalf of the steamboat company, and reported my opinion upon it to the directors. I inspected it two or three times while it was being erected. I measured the bridge, and saw the height of the pillars. So far as they were concerned I saw nothing to interrupt the navigation except that they were two feet too low. I thought that they should be raised to that extent, and reported so to the company. The bridge has since been heightened in conformity with that opinion. I consider that the navigation of the Leven at Dillichip is now as free as ever it was. I think there will be no more risk incurred than was incurred formerly in taking steamboats and scows down the Leven, whatever be the state of the water. The deepest part of the channel" (that I have spoken of) "at the bridge where we used to take boats down was about 27 or 30 feet west of the eastmost pillars." Mr Copland, the engineer examined for the pursuers, does not differ very materially from this distance. He says 25 feet. Captain Neilson continues—"I used to bring steamboats and gabbarts down that way when I navigated the Leven. There

is also a deep part near the west pillars" (that is what I call the hole), "but it is out of the channel. In speaking of the deepest part I speak of the navigable channel. (Q.) But it is deeper close in to the bank near Dillichip Bridge? (A.) Yes; I never took a boat down that way, because we could not take the channel at the ford. There is a ford 100 yards below. If we had taken the boat into the deep part near the bank she would have run down into the lade or intake." There is more to the same effect, but I do not think it necessary to weary your Lordships by reading more at length of that evidence, which has been already read and commented upon at the bar. I refer to it as very important, as fixing the point as to whether or not damage is done to the navigation of the river by the works of the defenders.

(His Lordship then referred to the evidence of other witnesses.)

Now, I think I am justified in saying that as far as this evidence goes upon the matter of fact it appears to me to be established plainly and distinctly that there is no interference with the right of navigation on this river. Mr Neilson spoke of it with reference to the height of the bridge, which was altered on account of his statement that it might interfere with the navigation so far as he was concerned—that is to say, interfere with the top gear of his vessels. And the other witnesses, as well as Mr Neilson, speak positively as to the operations they have performed with the boats in which they have been accustomed to go down the Leven, such as they were. Now, the witnesses on the part of the pursuers state as a matter of opinion—Mr Copland, who is a respectable engineer, no doubt gives it as a matter of opinion—that damage might arise from this occupation of the bed of the river. But I do not set any value upon the evidence given in that direction by the witnesses on the pursuers' side as contrasted with the evidence given by these witnesses who have such a full knowledge of all the circumstances and the facts of the case, and have an actual experimental knowledge of them owing to their having been in every vessel which has been up and down the river since the time when the bridge was built.

Now, the claim made by the pursuers is to have an interdict—that is in fact that it amounts to—or a declarator of their rights. First, they seek by their action to have it declared that the river Leven is a "navigable river, free and open to the public," which it appears to me to be clearly made out that it is. It is open to public navigation in the sense of being open to free navigation on the part of those persons who may require the use of it. Then they seek further to have it declared that the erection of this bridge is an interference with that right. But the point which has weighed most with the learned Judges in the Court below, and which of course your Lordships would feel to be one which will require very great consideration having regard to the very high authority of the learned Judges who have considered the case, is, whether or not the pursuers are entitled to a declarator with reference to the possible damage which may be done to the navigation of the river.

That which appears to have weighed most with the learned Judges in the Court of Session was the case of *Bicket v. Morris*,¹ decided in your Lordships' House, with reference to obstacles placed in the *alveus* of the river at Kilmarlock. That case itself was of a totally different character from the case raised here. That was a case of a proprietor on one side of the river having his rights interfered with by the proprietor on the other side making such an erection in

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¹ July 13, 1866, 4 Macph. H. L. 44, 38 Scot. Jur. 547, L. R. 1 Sc. App. 47.

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the *alveus* of the river as to effect an alteration of the current of the stream with reference to his own land upon the other side. My Lords, I apprehend that the law applicable to that case would be beyond all possibility of doubt ; neither should I have felt much hesitation anterior to that decision in coming to the conclusion that although each of the two proprietors on the banks of a river is said to have rights up to the *medium filum fluminis*, neither of those persons may so use those rights with reference to the river, which has been accustomed for all time to run in a certain course, as to alter the course of that river with reference to the property of his neighbour, who is separated from him only by the river, and whose property on the other side of the river is affected by that change.

I think that that case alone would not have weighed so much with the learned Judges in the Court below ; but this consideration weighed much with them : In the course of discussion of that case (*Bicket v. Morris*) it was more than once thrown out on the one side that there was no appreciable damage done by this change which had taken place in the course of the river, although it was admitted that there had been a change, and that the state of the property on the other side of the river was affected by that change, inasmuch as the river came in a different way to that bank, either more or less abundantly, whichever it may have been. It was affected either by the water being thrown in too great abundance on that side where the land might possibly be wanted for building property or any other particular purposes, and therefore would be rendered unsuitable in its changed condition for those purposes for which it was suitable in its unchanged condition ; or it might be that the water was withdrawn from it, so that that amount of water which the opposite proprietor was entitled to use for various purposes he would not have the means of using. Some extreme cases were put in the course of the argument at your Lordships' bar in that case, and in answer to some of those extreme cases it was said by some of the learned Judges,—How can we say to what extent the mischief may run in case the proprietor may be minded at some future time to exercise his rights in a way in which he may not be exercising them now ?

I have had the advantage of seeing one of your Lordships' opinions upon this case which we are now considering, and I find, not by my own research, but from that opinion, that from a very early period in Scotland—much earlier than in England—that view was taken of the absolute illegality of attempting to alter the condition of your neighbour's property, and that it would not be a sufficient justification of such an alteration to say that your neighbour had never used his property for the purpose which the alteration you proposed to make would interfere with ; the answer being,—You cannot tell for what purpose he may wish to use it at a future time. The case was put in the argument of *Bicket v. Morris* of putting a pole in the river, and it was asked whether that was interfering with the rights of the riparian proprietors ; and Lord Cranworth said,—“ You must see what effect will be produced by what is done ; the effect of a pole would be inappreciable and *de minimis non curat prætor*, but if there is any perceptible damage or injury done upon that property then we hold, in accordance with the maxim *melior est conditio prohibentis*, that the persons who wish to keep things as they are have a right to say, let things stay as they are.

The learned Judges of the Court of Session seem to me to have applied that case of *Bicket v. Morris* in a manner in which the circumstances of this case and the grievance complained of in this case would not permit it to be applied.

They say, and it appears to me justly, that the right of navigation is a right to be protected like any other right, and you are not entitled to interfere with that right of navigation because what you are now doing may be said not to interfere with any existing mode of navigation or with any existing mode of exercising that right. Now, my Lords, it appears to me that there are two totally distinct and different things—the one is right of property, and the other is the right of navigation. The right of navigation is simply a right of way you must not interfere with in any manner by any course you take. The question seems to be simply this, Does this Dillichip Bridge interfere with that right of navigation as exercised or as capable of being exercised in the stream? A man having a right of way over my field cannot say that I shall not have the power to put swing-gates across his path so as to inconvenience him in walking along it. I cannot set gates to shut up the path in such a way as would interfere with his exercising his right, but if I do not interfere with that it cannot be said that I shall not put up gates. This point is dealt with in the opinion of one of your Lordships which I have had the pleasure of seeing, and therefore I need not dwell upon it. I think we have evidence here which is beyond all dispute evidence of people who speak with regard to the last half century with a perfect knowledge of the river, and they say that the right of navigation has not been exercised to the east of the piers of the bridge. In my opinion the case in your Lordships' House which has weighed very much with the learned Judges in coming to the conclusion to which they have come has no application to this case.

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Having come to the conclusion that no injury has been established of which these pursuers have a right to complain, and having had the advantage of the assistance of one of your Lordships in considering the form in which the resolution of this House should be worded, it appears to me that we should do well to find that the river Leven is a navigable river, free and open to the public; that the appellants have no right to execute any works which will interfere with or obstruct the navigation thereof, or the free use of the towing-path along the banks of the river for the purpose of navigation; that the works complained of in the summons do not in point of fact interfere with or obstruct the navigation of the river; and with these findings to remit the case back to the Court of Session, with instructions *quoad ultra* to assoilzie the appellants from the conclusions of the summons, and to find them entitled to the expenses incurred by them in the Court of Session.

LORD BLACKBURN.—My Lords, in this case the Lord Ordinary by his interlocutor found that “the river Leven is a navigable river, free and open to the public, and that the defenders have no right to execute any works which will in any way interfere with or obstruct the navigation thereof or the free use of its banks and of the towing-path along the banks of the said river for the purpose of navigation,” and “that the piers recently erected by the defenders in the bed of the said river near to the east bank are an obstruction to the free navigation thereof; therefore decerns and ordains the defenders forthwith to remove the said piers.” On appeal to the First Division the Lords by a majority adhered to the interlocutor.

The pursuers (now respondents) had in their summons and condescendence set up a case that there was an obstruction to the towing-path, and also that as proprietors of land on the banks of Loch Lomond, and as owners of the salmon-

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fishery in the Leven, they sustained a damage, and had a cause of action special to themselves beyond what any other of the public had. This was negatived by the Lord Ordinary, and no appeal having been brought by the pursuers (now respondents) it is, I apprehend, not competent to your Lordships to inquire whether this was right or not. The only appeal is by the defenders from the interlocutors pronounced against them.

The river Leven is an inland stream, and the tide does not flow up to the spot where the piers are erected. And, as is pointed out by the Lord President, the rights of the Crown as regards the soil of the *alveus* and of the public to navigate are not the same in such a river as they are in the sea or in a tidal estuary.

In the present case, however, there is ample evidence that there had been, at least as long as living memory extended, a user by the public of the navigation in the river during the period of the year when the water was high enough,—that is, according to Mr Smollett, who was called for the defence, on an average, during two-thirds of the year. And the very able counsel who argued for the appellants felt it so impossible to deny that there was evidence of user of this waterway by vessels,—evidence such as, if the question had been as to the user of a land-way by carriages, would have established the public right,—that he abandoned this point; and I do not think any of the noble and learned Lords who have heard the argument entertain any doubt that the interlocutor, so far as it finds that the Leven is a navigable river, free to the public, and that the defenders have no right to execute works which obstruct the navigation, is right.

But the contest was as to the finding of the Lord Ordinary that the piers recently erected by the defenders in the bed of the river near to the east bank are an obstruction to the free navigation of the river, and the conclusion that the defenders should be ordained to remove them. I have come to the conclusion that I ought to advise your Lordships to reverse the finding in the interlocutors on this point.

The nature of the inquiry requires the consideration of two questions, each of mixed law and fact, first, What, just before the piers were erected, was the extent and nature of the public right, and over what space it extended? and when that is ascertained, second, whether the piers are such, and so situated, as to be what in point of law is an obstruction?

I think that the facts are to a certain extent perfectly clear. The place in question is considerably above the highest spot to which the tide ever flows. There is there a curve of the river towards the east or left side of the river, so that the chord of the arc which the river forms is on the west side. The towing-path is, and has always as long back as living memory goes, and certainly for more than sixty years, been on the west or right side. On the east side, from some remote period before living memory, and certainly for at least sixty years, an artificial cut or lade to lead off water to the Dillchip Works (now occupied by the defenders), and a catchwater projecting up the river so as to divert the water into the lade, have existed. This catchwater is between 300 and 400 feet in length.

The present condition of the catchwater is described by a witness, called for the defenders (James Deas) in the following terms:—"That plan was made under my directions. It is an enlarged plan and sections of the river at and near Dillchip Bridge. The catchwater wall is from 8 to 10 feet broad at the base.

It is a rough stone bank, with timber on the inside, and roughly pitched with stones on the outside. It is perpendicular in the inside, and slopes out with a batter to the outside. The water was a little under it the last time I saw it. On the first occasion it was covered. All that was visible was a little broken water on the top cross. I did not measure the perpendicular height of the intake wall, but it would be from 6 to 8 feet." No. 15.
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The pursuers' witness, Allan Stewart, on cross-examination, referring to a cross-section made under his directions, says—"On cross-section 17, under the bridge, the deepest part of that is right in front of the lade. If a boat went down there before the bridge was built I think it would be in very great danger of striking the catchwater wall. (Q.) Therefore that was not a part of the channel that could be used for navigation?—(A.) Certainly not exactly at the side of the bridge. It is hard to say how far the pitching of the catchwater wall is carried to the west, as there is very little of it visible, and I have no doubt that for safety it is carried under ground for some distance. I should think the slope of the pitching would come out two or three feet towards the middle of the river. (Q.) Would that bring the edge of the pitching just about the westmost side of the east pier?—(A.) It takes 7 feet to bring the post at the catchwater to the westmost side of the pier. The post is on the east face of the wall. On the same cross-section the deepest part under the main span of the bridge is 50 feet from the west, and 40 feet from the east pier, and the depth is 2 feet 9 inches."

The piers, it is clear, are in water as deep as any part of the channel, and the western side of the lowest of the two piers is about 41 feet from the solid bank as it now is, and about 6 or 7 feet further out than the post which marks the end of the inner wall or the catchwater, and consequently, if the sloping part extends so as to render the navigation impracticable for a distance of 10 feet, the pier is 3 feet to the east side of the impediment; if the sloping part so extends as more than 7 feet, the pier projects on the west side of the impediment. All are agreed that the piers are 30 feet higher up the river than the end of the catchwater, where a post stands. Lord Shand says—"The fact is, that the east piers of the bridge have been put down in a part of this river which is deep enough for navigation purposes at many states of the river, and there can be no doubt that the piers would be an obstruction, and clearly a material and present injury, to the navigation of the river but for the circumstance of the existence of the catchwater, to which reference has already been made. The piers are about 5 feet in diameter, and are solid blocks of masonry from 36 to 41 feet from the west bank, and there is no doubt they are in a depth of water that could be used for navigation. But then it is said that though they would be an obstruction to a great part of the water-way if there was no catchwater there, they are not so in point of fact, because you must take the river as it has existed from time immemorial; and that is, I think, a reasonable contention on the part of the defence."

I do not think it possible to state the point as to which the difficulty arises more clearly than is here done.

If the piers had been placed 20 feet further west than they are it would have been too obvious to admit of argument that they must have been, in point of fact, and at the present time, an obstruction to the navigation. If they had been placed 20 feet further east, so as though in the bed of the river to be quite inside the catchwater, it would, I think, be clear that they would not, in fact, have been at the present time an obstruction to the navigation as it has been used as

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long as memory goes, but the question of law would have arisen, whether they were illegal because placed in the *alveus* of the river, where, if (by any possible though improbable change) the catchwater was removed, the space might be useful for navigation. As it is, there is a disputed question of fact which has to be determined on the evidence, viz, whether the navigation was *de facto* so used and enjoyed that the piers, placed where they are, occasion, at the present time, an obstruction to that navigation.

My Lords, there has been evidence given which renders this a question on which different minds may well come to different conclusions. And, in fact, the Lords of Session have come to different conclusions upon it. The Lord Ordinary did not apparently come to the conclusion of fact which he did without hesitation. He says—"But the defenders maintain that the piers do not obstruct the navigation. On this question the evidence is very contradictory. On the whole, the Lord Ordinary prefers that of the pursuers. The witnesses for the defenders give a very unintelligible account of the manner in which they have been accustomed to conduct their boats between the piers and the right bank of the river. One thing, besides, is very evident, that in descending the river a boat will have less space and time to clear the bridge than to clear the obstruction presented by the defenders' catchwater dyke."

The Lord President says—"The Lord Ordinary's finding, I think, is quite satisfactory in so far as he finds that this river is a navigable river, free and open to the public, and that the defenders have no right to execute any works which would in any way interfere with or obstruct the navigation or free use of its banks and of the towing-path along the bank of the said river for the purposes of navigation, and I need only say, with reference to that last finding, that I should have been inclined to make it a little more extensive than his Lordship has done, because it seems to imply that, in order to entitle the public to complain, they must be in a position to shew that the operations of which they complain do, in point of fact and at the present time, interfere with or obstruct the navigation. I do not think the burden upon the pursuers in an action of this kind is so heavy as his Lordship supposes. On the contrary it rather appears to me that if any man building a bridge over such a river as this fixes his piers *in alveo* of the river he is in point of fact committing what is an illegality in itself. He has no right to build in the *alveus* of the river. No man is entitled to build even in the *alveus* of a small stream, at least without the consent of all the other proprietors who are interested in that stream, and, I think, *multo magis*, no man is entitled to build anything in the *alveus* of a stream in which the public have rights of navigation. In short, I am inclined to be of opinion that the doctrine which was applied in the case of *Bicket v. Morris* is quite as applicable to a river of the description we are now dealing with as it was to a private stream. The principle of that case appears to be, that where there are other parties besides the party complained of who have an interest in a running water it is illegal to build *in alveo*. It is not enough to say in defence of the operation complained of that it does nobody any harm. It may be that at the present moment the injury may not be foreseen, and yet it may occur, because nothing is so wilful and capricious (if we may use the expression) as a stream of running water, and it is almost impossible to foresee what the effect may be of any interference with the natural flow of such a stream as regards the proprietors further down the stream, or as regards the proprietor opposite to the place where the operation is carried out. Now, in like manner, in the case of a navigable river

like this, where there is no great abundance of water, and where the deep part of the channel is but narrow, and there is nothing to spare in the way of room for navigation, it is very difficult to foresee what the effect of any operation of this kind may be in times of flood or in various states of the river. The deep-water channel of a stream like this may shift and vary by the operation of causes with which we are very imperfectly acquainted, and which even experts of the highest skill are unable to foresee, and therefore to put down the pier of a bridge or any other building in the *alveus* of a river of this kind appears to me to be what I should call a dangerous operation as regards the navigation, even though it cannot be shewn that at the present moment it constitutes an absolute obstruction to that navigation. I have made these observations because I have some little difficulty in saying that upon the evidence before us the preponderance or weight of the evidence is in favour of the pursuers upon the question of fact, whether the piers of this bridge do at the present moment constitute an obstruction to the navigation. It is a narrow case in that respect, and if the pursuers were under the burden of proving as a matter of fact that at the present moment there is an obstruction to the navigation caused by the existence of those piers, I should hesitate to affirm that proposition."

So that it appears that the Lord President would not have found the fact against the now appellants if he had not taken a view of the law which, if correct, rendered it immaterial.

Lord Deas says—"The Crown holds the *solum* of the tidal part of the river as trustee for the whole public, but in the remaining portion of the river the proprietors of the banks are the proprietors of the *solum* of the river, and the right of navigation on the part of others requires use to found and support it. In the present case, therefore, I think it incumbent on the pursuers to make out that the works objected to do or may cause obstruction to the kind of navigation which has been prescriptively practised by members of the public; but, on the whole, I think that the proof sufficiently preponderates in that direction. I do not intend to go into the details of the proof. In some respects it is contradictory, but upon the whole, I think the burden of the proof is in favour of there being a certain degree of obstruction at present, and I think it is at all events impossible to say that there is no ground for apprehending obstruction in future. Either of these reasons is quite sufficient to entitle any member of the public interested in the navigation to object to such an erection as we have here, and consequently to justify the conclusion at which the Lord Ordinary has arrived."

So that he hesitatingly finds that there is a present obstruction, but, agreeing with the Lord President that it is enough if it is impossible to say that there is no ground for apprehending obstruction in future, bases his judgment more on that latter ground.

Lord Mure finds the fact for the defenders.

Lord Shand finds, with some hesitation, that it is proved that in fact there is an obstruction, but, with more positiveness, bases his judgment on taking the same view of the case as is taken by the Lord President.

My Lords, before proceeding to consider what the fact is, I think it expedient to consider whether the law really is as the Lord President and Lord Shand, and to a lesser degree Lord Deas, seem to have thought it was. I have very great respect indeed for the learning and logical acumen of those learned Judges, and I should not differ from them without much consideration. But I have come to the conclusion that they have taken a mistaken view of the principle on which

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the case of *Bicket v. Morris* in your Lordships' House, and those Scotch cases which are there affirmed, were decided, or at least have applied it to a case to which, what I think the true principle, does not apply. I think, and submit to your Lordships, that the principle on which they were really decided was, that where any unauthorised erection is a sensible injury to the proprietary rights of an individual, there is *injuria* for which he might, in a court of law in England, recover at least nominal damages. A Court of equity in England or the Court of Session in Scotland, in the exercise of its equitable jurisdiction, would not order the removal of the erection if convinced that the damage was only nominal, but, where there is an injury to the proprietary rights in running streams, the present injury, now producing no damage, may hereafter produce much. And I understand the principle of *Bicket v. Morris* to be, that where an erection is a present sensible *injuria* to the proprietary right of the owner of the other part of the *alveus* or of the opposite bank of a running stream, he may have it removed, on the ground that there is a present injury to the right of property, if it is impossible to predicate that it may not produce serious damage in future, though the complaining party is not yet in a position to qualify present damage. And, I think, the same principle will apply where the complaining party is not a proprietor *ex adverso* of the spot where the erection is made, but is a proprietor of land on the banks of the stream below the spot, but so near to it that the erection affects the natural flow of the water on the complaining party's land. But I do not think it was intended to be decided, and I do not think it is the law, that an erection *in alveo* of a natural stream is illegal *per se* if all who have property on the banks of the stream consent to the erection. Nor do I think it was meant to be decided, nor do I think it law, that a riparian proprietor on the water of *Kilmarnock*, or on the water of *Irvine*, into which it flows ten miles below the town, on whose land the flow of the water would be in no way affected, could have maintained the action against *Bicket* for altering the line of his building in the town on the waterside, which *Morris*, the proprietor of the houses and building ground immediately opposite, did maintain, for I think that there would be no injury to the proprietary right of the party complaining, in respect of such land.

Now, the public who have acquired by user a right of way on land or a right of navigation on an inland water have no right of property. They have a right to pass as fully and freely and as safely as they have been wont to do, but unless there is a present interference with that right, or it can be shewn that what is now done will necessarily produce effects which will interfere with that right, there is no *injuria*, and I think that if there be no *injuria* the foundation of the right to have the thing removed fails.

My Lords, as the *ratio decidendi* of this House in *Bicket v. Morris* is unquestionably binding, I shall proceed to support my view of that decision by argument and authority, and I think it the more necessary to do so as the Lord President, who as Lord Justice-Clerk was a party to that decision, seems now to take a different view of the effect of that decision from that which I take.

My Lords, where the property in the banks of a natural stream above the flow of the tide is in different persons, *prima facie*, and until the contrary is shewn, the boundary between the properties is the *medium filum aquæ*. In this respect there is no difference between the law of England and Scotland. And after some diversity of opinion it has, I think, been for many years the settled law of England that the proprietor of land on the bank of such a river has as incident to his property in the land a proprietary right to have the

stream flow in its natural state, neither increased nor diminished, and this quite independently of whether he has as yet made use of it, or, as it used to be called, appropriated the water. This can hardly be considered as settled law in England before the case of *Mason v. Hill* (5 B. and Ad. 1) in 1833. It had been the law of Scotland from a much earlier period. In *Bannatyne v. Cranston* (Mor. Dict. 12,769, "Property") "it was not found necessary to the pursuer to libel or qualify any use of the burn and water thereof wherein he was prejudiced by the defenders taking in the same, seeing the Lords found that the water running by his land which lay marching contiguous to one side thereof could not be drawn from any part of the land marching thereto without his own consent. For albeit he had no present use thereof, yet he might possibly find thereafter some use for the same." This was in the year 1625. Precisely the same law has been now established in America (*Blanchard v. Miller*, 8 Greenleaf American Reports, 268) and in England (*Mason v. Hill*, 5 B. and Ad. 1) without, I think, either the American or English Judges being aware that the Scotch Judges had so long before anticipated their reasoning. This right is subject to the use of the water by those above him, below him, and opposite to him, either acquired by user or such as the general law gives to the riparian proprietors. I refer to the very elaborate judgment of the Court of Exchequer delivered by Baron Parke (in 1851) in the case of *Embery v. Owen* (6 Exchequer, 367) as containing an exposition of the English law.

In *Miner v. Gilmour*, in 1858 (12 Moore, P. C. Rep. 156) Lord Kingsdown, in delivering the judgment of the Privy Council, says,—“It does not appear that for the purpose of this case any material distinction exists between the French and the English law. By the general law applicable to running streams every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land—for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.”

My Lords, I do not know if the Lord President, in the passage I have already read, means to state that the law of Scotland is that an erection *in alveo* of a running stream, though in a man's own land, is *prima facie* illegal, even if it does not alter the flow of the water on any one else's land, nor interfere with the rights of other properties either above or below him, nor with the public right of navigation in another part of the stream. But I think that it was necessary to go so far as this in order to support his conclusion. If such be the law of Scotland it is different from what Lord Kingsdown, in the passage quoted, states to be the law of England and France. I have already read what the Lord President says on this subject, and I cannot agree to it.

The owner of the banks of a non-navigable river has an interest in having the water above him flow down to him, and in having the water below him flow away from him as it has been wont to do; yet I apprehend that a proprietor may, without any illegality, build a mill-dam across the stream within his own property and divert the water into a mill-lade without asking the leave of the

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propriators above him, provided he builds it at a place so much below the lands of those proprietors as not to obstruct the water from flowing away as freely as it was wont, and without asking the leave of the proprietors below him, if he takes care to restore the water to its natural course before it enters their lands.

It would require strong authorities to lead me to believe that the law of Scotland does give the proprietors on the banks of the stream a right to act the part of the dog in the manger to such an extent as to hinder this. None were cited at the bar, and I find that in the *Magistrates of Linlithgow v. Elphinstone* (Kames' Decisions, 332), it is laid down that "a man who builds a mill is entitled to make an aqueduct, provided after using the water for his mill he restores it to the river from whence it was taken. This right he has from the law of nature without the aid of prescription." The Lord Advocate admitted that he understood the law of Scotland to be that if the same person is proprietor of the ground on both sides of a river in which there is no right of navigation he can change its channel as he pleases, provided he restores it to its old channel before it leaves his ground. That is of course subject to this qualification, that it flows out of his ground into the lands below as it was wont to flow, neither increased nor diminished in quantity or quality or direction. There have been several Scotch cases in which a proprietor on one side of a river had been held entitled to have a new erection *in alveo* removed, but in every one of them the person complaining of the erection was one who owned land against which the new erection directed a flow of water greater than had been wont to flow on it before. In *Menzies v. Breadalbane* (3 Wilson and Shaw, 235), Lord Eldon seems to me to point out with great clearness that it was against such a proprietor who is prejudiced, and as I think against such a proprietor alone, that the erection was unlawful. He first points out that it was clear in fact that if the embankment should be continued as it was projected, it would have the effect of throwing the ordinary flood-streams of the river off the lands of Lord Breadalbane and on the lands of Sir Neil Menzies; and then says (p. 243)—"Now, with reference to the law of Scotland, this is perfectly clear, that a superior heritor cannot divert any part of a stream to the prejudice of an inferior heritor. It is also clear that an inferior heritor cannot do that which shall cause the water to stagnate to the prejudice of the superior; that is acknowledged to be clear law. But it is said, that applies only to the *alveus* of the course. But it does not appear to me that there is any solid ground for this distinction. The ordinary course of the river is that which it takes at ordinary times; there is also a flood-channel. I am not talking of that which it takes in extraordinary or accidental floods; but the ordinary course of the river in the different seasons of the year must, I apprehend, be subject to the same principle." He concludes that Lord Breadalbane in that case ought not to be allowed to carry on his work in what (if I may be allowed to coin a word to express Lord Eldon's idea) was the flood *alveus* of the river, to the prejudice of Sir Neil Menzies, but that the interdict as craved was too extensive, and he would prepare a judgment with the proper qualification. That deliberately prepared judgment is as follows:—"That the respondent ought to be prohibited and interdicted from the further erection of any bulwarks or any other *opus manufactum* upon the banks of the Tay which may have the effect of diverting the stream of the river in times of flood from its accustomed course and throwing the same upon the lands of the appellant." I cannot think that Lord Eldon would have given a similar judgment against works of Lord Breadalbane in the accustomed course, either

in times of flood or in summer, in favour of a proprietor whose lands lay on the Tay below Dunkeld, and on whose lands the diverted waters could not be thrown.

It remains to see if there is anything in the judgment in *Bicket v. Morris*, and above all in the opinions of the noble and learned Lords who advised your Lordships' House on that occasion, inconsistent with this view of the law. I think there is not.

There certainly was nothing in the facts of that case to call for a judgment inconsistent with it. The pursuer and defender were proprietors of the opposite sides of the Kilmarnock Water where it flows through the town of Kilmarnock—where the land is building land, and every foot is or may be of value. The defender had built, and after warning persisted in building, his wall into the course of the stream, and thereby necessarily diverted the water and threw it on the pursuer's land. The point made was, that this could not be held to the prejudice of the pursuer, unless he could shew that damage had actually been occasioned. As to this the Lord Justice-Clerk, now the Lord President (Court of Session report, 2 Macph. 1089), says,—“I entertain no doubt that a party in the position of the defender here is not entitled to make any erection *in alveo*; but then, at the same time, if it could be shewn that the party complaining of a very slight encroachment upon the *alveus* was doing so for the mere purpose of annoyance—in *emulationem vicini*—not under any apprehension of danger to himself or of damage to his property, but merely for the purpose of asserting his legal right up to a definite line—if it could be shewn that the work had been accidentally extended into the *alveus*, I am not prepared to hold that such a work would be illegal.” My Lords, I pause here to observe that on the view of the facts in the present case which I take, and which I understand the Lord President also to take, this is an apt enough description of the present case. He then goes on—“But then the question comes to be, whether the pursuer in this case, though he cannot (and that is the fair result of the proof) shew that any damage has actually been occasioned by the erection of this wall, is not in a position to say that an injury has been done to him because the operation involves a certain risk of damage. There is nothing the operation and action of which is more uncertain than running water. . . . I think, therefore, looking to the nature of the subject, and to the fact that this is not an encroachment of an inch or two, or any such impalpable encroachment as that, but that it is an encroachment clearly established to be of considerable size, and certainly calculated to effect some deviation in the course of the water, that the opposite proprietor, the pursuer, is well entitled to say, ‘I apprehend risk to my interest; I apprehend that my property may be affected by the consequence of this diversion of the stream.’” And the interlocutor appealed against was as follows:—“Find that the erection complained of by the pursuer is an erection in the *alveus* of the water of Kilmarnock *ex adverso* of the pursuer's property, and has the effect of diverting to a certain extent the flow of the water, and is therefore an illegal encroachment on the rights of the pursuer”—a conclusion of law which, if the facts were as stated above, I think irresistible. It then proceeds to order the removal of the erection, the propriety of which would depend on the various considerations stated by the Lord Justice-Clerk in the passage I have just read.

On appeal, Lord Chelmsford (the Lord Chancellor) says (L. R. 1 Scotch Appeals, p. 53, 4 Macph., H. L., p. 47)—“It is in respect of their property in the land that

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the pursuers dispute the right of the defendant to encroach on the river;" and afterwards—"The proprietors upon the opposite banks of the river have a common interest in the stream, and although each has a property in the *alveus* from his own side to the *medium filum fluminis*, neither is entitled to use the *alveus* in such a manner as to interfere with the natural flow of the water. . . . It seems to me clear that neither proprietor can have any right to abridge the width of the stream, or to interfere with its regular course; but anything done *in alveo* which produces no sensible effect upon the stream is allowable. It was asked in argument whether a proprietor on the banks of a river might not build a boathouse upon it? Undoubtedly that would be a perfectly fair use of his rights, provided he did not thereby obstruct the river or divert its course; but if the erection produced this effect the answer would be, that, essential as it might be to his full enjoyment of the river, it could not be permitted" (that is, as I think is implied by Lord Chelmsford, though not expressly said, if the proprietors of that part of the river where the course is impeded or diverted object). He goes on—"A fortiori, when the act done is the advancing of solid buildings into the stream, not in any way for the use of it, but merely for the enlargement of the riparian proprietor's premises, which must be an infringement upon the right and interest of the proprietor on the opposite bank, any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor, and therefore the act being *prima facie* an encroachment the *onus* seems properly to be cast upon the party doing it to shew that it is not an injurious obstruction"—which I again think must by implication mean an obstruction injurious to the opposite riparian proprietor, with whose rights it is an interference.

Lord Westbury had, in the course of the argument, said—"If I build a boathouse, though it injures no one, it would seem that any riparian proprietor may complain." He seems to have (in my opinion very justly) thought that if the pursuer's argument went so far as this it could not be sound. But on consideration he found that it did not go so far. And he says—"I am convinced that the proposition, as it has been laid down in the Court below, and as it has received the sanction of your Lordships' judgments, is one that is founded in good sense, and ought to be established as matter of law."

In my view of the case, what was laid down in the Court below, and received the sanction of this House, was that the pursuer and defender being owners of opposite properties on the Kilmarnock Water, each therefore was—there being nothing to shew the contrary—proprietor of the *alveus* up to the *medium filum aquæ*, and each had, as incident to his property, the right to insist that the regular flow of the water should continue on his side as it was wont to flow, which in ordinary times would be a benefit; and that nothing should be done to obstruct the regular flow of water on the other side of the stream, so as to cast more water on his side than had been wont to flow, which, at least in times of flood, would be a burden. The defender had, without any right, built an encroachment on his side of the river, which necessarily caused more water to flow on the pursuer's side, and though that encroachment was small, it was such as, in a small stream, to make a sensible alteration in the flow. That was an injury to the proprietary rights of the pursuer, but he was not able to qualify present damage. The decision of the Court of Session was that this was an injury to the proprietary rights of the pursuer, whether he could qualify damage or not, and that he was entitled to insist on

the erection being removed, it being from the nature of the property (building No. 15. land), and the nature of the right infringed, highly probable that there would be damage. All that was said as to the impossibility of telling what a stream of running water would or might do was, in my opinion, relevant only to the question whether there was such an absence of damage as to lead the Court, in the exercise of its equitable jurisdiction, to refuse to interfere. July 30, 1877.
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It was said in argument in the present case that whether the stream was navigable or not made no difference as to the rights of the riparian proprietors, and that in England at least, it made no difference whether the tide flowed or not. I agree to this. But on the question whether an erection on the *alveus* of the stream is of sufficient magnitude to cause a sensible alteration of the flow of the water, I think (though it is unnecessary for this case to consider how that may be) that the magnitude of the stream may be of great importance. The river Amazon is many miles wide, and, assuming the law of Brazil to be the same as that of this country, I think a proprietor of land on the one bank of a stream of that width would not be in a position to require one on the opposite shore to remove an encroachment of one or two feet into the river, for it would do him no sensible injury, though in the narrow Kilmarnock Water such an encroachment did do the opposite proprietor sensible *injuria*, which, especially seeing it was in a town, and was or might be building land, was very likely to produce substantial damage, though he might not as yet be able to shew present damage.

In the case of *Attorney-General v. Lord Lonsdale* (L. R. 7 Equity, 377) the obstruction was in a tidal river, but it occupied one-third of the bed of the river. In *Attorney-General v. Terry* (L. R. 9 Chancery, 423) there was an actual occupation by the piles put in by the defendant of part of what was used for the navigation and wanted for the navigation. The Master of the Rolls intimated an opinion that the Court of Equity might order the piles to be removed, though doing no present damage to the navigation, if there might be damage hereafter, I apprehend on the ground of the piles being placed on the soil of the Crown, and therefore a wrong to the Crown. How that may be in such a case it is unnecessary to consider. I think it clear law in England that, except at the instance of a person (including the Crown) whose property is injured, or of the Crown in respect of an injury to a public right, there is no power to prevent a man making an erection on his own land, though covered with water, merely on a speculation that some change might occur that would render that piece of land, though not now part of the water-way, at some future period available as part of it. I think that the land being covered by water is in such a case a mere accident, and that the defenders are as much at liberty to build on the bed of the river (if thereby they occasion no obstruction) as they would be to build on an island which might at some future period be swept away. And, with every respect for the judgment of the learned Lords of Session, from whom I differ, I advise your Lordships to hold that there is no such power in Scotland.

My Lords, on the question of fact I would not lightly come to a different conclusion from the Court below if they had been unanimous, or even if the Lord Ordinary, who saw the witnesses and their demeanour, had formed a strong opinion on the result of the evidence. But, as appears from the passages I have read, in the present case the finding in fact comes before your Lordships without any such prestige. And, as it seems to me, on such a question as this, the evidence of the surveyors and engineers is of very great weight as to the condition

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and depth of the river, and the position and size of the piers, but, in my mind, of very little weight as to the mode in which the navigation by vessels floating down the stream without any locomotive power was used. No one of them pretends to have any practical knowledge of such navigation, and it is too exceptional a kind of navigation to have become part of the general knowledge of an engineer.

Of the practical men who were called on both sides, Dugald Macfarlane (called for the pursuers) says distinctly—"If we go to the west side of the east piers of the bridge we keep clear of the intake and catchwater. If we steered straight from the piers we would certainly go on the catchwater."

John Russell says—"That the piers are just where our proper channel was where we went up and down." And Neil Black says nearly the same thing. But the cross-sections made on behalf of both parties shew that the preferable part of the channel is at all events west of the piers, so that I think these witnesses prove too much. I think the other witnesses for the pursuers are all persons conversant with the towing of boats up the stream, not with the manner in which boats were conducted down the stream. On the other hand, George Macfarlane and John Stewart, who have had the conduct of every boat that went down since the bridge was built, and certainly are persons of much experience, are positive that in taking boats down they never went nearer the intake than 15 or 20 twenty feet to the west of it, so as to clear the catchwater. Their evidence, if believed, shews that the spot where the piers now stand was avoided by those who managed the boats.

The Lord Ordinary seems to have distrusted their evidence, because he thinks the account they give of the manner in which they have been accustomed to conduct their boats unintelligible—I presume referring to their statement that loaded boats have steerage-way and answer the helm, and also, as they phrase it, steer themselves or keep the channel, whilst light boats require to be poled. All agree that such is the fact, and if I were bound to find a theoretical reason for it I should infer that in such a stream as the Leven the upper and the lower strata of water do not flow with a uniform velocity, and that there may be something in the nature of an underflow off the banks. But I am not inclined to reject the evidence of practical men as to a fact merely because they give a bad theoretical reason for it and I am not able myself to furnish the right one. I have been told that some years ago the pilots in the English Channel uniformly asserted that there was current setting toward the French shore, and to allow for that supposed current they always steered to the north of the course which by the chart and compass they should have held. It was ascertained that there was no such current, and some ships were lost because their commanders disregarded the rule of the pilots, because their reason for it was wrong. On further investigation it was found that the deflexion of an unadjusted compass from the action of the iron in most ships was such as make it right when the ship's head lay either east or west to steer to the north of the course by chart as indicated by that compass. The pilots were quite right in the fact which they had observed, but quite wrong in their reason. Whether what I have been told is accurate or not it is a good illustration of what I mean.

I think therefore that the balance of evidence is in favour of the piers being out of the channel where a right of way had been acquired by user, and I think that the Court, before ordering the defenders to incur the heavy expense of pul

ing down a bridge erected in the *bona fide* belief that it was no obstruction, No. 15. ought to be satisfied affirmatively that it is an obstruction.

There is one point more which I should mention—something done out of a high-
way altogether may be a public nuisance if it renders the use of the highway less safe; for example, if an excavation is made for the purpose of erecting a new house close to a public highway, and left unfenced, so that persons using the way might, if accidentally deviating a little from the way, fall into it, it is a nuisance—(*Barnes v. Ward*, 9 Com. B. 420). But the neglect of duty is not in making the pit, but in leaving it unfenced. A Court of Equity in such a case would not order the defender to fill up the excavation if he put up sufficient fencing to make it safe. Lord Shand points out that a vessel accidentally deviating from its intended course would now strike a dangerous obstacle, which formerly was not there. Perhaps, as things are, the defenders would be responsible for the consequences of an accident of this sort if it happened; but the conclusion, if such a nuisance was proved, would be, not that they must remove the pier, but that they should put up a fender of the kind suggested by Mr Copland in his evidence. This, however, was not asked for by the pursuers.

I come, therefore, to the conclusion that the appeal should be allowed, with costs. I agree that the judgment should be as moved by my noble and learned friend who has preceded me, according to the suggestion of my noble and learned friend opposite (Lord Gordon).

My noble and learned friend Lord O'Hagan, who heard the argument, but is disabled by a slight accident from attending your Lordships' House and voting on this occasion, requests me to say that he has perused this opinion and concurs in it.

LORD GORDON.—The building of the bridge now in question was commenced in March 1875, and the east piers had been erected in the *alveus* of the river and completed by September, and the whole frame of the bridge is said to have been completed by the end of the year. The respondents on 31st December 1875 presented a note of suspension and interdict against the appellants, to have them interdicted from erecting the bridge, which had by that time been erected, and on 26th January thereafter the respondents raised the present process of declarator, in which they for the first time allege injury to public rights. But while doing so they set forth the injury done to their patrimonial rights as the main ground they have for seeking the removal of the bridge. They say in the fourth article of their condescendence that the erection of the pillars will obstruct the passage of salmon up and down the river; and in the fifth article they state,—“The most material interest which the pursuers have in the matter is the effect the bridge, as it is being constructed, will have on the value or return from the estate under their charge. The erection of the bridge will materially interfere with the transmission of the produce from the farms and of goods to them. These articles will not be transmitted as conveniently and cheaply as hitherto, but will have to be carried by road or rail; and the value of the lands will be diminished, and the rents to be obtained lessened. The pursuers have been informed and believe that the impediment which the bridge will cause in the conveyance of wood from the pursuers' lands down the Leven will prevent merchants from giving the same price for it as formerly. As a considerable quantity of wood from the estate is likely to be in the market in a few years, amounting in value to several thousand pounds, any

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reduction of price will be a serious loss to the trust-estate." The respondents also allege that "the erection of the pillars for the bridge on the towing-path will interfere with the towing of vessels, inasmuch as the horses will not be worked with the same freedom as formerly, and the passage of vessels, or at least of the scows or gabbarts, up and down the river."

These are the allegations of damage on which the summons is based, and on these the respondents seek to have it found and declared "that the river Leven throughout its course from Loch Lomond until it falls into the river or Firth of Clyde at Dumbarton is a navigable river, free and open to the public; that the defenders (appellants) have no right to execute any works or obstruct the navigation thereof, or the free use of its banks and of the towing-path along the bank of the said river for the purposes of navigation; and that the defenders (appellants) have no right to erect any bridges, piers, or other works therewith connected, which will in any way injuriously affect the rights and interests of the pursuers (respondents) as proprietors of salmon-fishings in the said river Leven and in Loch Lomond;" and then the summons concludes to have it found and declared that the works complained of do and will obstruct the free navigation of the river and use of the towing-path to the injury of the respondents, and will also injuriously affect their salmon-fishings, and should therefore be removed.

The proof has not supported the respondents' allegations of injury to patrimonial rights and to the towing-path—indeed the proof is in direct opposition to the allegations. Accordingly the respondents do not now contend that the patrimonial rights, which in their summons they alleged were materially affected, have, in point of fact, been so affected, and therefore it is unnecessary further to advert to the allegation of injury to the navigation by the alteration of the towing-path, as that is also now admittedly out of the case. The only point now really at issue in the case is the finding of the Lord Ordinary, which has been adhered to by the Court, that the piers recently erected by the appellants in the bed of the river near to the east bank are an obstruction to the free navigation of the river, and that in consequence they should be removed.

The appellants did not, in your Lordships' House, dispute that the Leven is a navigable river, free and open to the public. But the river is capable of very limited navigation, the only vessels which use it being the few scows or gabbarts referred to on the record, and occasionally, when the river is in flood, the Loch Lomond steamboats on their way to and from Dumbarton for repairs. The fact that the Leven is a navigable river, free and open to the public, infers that the appellants have no right to execute any works which will interfere with or obstruct the navigation thereof, or the free use of the towing-path along its bank for the purpose of navigation. I think it appears that there are several other bridges having piers in the Leven.

The Leven during the greater part of its course is a fresh water stream, and it is so at the point where the bridge in question has been erected. The *alvens* of such fresh water rivers belongs to the proprietors of the properties along their banks. Where such a river is navigable, free and open to the public, the right which the public has in such a river is substantially a mere right to use the river for the purposes of navigation, similar to the right the public may have to passage along a public road or footpath through a private estate. In the case of *Galbraith v. Armour*, in this House (11th July 1845, 4 Bell's Appeals, 374), Lord Campbell said,—“I must express my clear opinion that by the law of Scotland, as well as by the law of England, the soil of the public highways is presumed to

be in the conterminous proprietors, and that if a public highway is established by usage over the land of another the soil is still his, with all his former right, subject to the public servitude which he has suffered to be established ;" and Lord Brougham stated that he entirely agreed in the views stated by Lord Campbell. But though the public has no right of property in such rivers or roads they have a right to object to any obstruction being placed in the river or road which interferes with or obstructs the use of them to which they are entitled.

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But I do not agree with the finding in the Lord Ordinary's interlocutor that the piers recently erected by the appellants in the bed of the river near to the east bank are an obstruction to the free navigation thereof. This is a finding of fact which depends on the evidence. I do not mean to refer particularly to that evidence, because it has been fully adverted to by Lord Blackburn. But I have carefully considered it, and I agree in the view of it which your Lordship on the woolsack and his Lordship have taken, and I think it is of importance to keep in view that the Judges in the Court of Session were divided in opinion in regard to it. I concur in the opinion of Lord Mure, who goes fully into the facts of the case, that it has not been proved that the piers in the bed of the river do *de facto* obstruct the navigation of the river.

It is contended by the respondents that it is not necessary for them to establish by evidence that the piers in the bed of the river do at present obstruct the navigation, and that it is sufficient if it is shewn that the erection may do so at some future time and under some change of circumstances. The majority of the Judges in the Inner-House of the Court of Session have adopted this view, and they found strongly on the case of *Bicket v. Morris*. But that was a case between two conterminous proprietors having property on the opposite sides of a small stream flowing through the town of Kilmarnock, and each having a right of property *ad medium flum* of the stream, while as regards the stream itself there was a common interest which entitled each to object to any operation which might interfere with the regular flow of the water. This is very clearly and fully brought out in the opinions of the Judges of the Court of Session in the report of the case, 20th May 1864 (2 Macph., 1082).

The case of *Bicket v. Morris* appears to be quite in accordance with the law laid down in this House in the prior case of *Menzies v. Lord Breadalbane*, July 4, 1828 (3 Wilson and Shaw, 235), the rubric of which is,—"*Held* (varying the judgment of the Court of Session) that an heritor was not entitled to erect a bulwark or any other *opus manufactum* on the banks of the river Tay which might have the effect of diverting the stream of the river in times of flood from its accustomed course, and throwing the same upon the lands of an opposite proprietor, although it was alleged that the bulwark was intended to protect the heritor's lands from the flood." It was contended there that the bulwark, if allowed to be finished, must have the necessary effect of turning the great body of water which formerly went down upon the south side of the channel towards the north, upon the complainer's (Sir Neil Menzies) property, and thus overflowing the lands upon that side in a much greater degree than formerly. The House ordered and adjudged "that the respondent ought to be prohibited and interdicted from the further erection of any bulwark or any other *opus manufactum* upon the banks of the river Tay which may have the effect of diverting the stream of the river in times of flood from its accustomed course, and throwing the same upon the lands of the appellant." Lord Eldon, in com-

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paring the law of England and Scotland, said,—“This case must be decided by the law of Scotland. Now, with reference to the law of Scotland, this is perfectly clear, that a superior heritor cannot divert any part of a stream to the prejudice of an inferior heritor. It is also clear that an inferior heritor cannot do that which causes the water to stagnate to the prejudice of the superior. That is acknowledged to be clear law.”

The cases of *Bicket v. Morris*, *supra*, and *Menzies v. Breadalbane*, 3 W. and S., 235, as well as the cases of *Farquharson v. Farquharson*, 1741, M. 12,779, and *Magistrates of Aberdeen v. Menzies*, 1748, M. 12,787, which were also referred to as authorities for having the piers complained of in the present case removed, were all cases between adjoining or *ex adverso* proprietors. There was no question of navigation involved in any of these cases; neither was there any case of the public right. The right of a conterminous proprietor in a stream dividing his property from that of his opposite neighbour is, in my opinion, very different from that with which your Lordships are now dealing. The Lord President seems to think there is no difference in principle between the private rights of conterminous proprietors and those of the public. He says,—“I do not understand that the case of Sir James Colquhoun's trustees is based upon the notion that they have a private right here, as distinguished from that of any other member of the public. But it appears to me that the distinction is of no consequence in the application of the legal principle. The proprietor on the banks of a stream has an interest to prevent an erection in the *alveus*, because it may interfere with the flow of the stream, and so injure him. But it is not because he is a proprietor on the banks of the stream, but because, being a proprietor on the banks of the stream, he has an interest in the water, that he has a title to complain, and it is because the public have a right in the water that they, I think, have a title to complain. The title is not so much that of proprietorship as of interest in a running water, and in that respect the title of the complainers here, and the title of the complainer in *Bicket v. Morris*, is identical in principle.”

With great respect for his Lordship's opinion, I cannot agree with his Lordship in the view that there is no difference in principle between the rights of conterminous proprietors and the right of the public. I think that the interests which adjoining proprietors have in a stream are numerous, both in the water itself and in regard to the benefits or injuries which it may cause to the proprietors, and that these interests give them a right to complain and seek the removal of any impediments to the flow of the river.

But, in my opinion, the interests of the public in such a case as your Lordships are considering are very different from those of conterminous proprietors. The rights of the public are of a limited nature. They possess no right of property in the water itself. They have a right to the use of it only for the purpose of navigation. They have no right as regards the flow of the water or withdrawing of water, if the right of navigation is not affected. If that right is not interfered with they are not, in my opinion, entitled to complain of operations by proprietors for the beneficial use and occupation of their properties. I think, therefore, that the principles involved in cases between conterminous proprietors are inapplicable to the present case.

The Lord President in his opinion says—“The right of the public over a river of this class (that is, of a non-tidal river) is more like a right of way than the right of the public, which is represented and protected by the Crown in the

case of a navigable river where the tide ebbs and flows; and I am very much disposed to deal with this case as if it were just a right of way along this river—by means of the river—where it is fitted for purposes of navigation.” I agree with his Lordship that the right in question is very much the same as a right of way, and I therefore think that the principle which was applied by the Second Division in *Sutherland v. Thomson*, 29th February 1876 (3 *Rettie*, 485), has an application to the present case. In that case the question related to swing-gates which had been erected across a public footpath; and there the Court held “that these gates were necessary for the proper use of the respondent’s farm, and were so constructed as not to be in any material degree injurious or obstructive to the public in the free use of the path,” and the Court found “in point of law that the respondent was entitled to erect said gates across the footpath, and that the appellant was not entitled to remove or destroy the same.” Lord Ormisdale, in delivering his judgment in that case, after referring to the case of *Galbraith v. Armour*, before referred to, and to the case of *The Marquis of Breadalbane v. Macgregor*, in this House, 14th July 1848 (7 *Bell’s Appeals*, 43) (in which a right was claimed by the public to have stances on a drove road for cattle using the road to rest and pasture upon, and was repelled) said—“If the public, then, has a mere right to pass over the road, and if the *solum* or ground passed over belongs to the conterminous proprietor, it would be a strong thing to hold that the proprietor, or his tenant with his leave and in his right, is not entitled, for the protection and service of his estate, to put up gates which do not unnecessarily or in any material degree obstruct the public in the exercise of their right of passage. No authority was cited in support of any such proposition. On the contrary, there is ample authority, I think, in the opposite direction;” and then his Lordship refers to three cases in regard to gates across public roads, which he holds to support his proposition.

Lord Gifford in *Sutherland’s* case said—“In reality a public right of footpath is really the same as a servitude right, excepting that the dominant tenement is the whole kingdom and not a special subject or estate, and no good reason seems to exist why the equitable rights of use which the law secures to the proprietor of a servient tenement should not be given to the proprietor of an estate burdened with a public footpath, provided only its use as a public footpath is not interfered with. It seems to follow from the judgment of the House of Lords in the case of *Galbraith v. Armour* that the *solum* of the line of footpath is in the landlord of the ground, and not in the Crown; the public have nothing but a mere right of free passage over or through the lands which the respondent in the appeal occupies, and which belong to the Earl of Kinnoull. I am therefore of opinion in the present case that the respondent is entitled, in order to the enjoyment of his land for pasture, to put up such swing-gates or wickets as, while they will prevent his cattle from straying, will not impede the public right of way.”

The case of *Grant and Others v. The Duke of Gordon*, 9th March 1781 (*Mor.* 12,822), which had reference to the floating of timber from the Highlands down the river Spey to the sea, is entitled to consideration in the decision of the present case. It was a question between the upper proprietors of the river Spey and the Duke of Gordon as to the rights of the latter as proprietor of a cruive for salmon-fishing in the river near the sea. The report of the case bears—and the judgment was affirmed by your Lordships’ House on 20th February 1782—that the Court “considered a river by which the produce of the county

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could be transported to the sea to be a public benefit, entrusted to the king as *pater patriæ* for the behoof of his subjects in general, which could neither be given away nor abridged by him; and that this transportation, as the chief and primary use of the river, if incompatible with the cruive-fishing, would prevail over it. They were, at the same time, of opinion that those rights were not incompatible if not emulously used, and therefore proceeded to fix certain regulations according to which they were to be exercised."

This case is of importance in so far as, while it recognises a right of floating timber down the river as a quasi-navigable public right, and as the chief and primary use of the river, and which, if not compatible with the cruive-fishing, would prevail over it, the Court at the same time held that that right of navigation was not so absolute that it was not subject to equitable restrictions when in competition with other rights. And accordingly the right of the upper proprietors was held subject to restriction and limitation as regards the periods during which it could be exercised, a restriction which could not have been recognised by the Court if the right of navigation had been held to be absolute and not subject to equitable limitations.

I am of opinion that the appellants are entitled, as in a question with the respondents as members of the public, to the full and free use of their property, and to erect a bridge connecting their property on the one side of the river with their property on the other. The whole of the intervening *alveus* of the river is their property, and the appellants were entitled to erect piers in the river, provided those piers did not obstruct the navigation. I think it has not been proved that the piers which have been erected do in point of fact, having regard to their position with reference to the catchwater dyke, obstruct the navigation of the river, and therefore I am of opinion that the respondents have no right to demand their removal.

The views upon which I proceed in advising your Lordships are founded upon what I consider to be the law of Scotland, as found by your Lordships in previous Scotch cases. I observe that Lord Shand in his opinion refers to two English decisions as explaining the opinions of English Courts with reference to the case of *Bicket v. Morris*. But it is necessary to bear in mind that these cases had reference to the rights of the public in tidal rivers, and according to the law of Scotland, as well as in England, the principles applicable to tidal rivers differ from those applicable to rivers above the influence of the tide; and in these cases the Attorney-General, as representing the right of property of the Crown in the *alveus* of the water, was a party as relator.

I concur in the motion that the appeal should be sustained, and the interlocutors complained of recalled, with costs. I think the proper order is to recall the interlocutors appealed against; to find that the river Leven is a navigable river, free and open to the public; that the appellants have no right to execute any works which will interfere with or obstruct the navigation thereof, or the free use of the towing-path along the banks of the river for the purpose of navigation; that the works complained of in the summons do not in point of fact interfere with or obstruct the navigation of the river; and with these findings to remit the case back to the Court of Session, with instructions *quoad ultra* to assoilzie the appellants from the conclusions of the summons, and to find them entitled to the expenses incurred by them in the Court of Session.

THE following judgment was pronounced:—"Ordered and adjudged,

that the interlocutors complained of be reversed, and the Lords find that the river Leven is a navigable river, free and open to the public; that the appellants have no right to execute any works which will interfere with or obstruct the navigation thereof, or the free use of the towing-path along the banks of the river for the purpose of navigation; that the works complained of in the summons do not in point of fact interfere with or obstruct the navigation of the river; and with these findings it is ordered that the cause be, and the same is hereby remitted back to the Court of Session in Scotland, with instructions *quoad ultra* to assolzie the appellants from the conclusions of the summons, and to find them entitled to the expenses incurred by them in the Court of Session; and it is further ordered that the respondents do pay, or cause to be paid to the said appellants, the costs incurred by them in respect of the said appeal," &c.

No. 15.
 July 30, 1877.
 Orr Ewing
 and Co. v.
 Colquhoun's
 Trustees.

GRAHAM & WARDLAW—JOHN CARMENT, S.S.C.—J. & J. GRAHAM—TAWSE & BONAR, W.S.

CASES

DECIDED IN

THE COURT OF JUSTICIARY,

1876-7.

MARY CALLACHAN, Appellant.—*Brand.*
JOHN PATERSON, Respondent.—*Lang.*

No. 1.

Sep. 2, 1876.
Callachan v.
Paterson.

Poor—School Fees—Education (Scotland) Act, 1872, sec. 69.—The Education Act, 1872, sec. 69, provides that the parochial board shall pay out of the poor-fund the school fees for any child “in the event of such board being satisfied of the inability of the parent to pay such fees.” Where a parochial board had refused to pay the school fees of a child, on the ground that they were not “satisfied of the inability of the parent to pay such fees,” held that an action against the parochial board for recovery of the fees could not be sustained.

THE appellant, Mary Callachan, schoolmistress, Stirling, raised an action in the Sheriff Small Debt Court, Stirling, against the respondent, John Paterson, inspector of poor of the parish of Stirling, to recover certain school fees payable for Patrick Mulvany, aged nine years, son of Mrs Mary Girvan or Mulvany, who had, as alleged, been deserted by her husband, and was unable, from poverty, to pay the school fees in question. CIRCUIT COURT.
West Circuit.
Lord Deas.
Lord Mure.
W. H. Bell,
Clerk.

The ground of liability stated was that under the Education Act, 1872, section 69,* it was the duty of the parochial board, which the respondent represented, to pay the fees on the failure of the parent, through poverty, to do so.

The respondent had refused to pay the fees, in respect that the board were not satisfied of the inability of the parent to pay them. In defending the action he maintained that the course taken by the board was not subject to the review of a Court of law.

* 35 and 36 Vict. c. 62, sec. 69, enacts,—“It shall be the duty of every parent to provide elementary education in reading, writing, and arithmetic, for his children, between five and thirteen years of age, and if unable from poverty to pay therefor, to apply to the parochial board of the parish or burgh in which he resides, and it shall be the duty of the said board to pay out of the poor-fund the ordinary and reasonable fees for the elementary education of every such child, or such part of such fees as the parent shall be unable to pay, in the event of such board being satisfied of the inability of the parent to pay such fees,” &c.

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The Sheriff-substitute gave effect to this view, and dismissed the action.

The present appeal was then taken to the next Circuit Court of Justiciary.

Argued for the appellant;—(1) If the parochial board altogether refused to consider an application under section 69 of the Education Act they might be compelled to do so by the Sheriff. If, however, they only formally considered it, but refused to apply their minds to it, or decided on inadequate and unreasonable grounds, the evil was just as great, and could only be remedied by the Sheriff considering the case, and reviewing the decision of the board. (2) The payment of school rates by the board was intended to be in the same position as the affording parochial relief. There was an appeal given by the Poor-Law Act, 1845, to the Sheriff as to the right to relief, and to the Board of Supervision as to the adequacy of the relief. And in like manner it was intended that there should be an appeal to the Sheriff, at any rate where payment of school rates was altogether refused. The burden thus imposed on the parochial board was to be met out of the rates. It was therefore in the same position as ordinary parochial relief. The enactment of section 69 of the Education Act was just an addition to the Poor-Law Act, and the means of compelling the board to perform its duty introduced by the latter Act applied, though not formally imported into the former. (3) If the Sheriff could not compel payment of school fees the result would be that many children would remain uneducated. Suppose that the parochial board considered that a parent was able to pay school fees for a child who was not attending school, and accordingly refused to pay the fees under section 69 of the Act, and that the school board were satisfied of the parent's inability to pay these fees, and accordingly refused the certificate required by section 70 before the procurator-fiscal could prosecute to compel attendance, the result would be that the child must remain uneducated in spite of the compulsory clause of the Act. This result could only be avoided by sustaining an appeal to the Sheriff. (4) But the action was not necessarily to be looked on as an appeal against the board's decision. It was also an ordinary action to recover a debt. The 69th section of the Education Act had laid an obligation on the parochial board which constituted a debt against them unless they could shew that in the circumstances it was not due.

Argued for the respondent;—The parent was not a pauper for the gratuitous education of whose children provision was made by the Poor-Law Act, 1845. She claimed to belong to a new class created by section 69 of the Education Act, 1872, namely, of persons who, without being paupers, were unable to pay the fees for elementary education for their children. But the duty of paying the fees was only thrown upon the parochial board if "satisfied of the inability of the parent to pay such fees. The provisions of the Poor-Law Act, 1845, as to appeal to the Sheriff, had no bearing on the present question. They were not imported into the statute, and no other provision for review was made. As a means of reviewing the decision of the board the action before the Sheriff was therefore incompetent. If looked at as an ordinary action for debt due under the statute it was unfounded, for the condition on which the debt depended had not been purified.

LORD DEAS.—If the duty laid on the parochial board by section 69 of the Education (Scotland) Act, 35 and 36 Vict. c. 62, to pay for the elementary education of every child whose parent was unable from poverty to do so could be held to be a mere additional duty to that imposed by the Poor-Law Act,

and 9 Victoria, c. 83, to provide parochial relief for the poor, and was to be dealt with in the same way, it might follow that the Sheriff, in such a case as the present, could competently order the parochial board to provide the means of educating the child in question, although the Board of Supervision could alone deal with any question of disputed amount. But the Poor-Law Act is not one of the Acts recited in the preamble of the Education Act, and I can find no sufficient grounds for giving effect to the present appeal upon that view of the case.

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The more plausible argument is, that the action against the parochial board is to be regarded as an action for debt, and that the alleged debtors must be subject, like all other debtors, to the ordinary jurisdiction of the Sheriff, unless that jurisdiction has been expressly excluded.

But the peculiarity here is that it is only in the event of the parochial board "being satisfied of the inability of the parent to pay" the fees that the duty is laid on the board, by the enactment founded on (35 and 36 Vict. c. 62, sec. 69), to pay the fees out of the poor-fund; and it is very difficult to suppose that it was intended to allow an investigation in every instance into a question of that kind before the Sheriff, although there was no allegation that the parochial board had failed to make proper inquiry into the fact, and to give their deliverance upon it according to the best of their judgment.

If it had been distinctly averred that the parochial board had taken no means of ascertaining the disputed fact, but had altogether failed to apply their minds to the subject, I should have been disposed to think there was no incompetency in remitting to them to do so. But there is no allegation of that kind here. The case of the Lord Advocate against the School Board of Stow, 19th February 1876, 3 *Retie*, p. 469, was different from this, but I am inclined to regard the principles recognised in that case as not altogether inapplicable here.

LORD MURE concurred.

APPEAL dismissed.

D. W. FOGIE, Stirling—E. GENTLEMAN, Stirling—Agents.

ADAM COLQUHOUN, Appellant.—*Lord-Adv. Watson—Darling.*
MATTHEW LIDDELL AND CORNELIUS BAILLIE, Respondents.—*Mair.*

No. 2.

Nov. 16, 1876.
Colquhoun v.
Liddell and
Another.

Crime—Actor or Art and Part—Day Trespass Act, 2 and 3 Will. IV. c. 68.
*c. 1.—The above section enacts,—"That if any person whatsoever shall commit any trespass by entering in the daytime upon any land without leave of the proprietor in search or pursuit of game, &c., such person shall, on being summarily convicted thereof before a Justice of the Peace, . . . forfeit and pay," &c.

Three men were charged, "all and each, or one or more of them," with a contravention of the Day Trespass Act, "by entering or being in or upon a field" on the property of K in pursuit of game. It was proved that one of them had contravened the Act by entering the field without leave of the proprietor in pursuit of game, and that the other two were acting in concert with him, and were running up and down on the public turnpike road preventing the escape of the game of which he was in pursuit.

Held (diss. Lord Young) that the two latter men were not guilty of contravening the Act libelled.

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HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Ld. Craighill.
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MATTHEW LIDDELL and CORNELIUS BAILLIE and a third person, John Grant, were, on 24th August 1876, charged before the Justices of Peace for the county of Linlithgow with an offence under the Day Trespass Act, 2 and 3 Will. IV. c. 68, sec. 1,* in so far as they, "all and each, or one or more of them," did, on the 24th June preceding, "unlawfully commit a trespass, by entering or being in or upon a field," on the property of Kinneil, belonging to the Duke of Hamilton, in pursuit of game, &c.

Grant was convicted, but Liddell and Baillie, the respondents, were acquitted, whereupon the appellant, Adam Colquhoun, procurator-fiscal of Court, applied to the Justices to state a case under the Summary Prosecutions Appeals Act, 1875.

The statement of the case was—"On the evidence adduced the justices convicted John Grant of the contravention charged . . . and found it proved that the said Matthew Liddell and Cornelius Baillie were acting in concert with the said John Grant, and were running up and down on the public turnpike road preventing the escape of a hare, for pursuit of which with a dog the said John Grant was found guilty, but found in law that the same was not a trespass under the Act libelled."

The question of law was—"Whether, in the circumstances specified in the judgment of the Justices, the said Matthew Liddell and Cornelius Baillie, never having been off the public turnpike road, had contravened section 1st of the Act 2 and 3 William IV. c. 68."

Argued for the appellant;—The circumstances set forth in the case were sufficient to prove that the respondents were guilty of aiding and abetting Grant in a contravention of the Act 2 and 3 Will. IV. c. 68, sec. 1. The terms of the Summary Procedure Act, 1864, schedule A (2), however, did not admit of the libelling of a statutory offence as committed "art and part." It did not follow, however, that a statutory offence such as a trespass under the Act 2 and 3 Will. IV. c. 68, could not be committed "art and part" as well as "actor." The ordinary rule of law was applicable to such offences as well as to common law offences. The respondents by aiding and abetting were equally guilty with Grant of committing a trespass on the lands in question. Though the question had never arisen for decision in Scotland this view was supported by several English cases.¹

Argued for the respondents;—Actual corporeal entering or being on the land of another without his consent in pursuit of game was essential to the contravention of the statute. The statutory offence created by the Day Trespass Act was not criminal, and such a statute could not be stretched to cover by implication what it did not expressly include.² The English law of trespass rendered the English cases cited for the appellant of no application.

LORD YOUNG.—The question raised by this appeal is very important, for it

* "That if any person whatsoever shall commit any trespass by entering in the daytime upon any land without leave of the proprietor in search or pursuit of game, &c., such person shall, on being summarily convicted thereof before a Justice of the Peace," &c., "forfeit and pay," &c.

¹ The Queen v. Pratt, April 21, 1855, 24 L. J. Mag. Ca. 113; Mayhew v. Wardley, June 8, 1863, 14 Scott's C. B. Rep. 550; Rex v. Passey, March 8, 1836, 7 Car. and Payne, 282; Stacey v. Whitehurst, Jan. 25, 1865, 34 L. J. Mag. Ca. 94; The Queen v. Whittaker, April 29, 1848, 17 L. J. Mag. Ca. 127.

² Arthur v. Peebles, June 30, 1876, *ante*, vol. iii., Justiciary Cases, 38.

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is, I think, impossible to doubt that on the statement submitted to us the respondents, who were acquitted by the Magistrates, were, according to the reason and good sense of the thing, as well as the ordinary rule of law, as guilty as their companion who was convicted. The Magistrates inform us that their reason for acquitting the respondents was that they were not "upon" the land within the meaning of the Act, as they, the Magistrates, understood it, or rather that, not having been upon the land in their own proper persons, they were not liable to conviction by reason of concert with and active assistance to their companion. Whether or not this opinion is sound is the question for our decision. According to the statement, Grant (the man who was convicted) was on the land with a dog pursuing a hare, while the respondents, acting in concert with him, were on an adjoining road doing their best to help him and the dog by preventing the escape of the hare. The question therefore is, whether, in order to the conviction of any person under the Day Poaching Act, it is essential that he shall have been bodily upon the land. We have not to consider whether or not a trespass within the meaning of the Act may be committed without bodily entry on it by some human being—as, for example, by sending in dogs to hunt hares upon it, or by shooting game on it and sending a dog to fetch it, or by setting snares on it by means of a pole. I should myself have thought that all these were trespasses punishable by the Act. But the case we have here to consider is one of actual bodily trespass on the land by a man accompanied with a dog, and the question is only whether his companions who, acting in concert with him, remained on the road side of the fence where they could, as they thought, best aid him in the capture of the game, are not guilty of this trespass as well as he. The maxim *qui facit per alium facit per se* is one of very general application in all departments of law, civil and criminal, and at first sight certainly this seems a clear case for applying it. But it was urged that it is excluded by the nature of the offence and the language of the statute. With respect to the nature of the offence, it is simply a statutory offence with a penalty attached, "for the repression" of "trespasses upon property by persons unlawfully engaged in the pursuit of game." But it is generally true that a person may commit any trespass or act whatsoever *per alium* as well as *per se* to the effect of being legally responsible for it, civilly and criminally, and I see no reason for an exception in the case of this particular kind of trespass. With respect to the words of the Act, these are, that "if any person whatsoever shall commit any trespass by entering or being in the daytime upon any land without leave of the proprietor in search or pursuit of game" he shall be liable to conviction and punishment. Now, every statute must be applied and enforced in a Court of justice with reference to the common rules and principles of law, one of which is expressed by the familiar maxim to which I have referred. Such rules and principles are never, or at least very rarely, expressed in Acts of Parliament, although daily, and I may say of necessity, acted on and applied by the Courts in proceedings under them. A statute against cutting and stabbing does not express the rule of law that a person who holds down the victim while his companion stabs him shall be esteemed guilty of the stabbing, but leaves the Court to determine, according to the ordinary rules of law applicable to the matter, what conduct shall infer guilt of the act against which the statute is directed. There is here no distinction that I know of between statutory and common law offences, or indeed between civil and criminal matters. It was said that to run up and down a

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public road preventing the escape of a hare is an innocent proceeding. But it is also an innocent proceeding to stand on the street and whistle on seeing a policeman; only when this is done by a person acting in concert with a house-breaker who is committing theft in an adjoining house, it would, on the rule of law which I am considering, infer guilt of the housebreaking. So here the concert with the trespasser who was pursuing game on land adjoining the road infers, in my opinion, guilt of the trespass. There is, of course, no comparison in point of enormity between housebreaking and poaching, although I cannot concur in the view that a trespass on land in pursuit of game is, irrespective of the Act, quite innocent, for it is clearly illegal, and might be restrained as a trespass on property and an invasion of legal right, although no punishment were attached to it. It is, however, I assume for politic reasons, made a punishable offence by statute, and what acts or conduct shall be sufficient to infer guilt of it must, in my judgment, be determined according to the law that governs such matters, which does not ordinarily (though it may in a few very exceptional cases) require to warrant conviction that the very act wherein the offence consists shall have been committed directly and immediately by the accused with his own hands or in his own proper person. Whether this ought to be regarded as an exceptional case is really the question, and for my part I see no sufficient ground for so regarding it. I should therefore answer the question submitted to us in conformity with this view of the law, and remit to the Justices to proceed accordingly.

LORD CRAIGHILL.—I have come to be of an opposite opinion, and therefore think that the decision of the Justices must be supported.

The offence set forth in the complaint was an alleged contravention of the provisions of the 1st section of the Act 2 and 3 Will. IV. c. 68. In other words, what was charged was a statutory offence; and this being so, there are, as I think, two rules, and two rules only, by which our decision upon the question submitted to us ought to be governed,—the first of which is, that the words of the statute shall be taken in their plain and natural meaning; and the second, that words by which the operation of the Act would be extended, however reasonable some may consider the extension, are not to be held as implied in the statutory definition. What has been clearly and unequivocally enacted, and not also what might by some be considered equally criminal, is all which can be determined. Now, it appears to me that the words of the Act, plainly and naturally read, import that the offender must have himself been on the land upon which the trespass in pursuit of game is said to have been committed. These words are—"That if any person whatsoever shall commit any trespass by entering or being in the daytime upon any land without leave of the proprietor in search or pursuit of game, &c., such person shall, on being summarily convicted thereof before a Justice of the Peace," &c. &c., "forfeit and pay such sum of money, not exceeding two pounds, as to the Justices shall seem meet." Thus the person who is to be punished is the person who has entered or has been on the land and he can contravene only by entering or by being on the land. This seems to me to be the result of the enactment, and to widen the interpretation so as to include constructive presence would be to introduce into the statute an offence which it has not created. Nothing beyond this extension could have been accomplished, if, in addition to the words actually used, there had also been used words expressly enacting that the forbidden trespass would be committed,

not merely by entering or being on the land, but otherwise by instigating, aiding, or abetting those who had entered, and were upon the land. Words creating offences are certainly not to be stretched for the purpose of widening their comprehension. More than this, if they are susceptible of two interpretations, the more limited is that which should be preferred. Consequently, though, as I think, the plain and natural reading of the words creating the offence is that which I have adopted, it would be enough as a ground of judgment here that these are as susceptible of this interpretation as of another by which the area of criminality would be enlarged.

It appears to me to be of no importance that in common law offences guilt is ordinarily incurred by accession to the criminal act. That is a well known rule, and has been applied to what at first sight might be considered an extreme case. For example, it has been held that if a gang of thieves go to a town and lodge in the same house, conducting themselves so as to shew that they are engaged in a joint adventure, by sharing their booty with one another, and by meeting together during the day, then though the separate acts of theft committed by each may have been unknown until after the perpetration, still they are all guilty, art and part, of all the thefts committed,—*vide*, 1 Hume, pp. 115-6. Could this rule be applied to the offence under consideration? Suppose three men leave in the morning on a poaching expedition, the proceeds of which is to be shared by all, and that each goes his own way and commits the forbidden trespass upon land, without knowledge on the part of the others that it was to be visited in search or pursuit of game, could all three be held to have done that by which the trespass of each became the trespass of all? This, I think, would be a plainly unsound conclusion. And yet it can hardly be avoided if the statute is to be read as if it contained words by which it enacted that an accessor who had not entered the land might incur the same guilt as the principal offender.

LORD JUSTICE-CLERK.—This is certainly an important and difficult question. The English cases that have been referred to command our utmost respect, but they are not direct authorities for our guidance.

I have come to the same opinion as Lord Craighill, and on this ground: When a thing is in itself criminal, and a statute is passed merely to regulate procedure or penalties, then the ordinary rules of law apply, and the offence may be committed by a person who aids and assists although he is not the actual perpetrator. He who is "art and part" in the commission of the offence in law and in reason commits it. But when a thing which is in itself innocent, or at least not a crime, is raised into a criminal offence by a statutory enactment, attaching the character of a crime to certain qualities or incidents of an act not in itself criminal, then the statutory offence is only committed by acts having those specific qualities or incidents. It must be committed, not constructively, but directly, otherwise that which gives the sanction of the statute is not present.

Now, in the present case, running up and down on a public turnpike road, even to prevent the escape of a hare, is not at common law an offence of any kind. Certainly, apart from the statute, the respondents committed, on the facts stated, no criminal act whatever. The statute only attaches a criminal quality provided certain conditions accompany the act. A trespass committed by entering or being by day upon any land without leave in pursuit

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of game is created an offence. But it is the entry upon the land in pursuit of game that constitutes the act a criminal offence. Without actual entry on the land, and without the object being pursuit of game, the act remains what it otherwise is—an innocent, or at least not a criminal, act,—and this, because of the limitation of the statutory provisions. It is impossible to apply to a case of this sort the ordinary doctrine of “actor, or art and part;” for the specific act which constitutes the offence requires to be personally done by the offender. Take, for example, the Night Poaching Act: Could it be said that the offence of three or more persons together being trespassing on land, by night, armed, in pursuit of game, was committed by one man being on the land, and two men, not armed, and not on the land, assisting him? Would the offence of being on land, &c. with the face blackened be committed by the man who helped to blacken it? These remarks apply to a large category of penal acts, under a variety of statutes, where, for the interests of the public, punishment is attached to acts not criminal in themselves, but which raise such a presumption or probability of crime that they are prohibited and visited by the penalties of the law. In none of these offences do I think that the doctrine of art and part can apply.

THE COURT answered the question in the case in the negative, affirmed the determination of the Justices, dismissed the appeal, and found the appellant liable in expenses.

J. A. JAMIESON, W.S.—PETER MILLER, L.A., Linlithgow—Agents.

No. 3.

Nov. 16, 1876.
Banks v.
M'Lennan.

JOHN BANKS, Complainer—*Mair*.
MALCOLM M'LENNAN, Respondent.—*Burned*.

Crime—Breach of the Peace.—A was charged at common law before the Sheriff with “the crime and offence of disorderly conduct in a public street” (in a town where there was no police magistrate), “by using insulting and abusive language to or of and concerning B, who was then peaceably passing along said street, calling aloud that the said B was a thief, and using other grossly offensive words of the like nature, all in a manner calculated and intended to provoke a breach of the public peace.” Held that the charge was not relevant.

HIGH COURT.
Lord Justice-
Clerk
Lord Young.
Ld. Craighill.
Justiciary
Clerk.

JOHN BANKS, residing in Pulteneytown, was charged at the instance of Malcolm M'Lennan, procurator-fiscal of the county of Caithness, with “the crime and offence of disorderly conduct in a public street of a town, actor, or art and part, in so far as on the 8th day of April last, 1876, or about that time, and in or near Saltoun Street of Pulteneytown aforesaid, the said John Banks did wickedly and feloniously conduct himself in a disorderly manner by using insulting and abusive language to or of and concerning George Swanson, sheriff officer, residing in Thurso, who was then peaceably passing along said street, calling aloud that the said George Swanson was a thief, and using other grossly offensive words of the like nature, all in a manner calculated and intended to provoke a breach of the public peace.”

Pulteneytown had a special Police Act of its own, but its commissioners of police were not entitled to sit as magistrates. It had not adopted any of the General Police Acts. The case was therefore brought for trial before the Sheriff (Thoms) of Caithness at Wick.

Banks was convicted, and sentenced to pay a fine of £1, 1s, or, in default, to be imprisoned for ten days.

This suspension was brought by Banks, on the ground that the complaint was incompetent and irrelevant, as the offence charged was neither a statutory offence nor an offence at common law.

Argued for the complainer;—Disorderly conduct in a public street was a purely police offence, cognisable only within the jurisdiction of burgh or police magistrates. It was not an offence at common law, nor was it made such by statute. Even if it was so, no statute was founded on. Further, the major proposition, even if it set forth an offence known to the law, was not borne out by the minor.¹ The use of abusive language could not be raised into a criminal offence merely by an averment that it was used with the intention to provoke breach of the peace.

Argued for the respondent;—Disorderly conduct in public did amount to an offence at common law. Undoubtedly it was a police offence, cognisable by a police magistrate. But it was so, not by the force of any statute, but simply at common law.² Now, there was no ground for saying that there was a different common law within the jurisdiction of a police magistrate and without it,—that a man might be tried and punished for doing in Wick what he might do with impunity in Pulteneytown. Where the magistrates had no jurisdiction recourse must be had to the Sheriff. And there was no reason why he should not try outside the magistrates' jurisdiction a charge which would have been competent and relevant within it. If, then, the major of the indictment amounted to a relevant charge, the *species facti* set forth in the minor were sufficient to support it.

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M'Lennan.

LORD YOUNG.—I am of opinion that this conviction cannot be sustained. The prosecution was not a police prosecution, which the Dundee case (*Durrin and Stewart v. Mackay*) was. There was there no complaint with a major and minor, but merely an ordinary police complaint, tried in the Police Court. Here we have a regular indictment, and disorderly conduct in a public street is charged in the major as a crime at common law, and in the minor we have set forth that this crime was committed by "using insulting and abusive language to or of and concerning George Swanson, sheriff officer, . . . calling aloud that the said George Swanson was a thief, and using other grossly offensive words of a like nature."

It is impossible to sustain that as a relevant charge at common law. A conviction under it would be an interference with the liberty of the subject which we cannot sanction. If the sheriff officer wants redress he may have it by civil action. But the alleged abuse of him cannot be made a crime by saying that the panel uttered it "in a manner calculated and intended to provoke a breach of the public peace."

LORD JUSTICE-CLERK and LORD CRAIGHILL concurred.

THE COURT pronounced this interlocutor:—"Pass the bill, suspend the conviction and sentence complained of *simpliciter*: Find the respondent liable in expenses," &c.

WILLIAM OFFICER, S.S.C.—J. A. JAMIESON, W.S., Crown Agent—Agents.

¹ *Galbraith v. Muirhead*, Nov. 17, 1856, 2 *Irv.* 520, 29 *Scot. Jur.* 15; *Buist v. Linton*, Nov. 20, 1865, 5 *Irv.* 210, 38 *Scot. Jur.* 47.

² *Durrin and Stewart v. Mackay*, March 14, 1859, 3 *Irv.* 341, 31 *Scot. Jur.* 394.

No. 4.

JOHN DAISH, Appellant.—*M'Keechie*.
JOHN PATERSON, Respondent.—*M'Laren—J. A. Reid*.

Dec. 22, 1876.
Daish v.
Paterson.

Edinburgh Police Act, 1848 (11 and 12 Vict. c. cxiii.), sec. 197—Cleaning Common Stair.—Held that the obligation to clean a common stair or passage imposed by the 197th section of the Edinburgh Police Act, 1848, on the occupants of houses, flats, or stories of tenements entered thereby, did not apply to the occupants of houses having their proper access by a main door from the street, although entry from the common stair or passage was possible through a passage, not intended to be so used.

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Ld. Craighill.
Justiciary
Clerk.

A COMPLAINT was laid before the Police Court of Edinburgh by the respondent as inspector of lighting and cleansing in Edinburgh and procurator-fiscal of Court, charging the appellant, John Daish, and also John Martin, both residing in Valleyfield Street, Edinburgh, with having contravened the 197th section of the Edinburgh Police Act, 1848,* in so far as, on 31st October 1876, the appellant and the said John Martin, "being the occupiers of a house, flat, or story of a tenement entered by a common stair or passage in or near Valleyfield Street aforesaid, failed to sweep every lawful day, and wash at least twice a-week, said common stair or passage."

The complaint was found proved, and the accused were ordered to pay a fine of half-a-crown each or be imprisoned for one day. Whereupon a case for appeal was craved for the appellant, John Daish.

The facts stated were that the houses occupied by the appellant and John Martin respectively were the two main door ground flats of a tenement in Valleyfield Street consisting of four stories. That access was obtained to the three upper stories by means of a common stair, the passage leading to the bottom of which separated the houses of the appellant and John Martin. That behind the tenement there was a back green, of which both the appellant and John Martin and the proprietors and occupants of the upper stories had the use. That this back green was approached by a second passage leading from a door at the foot of the common stair to the outer door, opening to the back green. Both these doors were kept locked, all interested in the back green, including the appellant, having keys. The same key opened both doors. That the houses of the appellant and John Martin had both private doors opening on to this second or inner passage, and that the occupants therefore had no need for and made no use of the first or outer passage which ran between their houses. That the appellant and John Martin had taken their turn with the occupants of the upper stories in cleaning, as directed by the statute, the second or inner passage, but they had failed to clean the first or outer passage leading from the street to the bottom of the common stair, which the respondent contended they alone were bound to clean.

The questions of law submitted to the Court were,—“Whether the house of the appellant ‘is entered by a common stair or passage’ in the sense of section 197 of the Edinburgh Police Act, 1848; and whether the appellant is liable to be proceeded against for failing to clean as directed

* 11 and 12 Vict., c. cxiii., sec. 197, enacts,—“That the occupiers of every house, flat, or story entered by a common stair or passage shall cause the stair and passages immediately below the flat or story possessed by them to be swept every lawful day and washed at least twice a-week, and all areas connected therewith to be swept every lawful day; . . . and every person offending herein shall, for each offence, be liable to a penalty of five shillings.”

in said section" the first or outer passage leading from the street to the foot of the common stair. No. 4.

Argued for the appellant;—The clause of the statute founded on did not apply to main door houses such as his, having no access by the common passage, but merely an accidental means of getting into the common passage. Dec. 22, 1876.
Daish v.
Paterson.

Argued for the respondent;—The appellant had an access by the common passage which it was open to him to use at any time he liked. The public authorities could not be inquiring in each particular case whether such access was actually used. The mere possession of it brought the occupier within the terms of the statute.

LORD JUSTICE-CLERK.—The Sheriff has referred to us the following questions:—
“ Whether the appellant's house ‘ is entered by a common stair or passage ’ in the sense of section 197 of the Edinburgh Police Act, 1848 ; and whether the appellant is liable to be proceeded against for failing to clean, as directed in said section, the passage,” which, as shewn on the plan, separates his house from that of his neighbour, Mr Martin.

That is purely a question of construction of the statute, and though it is not one of any great moment in the particular case, as the amount of the fine inflicted on the appellant was only half-a-crown or one day's imprisonment, still it is one which, in a town like this, has a very general bearing. There are a great many houses in Edinburgh built in the same manner as that of the appellant, and if the Sheriff's decision is sustained their occupiers will find a burden of cleaning thrown upon them which, in my opinion, the statute did not contemplate. I think the section of the statute does not apply to houses which have main doors from the street, but only to houses whose usual entrance is from a common stair or passage. In the case of the appellant's house there is no proper entrance from the common passage. There is, indeed, a means of getting access to the back door of the appellant's house by means of the common passage. But it obviously exists only through the accident of the occupants of the common stair requiring a means of access to the common back green, and therefore to the back passage leading to the back green on which the appellant's back door opens. It is not a means of access intended for the benefit of the appellant's house, or from which the appellant derives any benefit.

I cannot therefore hold that the appellant, under this clause in the statute, is bound to clean this common passage.

The answer to the question, therefore, will be, that the appellant's house is not entered by a common passage in the sense of the statute, and consequently that he is not liable to be proceeded against for not cleaning it.

LORD YOUNG and **LORD CRAIGMILL** concurred.

THE COURT answered the question in the negative, reversed the determination of the magistrate, and found the appellant entitled to expenses.

J. & A. HASTIE, S.S.C.—**RICHARDSON & JOHNSTON, W.S.**—Agents.

No. 5.

JOHN GRAHAM, Appellant.—*Asher—R. V. Campbell.*
JOHN LANG, Respondent.—*Balfour—Lang.*

Dec. 22, 1876.
Graham v.
Lang.

Public-House Certificate, breach of—Public-Houses Acts Amendment Act, 1862, schedule (A) No. 2.—In an appeal against a conviction for breach of a public-house certificate, by selling exciseable liquor to a child “apparently under fourteen years of age,” held that no breach is committed if the child is *de facto* the messenger of an adult though this is not within the knowledge of the publican and the child is served without inquiry.

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
J. A. Craighill.
Justiciary
Clerk.

THE appellant, John Graham, spirit-dealer, Glasgow, was convicted in the Glasgow Police Court, at the instance of the respondent, John Lang, procurator-fiscal of Court, of breach of certificate, in that, on 18th November 1876, he sold exciseable liquor to Mary M'Cue, a girl apparently under fourteen years of age.*

A case for appeal was taken, in which the following facts were stated as the result of the evidence.

On the day in question the girl Mary M'Cue was supplied by the appellant's shopman with one half glass of brandy, which was put by the shopman into a bottle, which she had brought with her, and corked up. The girl had been sent for the brandy by her mother, who had been ordered to take it by a doctor. She paid for it with her mother's money, and on receiving it from the shopman took it home to her mother. She had been several times previously in the shop with her mother, but the evidence was conflicting as to whether she had ever been alone in the shop before and been supplied with liquor. The shopman who served her deponed that he had seen the girl before, but that he could not say that he had seen her come into the shop to get liquor, and that on the occasion in question he served her without asking any questions whatever.

The question of law submitted to the Court was—“Whether, on the facts proved, was the brandy sold or supplied to the girl Mary M'Cue contrary to the terms and intent of the appellant's certificate.”¹

LORD YOUNG.—The facts in this appeal are very short and very clear as stated in the case before us. An invalid mother sends her little girl of ten years of age to a public-house to get half a glass of brandy which she requires—and, unfortunately, some invalid mothers are obliged to use their little girls for such errands. The publican, without any inquiry, and acting indeed through one of his shopmen, who understood that the little girl did not come on her own account, but must have been sent by some one else, gave her the half glass of brandy, which she took away in a bottle, corked up, and which she paid for with the money her mother had given her for the purpose.

The complaint is then made against the publican under the statute for selling drink to a child “apparently under fourteen years of age.” According to the construction of the statute, authorised by the Court in the case of *Donaldson v. Linton*, no offence is committed when the liquor sold is not sold to a child at all, but to the child as the messenger of an adult. There can be no offence, because the liquor is not supplied to the child but to the adult. Here the magis-

* One of the conditions of a public-house certificate (25 and 26 Vict. c. 35, schedule (A) No. 2) is that the publican “do not sell or supply exciseable liquor to girls or boys apparently under fourteen years of age.”

¹ Authority referred to.—*Donaldson v. Linton*, Dec. 8, 1875, *ante*, vol. iii., Justiciary cases, p. 16.

trate convicted the publican upon the ground, which seems a strange one, on the statement of it, that he had accidentally, and without due inquiry, arrived at a right conclusion, and supplied liquor to a child who was really and truly the messenger of an adult.

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According to the decision in the case of Donaldson, where the liquor was sold to a child who was a messenger certainly, but a messenger for other children, the publican might have had the defence of being *in bona fide* in consequence of having been deceived into the idea that the child was the messenger of an adult after due inquiry. That was held to be a possible good defence; but then the publican had not made any inquiry at all, and so the evidence would not support the defence. Here the offence libelled was never committed, and to hold the publican guilty because he did not make inquiry and might have committed the offence is out of the question.

LORD JUSTICE-CLERK and LORD CRAIGHILL concurred.

THE COURT answered the question in the case in the negative, reversed the determination of the magistrate, and found the appellant entitled to expenses.

J. W. & J. MACKENZIE, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

JAMES GREIG, Appellant.—*R. V. Campbell*.
DONALD STEWART, Respondent.—*Trayner*.

No. 6.

Public-House—Conviction—General Police Act, 1857 (20 and 21 Vict. c. 72), sec. 24—Publican harbouring Police Constables.—The General Police Act, 1857, section 24, enacts that "if any victualler, &c. shall knowingly harbour or entertain any constable appointed under this Act, or permit such constable to abide or remain in his house, &c., to the neglect of his duty, during any part of the time appointed for his being on such duty," such victualler shall be subject to a penalty.

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A publican was charged under this section before the Police Court of A, in so far as he did "knowingly harbour or entertain X, Y, and Z, police constables for the A district, . . . being then constables within the meaning of the said Act, or did permit the said X, Y, and Z to abide or remain in his said house, &c. to the neglect of their duty, during part of the time appointed for their being on such duty." It was proved that two of the constables were in uniform, and on duty, and the other one not; that all three did together enter the publican's premises, purchase and consume a certain quantity of liquor, but that they did not sit down, and only remained four or five minutes. The publican was convicted of the offence charged and fined in a slump sum. Conviction *quashed*, on the ground that it was general, in respect of harbouring, &c. all three constables, while, as regards one of these, it was clear the offence had not been committed.

Observations on the prohibition contained in the General Police Act, 1857, section 24, against publicans harbouring police constables during the hours of duty.

THIS was an appeal on a case stated from the Justice of Peace Court at Airdrie for James Greig, spirit-dealer, Coatbridge, appellant.

HIGH COURT.
Lord Justice-
Clerk.

The appellant had been charged at the instance of Donald Stewart, superintendent of police of the Airdrie district of Lanarkshire, the respondent, with having been guilty of an offence within the meaning of the Act of Parliament 20 and 21 Vict. c. 72, sec. 24,* in so far as on 2d

Lord Young.
Ld. Craighill
Justiciary
Clerk.

* The General Police Act, 1857 (20 and 21 Vict. c. 72), section 24, enacts:—
"If any victualler, or keeper of any house, shop, room, or other place for the

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December 1876, he, "the said James Greig, being the keeper of a house, shop, room, or other place for the sale of liquors, either spirituous or otherwise, situated in Bank Street, Dundyyvan, Coatbridge, did then and there knowingly harbour or entertain James Menzies, Alexander Towns, and David Miller, police constables for the Airdrie district of the county of Lanark, stationed at Coatbridge aforesaid, and now or lately residing there, and being then constables within the meaning of the said Act, or did permit the said James Menzies, Alexander Towns, and David Miller, to abide or remain in his said house, shop, room, or other place, to the neglect of their duty, during part of the time appointed for their being on such duty."

On this complaint the appellant was convicted generally, and fined the sum of ten shillings and sixpence.

The facts set out in the case, as proved, were,—“That the appellant holds a certificate and licence for the sale of exciseable liquors at Bank Street, Dundyyvan, Coatbridge, and has so held the same for six years. That, on 2d December 1876, betwixt the hours of ten and eleven o'clock P.M., two of the police constables above mentioned, in their uniform, and while they were on duty, and another of them in plain clothes, entered the appellant's premises, and purchased and consumed at the counter, without sitting down, a quantity of drink, and were only in the premises four or five minutes.”

The question of law stated was,—“Whether the Justices, in the above circumstances, were right in their interpretation of the statute in holding that the appellant was guilty of the offence of knowingly harbouring or entertaining the said constables to the neglect of their duty, or of permitting them to abide or remain in his premises to the neglect of their duty, during part of the time appointed for their being on such duty.”

Argued for the appellant;—(1) The libel was alternative, in that it charged “harbouring,” or “entertaining,” or “permitting to abide or remain,” while the conviction was general, and did not specify which alternative was held proven.¹ (2) On the evidence the charge was not proved. One of the constables was not on duty, and, therefore, as regards him, the offence was not committed. Yet the conviction was general, as though the appellant had been guilty of harbouring, &c. all three constables. (3) But the question really intended to be submitted by the Justices was, whether to supply constables on duty with liquor as ordinary customers was *per se* an offence under this section of the statute. Now, the statute was not intended to debar a constable on duty under all circumstances from obtaining refreshment. It was intended to prevent a publican “harbouring” or “entertaining,” by which was meant, generally, treating constables, and so suborning them to overlook offences which it was their duty to notice and report, and also to prevent them “abiding” and “remaining,” that is, loitering in public houses, when the inspection, which was part of their duty under the Public-Houses Acts Amendment Act, 1862 (25 and 26 Vict. c. 35), sec. 13, was completed. It was not intended to prevent a publican selling a glass of liquor to a constable on duty if it was not accompanied by neglect of duty.²

sale of any liquors, whether spirituous or otherwise, shall knowingly harbour or entertain any constable appointed under this Act, or permit such constable to abide or remain in his house, shop, room, or other place, to the neglect of his duty, during any part of the time appointed for his being on such duty, every such victualler or keeper as aforesaid, being convicted thereof, shall for every such offence forfeit and pay any sum not exceeding £5.”

¹ De Banzie v. Peebles, March 16, 1875, *ante*, vol. ii., Justiciary Cases, p. 22.

² Copley v. Burton, June 28, 1870, L. R., 5 C. P. 489.

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Argued for the respondent ;—(1) The complaint was not alternative. "Harbouring" was the real offence created by the statute. The words "or entertain or permit to abide or remain," were merely explanatory of the word "harbour." (2) The offence was equally committed whether one, two, or three of the constables mentioned in the complaint were harboured. It was unnecessary for the Justices to specify which constables were harboured, so long as they were satisfied that the statutory offence of harbouring constables was committed. It would have been quite different had the charge been against the three constables themselves. But it was not. They were only part of the *species facti* which constituted the offence by the publican. (3) The offence was committed by the mere act of knowingly selling drink to a constable on duty as an ordinary customer. It could not reasonably be said that a constable on ordinary duty could go into a public house, purchase, and consume liquor, however short a time he remained, without neglecting *pro tanto* his duty. If there were exceptional cases conceivable none such were set forth here.

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LORD YOUNG.—This is in any view a very narrow case against the publican on the statement of the magistrates which we have before us ; and we must proceed on that statement as "setting forth the facts and the grounds" of the magistrates' determination.

The facts stated are—(reads statement quoted *supra*). The question for us to decide is, whether, these facts being proved, there was legal evidence to support a conviction under the 24th section of the Police Act, 1857. I am of opinion that the facts set forth in this case are insufficient in law to warrant a conviction of the offence created by that section of the statute.

In the first place, the particular complaint we have to deal with is not exactly in conformity with the statute. It is directly applicable only to "any constables appointed under this Act." Probably the constables in question were so appointed. But the complaint does not say so. It only says that they were constables "within the meaning of" this Act. This is a somewhat noticeable departure from the terms of the statute. But passing that by, the facts as stated by the magistrates are inconsistent with one at least of the constables being on duty at the time, or the time being one appointed for his being on duty. Now, the conviction against the appellant is in respect of the whole three constables, and the penalty is a *cumulo* penalty. In respect of one of them, the case is certainly not established. The conviction cannot be partially sustained, or the penalty apportioned. This, therefore, would be sufficient to overturn the conviction.

But I should wish to say, further, that I do not read the 24th section of the Police Act, 1857, as prohibiting any publican from serving any constable with a glass of liquor. There is a wide difference between what is prohibited in the language of the statute and such a simple prohibition as this—that no publican shall serve a constable in uniform and on duty with liquor. Such a provision might have been highly expedient and beneficial. But it has not been enacted. There is very much force in the view put forward by the counsel for the respondent, that the words of the statute "or entertain . . . or permit such constable to abide or remain," are merely exegetical of the preceding words "shall knowingly harbour," and that the statutory offence of harbouring constables is only committed by a publican who entertains or permits a constable to remain on his premises during a time appointed for his being on duty, and for such period and in such manner as to satisfy any reasonable man that he is

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neglecting his duty. Now, I do not find any evidence of that in the facts stated here. I do not even find what view the magistrates took. I do not find whether they thought that the appellant was entertaining these constables or permitting them to remain on his premises. The language of the statute is just imported wholesale into the complaint, and the conviction is quite general. Now, the terms of a conviction must appear from the conviction itself,—by reference to the complaint, if it is so expressed as to permit of this, but not if the complaint is set forth in alternative terms, so as to render a conviction by mere reference to it ambiguous.

On the whole matter, I am of opinion that the facts set forth are not sufficient in law to support this conviction, and that it must therefore be quashed.

LORD CRAIGHILL.—I concur in thinking that the conviction complained of must be quashed. But I come to that conclusion simply for the reason that the appellant has been convicted of entertaining three policemen while on duty, whereas it appears from the facts as stated in the case that only two of the three were on duty at the time when they were in the premises of the appellant. Had the third, who was not on duty, been on duty like the other two, I should not have been disposed to overturn the conviction because he was not dressed in his uniform when entertained by the appellant. That might be a material circumstance in determining whether what was done by the appellant was done or was not done in the knowledge that the men were, or one of them was not, on duty; but the sufficiency or insufficiency of the evidence was a thing for the magistrates' determination; and if they were satisfied upon the point, all that was required, so far as facts are concerned, had been accomplished. There may be review, not on the facts, but only on the law involved in a decision of the inferior Judges.

LORD JUSTICE-CLERK.—I concur in the result at which your Lordships have arrived—(1) because we have here an alternative complaint, and a conviction which does not specify the alternative found proven; (2) because it is clear that the conviction cannot be sustained as to one out of the three constables, in respect of all of whom the appellant has been convicted under the complaint. These two grounds are quite sufficient to quash the conviction. I should not be disposed in a question of this kind, of so much public importance, to have scrutinised with very critical eyes the proceedings. But on the face of them they are so manifestly inept that they cannot possibly be sustained. Nor can the conviction and penalty be in any way sustained in part or modified, for both are indivisible.

With regard to the terms of the statutory enactment founded on in the first place, I am of opinion that two separate offences are intended to be created by section 24—first, the harbouring or entertaining; and second, the permitting to abide or remain in the premises; and I think that the words "to the neglect of duty" apply to both of these offences. But that they are two separate offences is plain enough. In the second place, it is not necessary to decide whether this clause applies if a police officer on duty enters a public-house, not in the course of his duty, but for his own purposes, and the publican knowingly serves him with liquor as an ordinary customer. Though I do not wish to decide this point, I am very far indeed from saying that this would not amount to the offence created by the statute. With regard to the publican's knowledge, that

is a question of circumstances to be judged of on the evidence. It cannot be necessary to prove that the publican knew the special instructions given to the constable. In general, it will be enough to infer knowledge that the constable was in uniform, and on his beat, unless there are special grounds to the contrary.

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Feb. 23, 1877.
Greig v.
Stewart.

THE COURT answered the question in the case in the negative, reversed the determination of the Justices, and found the appellant entitled to expenses, &c.

R. A. VEITCH, S.S.C.—D. & W. SHIRESS, S.S.C.—Agents.

ARCHIBALD CAMPBELL, Appellant.—*Rhind*.
MELVILLE JAMESON, Respondent.—*Asher*—A. G. Murray.

No. 7.
Feb. 23, 1877.
Campbell v.
Jameson.

Appeal—Competency—Summary Prosecutions Appeals Act, 1875.—The Summary Prosecutions Appeals Act provides for appeal on case stated from the judgments of inferior Courts on points of law only. In an appeal presented under this Act held that the question whether, on the facts stated, a person had committed an offence under a statute by “grossly and without reasonable excuse” failing to perform a duty therein laid upon him, was one of law, and the competency of the appeal sustained.

School—Education Act, 1872 (35 and 36 Vict. c. 62), sec. 70—Compulsory Education.—In a prosecution before the Sheriff against a parent under section 70 of the Education Act, 1872, it was proved that the parent, who resided in a Highland parish at a distance of $3\frac{1}{2}$ miles from the nearest school, had refused to send a girl of five years that distance to school, and was unable to provide any other means of education. Held that the facts proved were not sufficient in point of law to justify the Sheriff in holding that the parent had failed, “grossly and without reasonable excuse,” in the sense of the 70th section of the Act, to discharge the duty laid upon him by the 69th section of providing elementary education for his child.

THIS was an appeal on a case stated by the Sheriff-substitute (Barclay) of Perthshire for Archibald Campbell, crofter, Auchtarsin, Rannoch, in the parish of Fortingall, the appellant, against Melville Jameson, solicitor, Perth, procurator-fiscal of Court, the respondent.

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Ld. Craighill
Justiciary
Clerk.

The following was the statement of the case:—

“This is a case originating in a complaint at the instance of the respondent against the appellant, presented to the Sheriff on 30th November 1876, setting forth that the appellant had contravened the Education Scotland Act, 1872, ‘in so far as the said Archibald Campbell has been and is now grossly, and without reasonable excuse, failing to discharge the duty of providing elementary education in reading, writing, and arithmetic for Catherine Campbell and Jessie Campbell, his children, and residing with him, of the respective ages of nine and five years or thereby, all as specified in a certificate of the school board of Kinloch Rannoch, dated the 11th November 1876, produced with and referred to in the said complaint, whereby the said Archibald Campbell is, in terms of section 70* of said Act, liable to a penalty not exceeding twenty shillings, or to imprisonment not exceeding fourteen days.’

* The Education (Scotland) Act, 1872, 35 and 36 Vict. c. 62, sec. 70, enacts —“It shall be the duty of every school board to appoint an officer to ascertain and report to the school board what parents, resident within the parish or burgh, have failed and omitted, and are failing and omitting, to perform the duty of providing for their children such elementary education as aforesaid; and it shall

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"The appellant appeared personally, and by a solicitor, and admitted that since the school at Auchtersin was given up in August 1875 his two children mentioned in the complaint had been at no school, and since then he has had no means for their education, as there is no person in the vicinity capable of instructing them.

"It appeared in evidence that there were three board schools in the parish of Fortingall, the nearest of which was about three miles and a half from Auchtersin."

The Sheriff considering that he could not order the school board to provide farther and more adequate accommodation, and that, though, as pled by the appellant, the board had failed to comply with a recommendation of the Scotch Education Board to provide school accommodation at Auchtersin, this, in his opinion, could not exempt the respondent from the charge under the 70th section of the statute libelled, and therefore he found and amerced Archibald Campbell in the modified penalty of ten shillings.

"The question in law for the consideration of the Judges of appeal as stated by me is, whether the appellant, under the above state of facts, has contravened the 70th section of the statute, the subject of the complaint?"

Argued for the appellant;—(1) On the facts set forth by the Sheriff the appellant's failure to provide elementary education for his children was not gross and without reasonable excuse. (2) The school board, having persistently refused to obey the recommendation of the Board of Education and erect a school at Auchtersin, was not in a position to prosecute. The recommendation of the Board of Education was sufficient to raise the presumption that the appellant's failure was not gross and without reasonable cause. (3) The respondent had not brought any evidence to rebut the presumption. The appellant's plea in the inferior Court was substantially one of not guilty; and where that was the case "the prosecutor or complainant shall proceed to establish his complaint by such evidence as is competent and the respondent may, if he think fit, lead such evidence as is competent, after which the Court shall pronounce judgment."¹ This had not been done, and the Sheriff had apparently proceeded on certain admissions which in no way justified his judgment. (4) The appeal was competent for the question was not what were the facts, but whether the Sheriff, from certain facts, was warranted in drawing a certain legal conclusion.²

be the duty of such officer to keep the school board constantly informed of the names and designations of all such parents: . . . And the school board is hereby authorised to summon any such parent to appear before the school board at any meeting thereof, and to require from him every information and explanation respecting his failure of duty with respect to the education of his child or children; and if he shall either fail to appear, or, on his appearance, to satisfy the school board that he has not failed in such duty without reasonable excuse for such failure, and shall not undertake, to the satisfaction of the school board, to perform such duty by forthwith providing such elementary education as aforesaid for his children, it shall be lawful to and shall be the duty of the school board to certify in writing that he has been and is grossly, and without reasonable excuse, failing to discharge the duty of providing elementary education for his child or children, and on such certificate being transmitted to the procurator fiscal of the county or district of the county in which the parent resides, or other person appointed by the school board, he shall prosecute such parent before the Sheriff of the county for such failure of duty as is in the certificate specified, and on conviction the parent shall be liable to a penalty not exceeding twenty shillings, or to imprisonment not exceeding fourteen days," &c.

¹ Summary Procedure Act, 1864, sec. 14.

² Compare *Donaldson v. Linton*, Dec. 8, 1875, *ante*, vol. iii. *Justiciary Cases*, p. 16; *M'Adam v. Laurie*, March 1, 1876, *ante*, vol. iii. *Justiciary Cases*, p. 20; *Colquhoun v. Liddell and Baillie*, Nov. 16, 1876, *supra*, *Justiciary Cases*, p. 2.

Argued for the respondent;—(1) There was no question of law before the Court. Review was excluded by the 71st section of the Education Act, 1872, and was only now competent under the Summary Prosecutions Appeals Act, 1875. But that Act limited the appeal which it introduced to cases where the inferior Judge's determination was "erroneous in point of law." Now, what the appellant here asked the Court to do was not to decide a point of law, but to determine whether the appellant's failure was "gross and without reasonable excuse." That simply resolved itself into construing what is "reasonable" excuse. That was a question of fact for the inferior Judge, on which his determination was final.¹ (2) Even if the appeal was competent, the statute distinctly laid on the appellant the obligation to educate his children. It was the admitted fact that the appellant having two children above the statutory age did not send them to school merely because he was of opinion that the distance of the nearest school, three-and-a-half miles, exempted him. But it must be borne in mind that this was a highland parish, and that the admission of such an excuse would make the compulsory clauses of the statute a dead letter over large parts of Scotland. The habits of the people, as well as the nature of the locality, must be considered, and it could not be reckoned an unendurable hardship that highland children should be sent a distance of three or four miles to school rather than lose its advantages.

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Feb. 23, 1877.
Campbell v.
Jameson.

LORD YOUNG.—The Education Act, 1872, sec. 70, subjects to a penalty any parent who "grossly and without reasonable excuse" fails "to discharge the duty of providing elementary education for his child or children"; and the question which we have here is, whether the facts stated by the Sheriff, and which he seems to have gathered by inquiry at the parties, without evidence being regularly led before him, afford sufficient evidence in law of gross and unreasonable neglect to perform that statutory duty?

Now, it must be borne in mind that compulsion in the matter of education was introduced for the first time by the statute of 1872, and the language therein used is such as to indicate that the compulsory clause is to be applied judiciously and discreetly, and I should even say gently and tenderly. A parent is not to be punished for mere neglect to provide elementary education for his children between the ages of five and thirteen, unless, in the circumstances, that neglect is gross and without reasonable excuse. Undoubtedly, then, the question whether the neglect is of that character depends on the circumstances of the particular case. Now, there may be a great difference in this as in other matters between a highland and lowland parish. Even the Legislature cannot sometimes overcome geographical difficulties except at an incommensurate expense, and the dwellers in highland parishes of large extent and sparse population must just submit to the inconveniences attaching to the locality in which they reside. But taking the particular case before us, it appears that the appellant here, who lives at Auchtersin, Kinloch Rannoch, is the parent of two girls, aged respectively nine and five years, and that the nearest school is distant three-and-a-half miles from his cottage. I say nothing about the elder girl, but taking only the case of the younger child of five, it may be that there is room for difference of opinion as to whether there is neglect in not sending a child of five years to school at a distance of three-and-a-half miles. I should hardly have thought so myself. But I cannot imagine that there should be any difference of opinion as

¹ Grant v. Wright, May 31, 1876, *ante*, vol. iii. Justiciary Cases, p. 28.

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to whether or not that neglect was gross and without reasonable cause. Yet the statute requires that it should be so to subject the parent in a penalty. It is incumbent on the prosecutor to lay before the magistrate some evidence, not only of neglect, but of the quality of the neglect, and, in a case where the neglect is not *ex facie* gross and without reasonable excuse, he must shew that it really is so. Here there was no such evidence led, and it cannot be said that the neglect was *ex facie* gross and without reasonable excuse. That is not a conclusion which the law will draw from the circumstances stated. I am, therefore, of opinion that, on the facts as here stated, there is no evidence of what it was incumbent on the prosecutor to prove, *viz.*, that the neglect was gross and without reasonable excuse. The question submitted by the Sheriff, and which, I think, is fairly a question of law, must therefore be answered in the negative, and the conviction set aside.

LORD CRAIGHILL.—I think that this is an important case. School boards, parents, and the public are alike concerned with the result. My opinion is that the appeal must be sustained; and it would, according to my view of the matter, be a sad thing for the country if the views upon which judgment in the Court below was given were to be held by us to be consistent with the provisions which are contained in the 70th section of the Education (Scotland) Act, 1872. For what were the elements of the decision? The first was that there was a school three miles and a half distant from the place where the appellant and his family resided; the second, that he had a child five years old; and the third, that this child, a girl, had not been sent to school. The failure or neglect, or, as perhaps it ought to be called, the refusal of the appellant to send this child to this, which was the nearest, school, or to any other school, is the offence of which he has been convicted. But there could be no legal conviction unless the appellant's failure was gross and without reasonable excuse; and yet this is a consideration which appears to have been overlooked by the inferior Judge. For who could say, much more, who could judicially determine, that the circumstances of this case were such as proved that there had been a failure—gross, and without reasonable excuse? A girl only five years old is of very tender age. A journey to school of three-and-a-half miles, and a journey back of equal length, might well be considered to be too much for her strength. The appellant so thought; and there was nothing, indeed there hardly could be anything, proved by which the contrary was established. The parent, in such circumstances as those which existed, must be the depository of the discretion by which attendance or non-attendance of a child, who is little, if anything else, than an infant, is to be regulated. The care and guardianship of the child, responsibility to and for the child in the matter of education, have not been withdrawn from the parent; and if there is nothing to shew, and consequently no reason to conclude, that in keeping his child from school he is obviously abusing his authority, it cannot truly be said of him that he was and is grossly and without reasonable excuse failing to discharge the duty of providing elementary education.

I likewise concur in thinking that the objection to the competency of review which has been urged on the part of the respondent must be overruled. The error in the Court below was not, as has been suggested at the bar, an error in the exercise of discretion, but was an error in the conception of the failure of duty, for which a prosecution, and of which a conviction, was authorised by the 70th section of the Education (Scotland) Act, 1872. In other words, it was

error in matter of law; and so the judgment which was pronounced may be reviewed. No. 7.

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LORD JUSTICE-CLERK.—I concur with your Lordships. In the first place, I think that we can competently entertain this appeal; and in the second, that there was, so far as the statement in this case goes, no evidence before the Sheriff on which he could legally convict.

We are not here to review the Sheriff's determination on a question of fact, though a consideration of the facts stated is necessary for the decision of the question of law. But the facts being stated, what we are here to do is to decide whether they are such as legally to warrant the Sheriff in coming to the conclusion at which he arrived. If we are of opinion, on the facts as stated, that the elements which go to constitute the statutory offence are wanting, we are entitled and bound to set aside the conviction.

So, judging of the case, I have no doubt whatever that the appellant is not within the class of parents struck at by the statute. There had been a sort of side-school at the place where he lived, but it was given up as explained to us in 1875 owing to the removal of the postmaster who had acted as schoolmaster, and had not again been opened notwithstanding the remonstrances of the Board of Education. The nearest board school was three-and-a-half miles distant from the appellant's cottage, and he did not see his way to send a child of five years old that distance. I cannot think that there is enough in that to stamp his failure as gross and without reasonable cause.

The nature of the locality is, no doubt, an important element in this consideration, but so is age and distance. And though I am far from saying that the distance in this case is such as, under all circumstances, would amount to reasonable excuse for failure to perform the statutory duty, I am of opinion that it is a matter which a parent is entitled to take into consideration, and that there is nothing in the facts stated to shew that the appellant's determination not to send his child of the age of five years that distance to school was unreasonable.

I therefore concur in thinking that the question submitted to us must be answered in the negative.

THE COURT answered the question in the case in the negative; reversed the determination of the inferior Judge; found the appellant entitled to expenses, &c.

ROBERT MENZIES, S.S.C.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

THE LOCAL AUTHORITY of the BURGH of SELKIRK, acting under the Public Health (Scotland) Act, 1867, Appellants.—*Fraser*.

JOHN BRODIE, Respondent.—*J. P. B. Robertson*.

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Appeal—Competency—Summary Prosecutions Appeals Act, 1875, secs. 2 and 3—Summary Procedure Act, 1864, sec. 3, sub-sec. 3—Public Health Act, 1867 (30 and 31 Vict. c. 101), secs. 24, 94, and 105—Assessment.—The "local authority" is, under section 24 of the Public Health Act, 1867, authorised to assess the expense of covering in any foul watercourse, &c., upon the proprietors of premises contributing to its pollution, and to levy and collect the sums so assessed, "with the same remedies in case of default in payment thereof as are hereinafter provided with reference to the general charge and expenses incurred by the local authority under this Act." Under the 94th section, in burghs with a

No. 8. population of less than ten thousand, "all charges and expenses incurred by the local authority in executing this Act . . . and not recovered as hereinbefore or after provided, may be defrayed out of an assessment to be levied by the local authority" on its whole district "in like manner and under like powers" as the prison or police assessment. Section 105 provides that "all applications to enforce any provision of this Act, or for the recovery of penalties herein imposed, or other sums of money becoming due to the local authority in virtue of this Act, in so far as not herein otherwise provided for, may be by summary petition" to any inferior Judge, who "may, without prejudice to diligence by poinding or arrestment, grant warrant for the imprisonment of the person convicted or found liable in a penalty or sum of money, unless he shall pay the whole sums found due within a specified time, until the same be paid, such imprisonment not to exceed a specified time."

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A local authority having covered in a foul watercourse under the 24th section, defrayed in the first instance the cost out of funds in their hands, the produce of a general assessment under the 94th section, but afterwards assessed the cost on the individual owners of premises contributing to the pollution of the watercourse. They proceeded to recover this particular assessment from one of these owners by petition under the 105th section.

Held (diss. Lord Young) (1) that the sum of money so sought to be recovered under the 105th section was not one the recovery of which was otherwise provided for in the Act; (2) that it was a "sum of money in the nature of a penalty" in the sense of sec. 3, sub-sec. 3, of the Summary Procedure Act, 1864; (3) that therefore the proceedings taken under the 105th section were proceedings which might have been brought under the Summary Procedure Act; and (4) that consequently the cause was one in which appeal on case stated under the Summary Prosecutions Appeals Act, 1875, was competent.

Public Health Act, 1867, secs. 24 and 94.—*Held* also that it was no defence to an individual proprietor against a claim for the particular assessment under section 24 of the Public Health Act, that the cost of the operations in question had been defrayed in the first instance out of funds raised by general assessment under section 94, a portion of which had been already laid on him.

HIGH COURT.
Lord Justice-
Clerk
Lord Young.
Ld. Craighill.
Justiciary
Clerk.

THIS was an appeal on case stated from the Sheriff Court of Selkirkshire for the local authority of the burgh of Selkirk as appellants in a proceeding at their instance against John Brodie, printer, Selkirk, the respondent.

The case stated that the "proceedings were instituted under the provisions of sections 105–6 of the Public Health (Scotland) Act, 1867,* at the instance of the appellants against the respondent for payment of a sum of £2, 8s. 5d., being the proportion assessed on the respondent as one of the owners of houses situated within the district or locality of the burgh known as Hillside, of the sum of £60, 14s. 4d. expended by the appellants

* The Public Health Act, 1867, 30 and 31 Vict. c. 101, section 105, provides, that "all applications to enforce any provision of this Act, or for the recovery of penalties herein imposed, or other sums of money becoming due to the local authority in virtue of this Act, in so far as not herein otherwise provided for, may be by summary petition, and such petition may refer to the clauses of this Act on which it is founded, without setting forth the same; and the Sheriff, Magistrate, or Justice shall thereupon"—(then follow directions as to the procedure in such petitions down to decree),—"and he may find either party liable in expenses, or in any modified sum of expenses, and may, without prejudice to diligence by poinding or arrestment, grant warrant for the imprisonment of the person convicted or found liable in a penalty or sum of money, unless he shall pay the whole sums found due within a specified time, until the same be paid, such imprisonment not to exceed a specified time, but the judgment shall not be invalidated by any deviation from any of the said periods of time."

Section 106 contains further provisions as to procedure in such petitions.

in laying down a sewer in lieu of an open drain for said district under No. 8.
the provisions of section 24 of the Public Health Act aforesaid.*

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"The sewer has been constructed and the expense has been assessed on the community at large including the respondent. But the local authority now propose, under section 24 of the Public Health Act, to throw the whole expense upon the owners of houses which, prior to the formation of the sewer, had drained into the pre-existing open drain, and this action has been brought to recover from the respondent, as one of the owners of houses situated within that district, his proportion of said assessment.

"The Sheriff-substitute (Milne) has assoilzied him from the conclusions of the action."

The following question of law was, *inter alios*, submitted for the judgment of the Court:—"4. Are the appellants entitled to decree for the sum now sued for seeing that they have already assessed and levied from the respondent in respect of the same property a rateable proportion of the same expenditure along with the rest of the community."

The respondent objected to the competency of the appeal.

Argued for him;—(1) The expenses sought to be recovered had been incurred by the local authority under the 24th section of the Public Health Act, and they had adopted the method provided in the 105th section as the means of recovery against the respondent. But such proceeding under the 105th section for recovery of a sum of money due to the

* The Public Health Act, 1867, section 24, enacts—"Whenever any water-course, ditch, gutter, or drain along the side of any public road, street, or lane shall be used or partly used for the conveyance of any water, sewage, or other matter from any premises, and cannot, in the opinion of the local authority, be rendered free from foulness or offensive smell without the laying down of a sewer or of some other structure, such local authority shall, and they are hereby required, subject to the approval of the Board (of Supervision), to lay down such sewer or other structure within the limits of their district, or, where necessary for the purpose of outfall or distribution of sewage, without their district, and to keep the same in good and serviceable repair; . . . and such local authority are hereby authorised and empowered to assess the owners of all the premises (according to the yearly value thereof) from which then or at any time thereafter any material other than pure water flows, falls, or is carried into the said sewer or other structure, for payment of all expenses incurred in making and maintaining the same, and that either in one sum or in instalments, and after fourteen days' notice, at the least, left with the said owners, if resident within the district, and, if not so resident, with the occupiers of the said premises, to levy and collect the sums so assessed, with the same remedies in case of default in payment thereof as are hereinafter provided with reference to the general charge and expenses incurred by the local authority under this Act."

Section 94 provides, with respect to burghs such as Selkirk, having a population of less than 10,000 according to the census last taken, and not having a local Act for police purposes . . . "(2) All charges and expenses incurred by the local authority in executing this Act or any of the Acts hereby repealed, and not recovered as herein before or after provided, may be defrayed out of an assessment to be levied by the local authority along with but as a separate assessment from any one of the assessments hereinafter mentioned in this section; that is to say, the said assessment shall be assessed, levied, and recovered in like manner and under like powers (which powers are hereby given and are declared to extend over the whole and every part of the district of the local authority) as the prison assessment or police assessment, as the local authority shall resolve," &c.

No. 8. local authority was not a cause to which the Summary Prosecutions Appeals Act, 1875, was applicable.* It had not in point of fact been brought under the Summary Procedure Act, 1864, nor was it a proceeding for prosecution of an offence or recovery of a penalty before an inferior Judge. Neither, taking the widest view of the expression "any proceeding which may be brought," could it ever have been brought under the Summary Procedure Act, 1864, for it was neither a proceeding for the recovery of a penalty, nor of a sum of money in the nature of a penalty; and these exhausted the causes to which, in the widest view, the Summary Prosecutions Appeals Act, 1875, applied. The appeal therefore was incompetent. (2) Even if the cause was one in which appeal was competent under the Appeals Act of 1875, it was not competently brought to the Court of Justiciary but should have been taken to the Court of Session; † for the proceedings had not been instituted by way of complaint, nor were they in virtue of any such Act as those referred to in the Summary Procedure Act, 1864. They were truly special proceedings authorised by the Public Health Act for recovery of a particular description of civil debt.

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Argued for the appellant;—(1) The appeal was competent. The Summary Prosecutions Appeals Act, 1875, authorised appeal in any proceeding which may, that is, which may competently, be brought, not which in fact shall be brought, under the Summary Procedure Act, 1864. Now,

* The Summary Prosecutions Appeals Act, 1875, 38 and 39 Vict. c. 62, section 3, provides,—“On any inferior Judge hearing and determining any case, either party to the cause may, if dissatisfied with the Judge’s determination as erroneous in point of law, appeal thereagainst,” &c.

And by the interpretation clause (section 2) “cause” is defined to mean and include “every proceeding which may be brought under the Summary Procedure Act, 1864, and every other summary proceeding for the prosecution of an offence or recovery of a penalty competent to be taken before an inferior Judge.”

The Summary Procedure Act, 1864 (27 and 28 Vict. c. 53), section 3, provides,—“The provisions of this Act may be applied to (3) all proceedings for the recovery of any penalty, or sum of money in the nature of a penalty, which, under the provisions of any Act of Parliament, may be recovered by summary complaint or information, or by poinding and distress or sale, or other summary process or diligence of the like nature, before any Sheriff, Justices or Justice, or Magistrate.”

† The Summary Prosecutions Appeals Act, 1875, section 7, provides,—“The superior Court to which a case stated and signed by an inferior Judge as hereinbefore provided shall be sent for opinion shall be the High Court of Justiciary at Edinburgh when the jurisdiction in the cause is of a criminal nature according to the provisions contained in the 28th section of the Summary Procedure Act, 1864, and either Division of the Court of Session when the jurisdiction in the cause is of a civil nature according to the said provisions.”

The 28th section of the Summary Procedure Act, 1864, enacts,—“In all proceedings by way of complaint instituted in Scotland, in virtue of any such statutes as are hereinbefore mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment upon such complaint, or a part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required in case of default of payment or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation; and in all other proceedings instituted by way of complaint, under the authority of any Act of Parliament, the jurisdiction shall be held to be civil.”

the present was a proceeding which might have been so brought. For it was a proceeding for recovery of a sum of money in the nature of a penalty, recoverable by summary complaint, &c., as specified in section 3, sub-section 3, of the Summary Procedure Act. (2) The appeal was competently brought in the High Court of Justiciary looking to the way in which the judgment of the inferior Judge was to be enforced under the 105th section of the Public Health Act, and to the definition of criminal and civil in the 28th section of the Summary Procedure Act.¹

At advising,—

LORD CRAIGHILL.—These proceedings originated in a petition presented by the appellant to the Sheriff of Selkirk to obtain decree in the terms authorised by section 105 of the Public Health (Scotland) Act, 1867, 30 and 31 Vict. c. 101, for the portion of an assessment alleged to be due by the respondent; and which assessment, as the appellants averred, had been imposed by virtue of sec. 24 of that statute. Judgment was given in the Court below for the respondent. The appellants thereupon required a case to be stated for the opinion of this Court, in pursuance, as they said, of sec. 3 of the Summary Prosecutions Appeals (Scotland) Act, 1875, 38 and 39 Vict. c. 62. This requisition was complied with, and upon the case consequently stated the proceedings are now before this Court. The respondent, however, in place of joining issue at once with the appellants upon the questions presented in the case, has objected to the jurisdiction of this Court. He contends that the inferior Judge had no power to state a case for the opinion of the superior Court, and that an interlocutor to this effect, by which all procedure should be terminated, ought now to be pronounced. The jurisdiction of this Court, in other words, the power of the Sheriff to state the case upon which we are asked to give a decision, is thus the point that has now to be determined. My opinion is that the Sheriff had power, and that this Court has jurisdiction. The point turns primarily upon the definition of the word “cause,” which is contained in the 2d section of the Summary Prosecutions Appeals (Scotland) Act, 1875. A cause in which a case may be required and stated “means and includes every proceeding which may be brought under the Summary Procedure Act, 1864, and every other summary proceeding for the prosecution of an offence or recovery of a penalty competent to be taken before an inferior Judge.” Furnished with this definition the inferior Judge is directed by sec. 4, when required, as there provided, “to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of a superior Court of law, as hereinafter provided.” We therefore are now to determine the question which has been raised as if it had been submitted to the inferior Judge. So viewing the matter, the first thing for consideration is whether the cause was one, not which had been brought, but which might have been brought, under the Summary Procedure Act, 1864. The respondent, no doubt, argues that the words “every proceeding which may be brought,” occurring in the definition above quoted, must be read as if the words had been “every proceeding which shall be brought.” But I cannot adopt this interpretation. The words of the definition were, as I think, selected of set purpose, because they had a wider comprehension. The Summary Procedure Act, 1864, is a permissive statute. The 3d section, which specifies the proceedings to which it is applicable, only enacts, that to these pro-

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¹ Forbes v. Adair, Dec. 16, 1871, 10 Macph. 244, 44 Scot. Jur. 142.

No. 8. proceedings it "may be applied," and sec. 32 provides that proceedings in the cases there specified "may either be according to the form prescribed by such Act or any Act incorporated therewith, or according to the form prescribed by this Act, or, where such proceedings are before the Sheriff, according to the forms prescribed by the first recited Act," that is to say, 9 Geo. IV. c. 29. Cases of the same nature, therefore, may be brought under the Summary Procedure Act, 1864, or under other Acts of Parliament; but it was not intended, and obviously it would be inexpedient, that the amenability to review of the decision of the inferior Judge should be governed by the accident that the case had been brought under the Summary Procedure Act and not in the form for which other statutes had made provision. Not the form of proceeding, but the character of the question presented for decision, is the consideration by which the propriety, the expediency, and presumably the competency of review, ought to be determined. The definition of the word "cause" in the Summary Prosecutions Appeals (Scotland) Act, 1875, recognises this principle according to the plain reading of the words, and, therefore, though the proceedings in the inferior Court were not brought under the Summary Procedure Act, 1864, the cause nevertheless is one in which, according to my view, a case might be required, and might be stated, if they might have been brought under that statute. Could they have been so brought consistently with the provisions of that Act of Parliament? The answer depends on the applicability of sub-sec. 3 of sec. 3, by which it is enacted that the provisions of this Act may be applied to "all proceedings for the recovery of any penalty, or sum of money in the nature of a penalty, which, under the provisions of any Act of Parliament, may be recovered by summary complaint or information, or by poinding and distress, or sale, or other summary process or diligence of the like nature before any Sheriff, Justices of Justice, or Magistrate." The sum sued for by the appellant, appears to me to be, in the sense of this enactment, of the nature of a penalty. True, no doubt it is only a civil debt, but this is not a test by any means decisive, for penalties, to say nothing of sums which are to be regarded as only of the nature of penalties, are, in numerous instances with which we are all familiar, simply civil debts. The things which persuade me that the sum sought to be recovered by the proceeding before the inferior Judge is of the nature of a penalty, are, in the first place, that it might be sued for under sec. 105 of the Public Health (Scotland) Act, 1867, inasmuch as it is a sum due to the local authority in virtue of that Act. In the second place, that not only might that sum have been decreed for, and this decree have been enforced by poinding or arrestment, but warrant for the imprisonment of the respondent, "unless he shall pay the whole sums found due within a specified time, until the same be paid, such imprisonment not to exceed a specified time," might have been granted. And, in the third place, that by sec. 28 of the Summary Procedure Act, 1864, a case of this nature, where the decision of the inferior Judge may be reviewed, is appointed to be reviewed, not by the Court of Session, but by the Court of Justiciary.

For these reasons I am of opinion that the exception which has been taken to our jurisdiction ought to be overruled. I may add that this view of the law seems to me to be supported by the cases of *Robertson v. Duke of Atholl*, 1 Cooper, 348,¹ and *Holland v. Gauchalland Coal Company*, 5 Irvine, 561,² both cited upon p. 71 of Mr Moncreiff's *Treatise on Review in Criminal Cases*, just published.

¹ Oct. 25, 1869, 42 Scot. Jur. 28.

² Dec. 24, 1867, 40 Scot. Jur. 102.

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LORD YOUNG.—Lord Craighill was good enough to communicate his judgment to us before we came into Court, and understanding that your Lordship concurs in it, I desire to state as clearly as I can the grounds on which I dissent from it, and am of opinion that we have here no jurisdiction.

The petition to the Sheriff by which the proceeding commenced bears to be founded on sec. 24 and 105 of the Public Health Act, 1867, and had it prayed for the imposition of a penalty or for a sentence of imprisonment I should have thought we had jurisdiction in consequence of the character thus impressed on the proceeding, however erroneously, although I should also have thought that we could only exercise it by affirming the Sheriff's judgment in its result without reference to the merits of the question intended to be raised, and solely on the ground that the proceeding was inappropriate and unwarranted by the statute. But as the plain object of the petition was only to ascertain whether or not the respondent was liable in the amount of the sewer assessment which had been laid upon him under sec. 24 of the Act,—and so it only asked decree for the amount, together with expenses of process,—I am disposed to disregard the reference to sec. 105 of the Act, and any criticism that suggests itself on the form of the proceeding, in order to consider and decide the substance of the question that was argued before us, viz., whether sewer assessment under sec. 24 of the Act is in legal estimation a penalty, or (if there is any difference) in the nature of a penalty, imposed on the persons on whom it is laid. I assume that your Lordships are similarly disposed, for this is the question dealt with in the judgment that has just been read. If the rate laid on the respondent is a penalty, or in the nature of a penalty, the proceeding against him for its recovery is within the definition of the term "cause" in the Summary Prosecutions Appeals Act, 1875, otherwise not. From the judgment just delivered I infer that your Lordships perceive a distinction, material to the present question, between a penalty and "a sum of money in the nature of a penalty." I perceive none, and cannot even form an idea of what the distinction may be. Of course a penalty may and in this Court generally does take a sharper and more unpleasant form than the pecuniary, in which form a penalty is frequently called a fine or forfeit, although both these words convey other meanings also. In the Summary Procedure Act, 1864, the word "penalty" always means a money penalty. It is defined to be "a sum of money" recoverable "in respect of the contravention of any statutory requirement or prohibition," or "as a penalty or forfeiture," and whether the amount thereof is fixed by statute, with or without a power to mitigate "or is in the nature of a penalty not exceeding a certain sum to be awarded by the Court or Judge." This is all quite consistent with the ordinary meaning of the word in common language, for, although that meaning is not exhausted (there being penalties of another and higher order than those which the Act deals with) no violence is done to it; and it is not immaterial to observe that the significant term "forfeiture" is used as exegetical of the word "penalty." Now, I should like to know what is the supposed distinction between "a sum of money" which is a penalty, either according to the ordinary meaning of the word, or according to the definition of it in the Summary Procedure Act, and "a sum of money in the nature of a penalty," of course taking that word itself in the same sense in both cases? I should have thought that the nature of the thing must generally, and, indeed, always in the absence of express enactment to the contrary, determine its quality, and the applicability of the name by which it is sought to be characterised.

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No. 8. The Legislature may, and perhaps sometimes does, make "recoverable as penalty or forfeiture" a sum of money which would not otherwise be regarded as of that nature, but the words "sum of money in the nature of a penalty" cannot have that effect, and in the Act in question are plainly used only to comprehend proper penalties according to the nature and reality of the thing.

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Having this opinion, I see no purpose in the endeavour to bring the proceeding we are dealing with within the Summary Procedure Act. I must, however, add, that were I able to distinguish between a sum of money which is a penalty according to the definition of that Act, and a sum of money which is in the nature of a penalty according to the same definition, and so thought it important to inquire whether the proceeding, although not brought under that Act, was nevertheless to be regarded as if it had, I could not assent to the reasoning upon which Lord Craighill answers that question in the affirmative. Deeming the question immaterial to the case before us, I shall not dwell upon it, but only suggest as a criterion of the reasoning from which I dissent that the definition shall be substituted for the word defined in sec. 3 of the Act. That clause would then run thus:—"On an inferior Judge hearing and determining any proceeding which may be brought under the Summary Procedure Act, 1864," &c.

His Lordship, as I understand his view, would construe this as applying to the hearing and determining of any proceeding which, although not brought under the Summary Procedure Act, related to a matter which might have been made the subject of proceeding under it. To this I cannot agree. Taking the whole definition of the word "cause" as truly, and I think clearly extending to every summary proceeding for the prosecution of an offence or recovery of a penalty, whether brought under the Summary Procedure Act or not, I necessarily regard this matter as unimportant to the case in hand. It has nevertheless an importance of its own, for such language as I am now considering is of frequent occurrence in statutes and deeds, and it would be unfortunate if, even obiter, an erroneous construction of it should be countenanced by this Court. I must therefore, say for myself that when a statute contains an enactment regarding a fact as one "which may" occur, the fact must be an existing fact when the enactment is applied, although only anticipated as a possibility when the enactment was made. Enactments made with reference to all proceedings "which may be brought" in a particular Court or under a particular statute, clearly, I should think, regard only causes actually in existence in that Court or under that statute when the enactments are sought to be applied, and cannot affect causes in fact brought in another Court or under another statute, or at common law. In short, the proceeding must exist before any enactment can be applied to it, and an existing proceeding *may not* be brought otherwise or elsewhere than it has been, although the party, who was at liberty to select his remedy, *might have* chosen another than he did.

But, passing from this, which, however important in itself, is, in my opinion, immaterial to the case in hand, I proceed to inquire whether an assessment under sec. 24 of the Public Health Act is a penalty, or in the nature of a penalty, according to the meaning assigned to these terms by the Summary Procedure Act, or their plain and ordinary meaning in common or legal language. Lord Craighill says of such an assessment,— "True, no doubt it is only a civil debt, but this is not a test by any means decisive," penalties being "in numerous instances with which we are familiar simply civil debts." I know of no such instances, and have to say that while I agree with his Lordship that the assess-

nent in question is "only" or "simply" a civil debt, I am constrained to dissent from the notion that what is only or simply a civil debt may also be a penalty, or, indeed, anything else than a civil debt. But, passing the obvious contradiction in terms, I should like to know what it is other than a simple civil debt that we can, usefully in this case, distinguish from a penalty? I, of course, admit that a person may be debtor for a penalty and be sued for it civilly, but each person is not only simply a civil debtor. There is a real distinction between a penalty and a simple civil debt—broad enough in the main, although here may be more or less difficulty in drawing it in some cases, and it is precisely on this distinction that the case before us turns. It would be superfluous and perhaps difficult to give an exhaustive definition of the term "penalty," and only in one instance does the Summary Procedure Act give a definition (and that a very limited one), without reference to the common meaning of the word as known or supposed to be known to every one acquainted with the language. In that exceptional instance the definition is "any sum of money which may under any Act of Parliament be recovered from any person in respect of the contravention of any statutory requirement or prohibition." In the remainder of the definition the word "penalty" is itself used as presumably well understood; as for example, thus,—"**Any sum which may, under the provisions of any Act of Parliament, be recoverable as a penalty or forfeiture,**" or "**is in the nature of a penalty not exceeding a certain sum to be awarded by the Court or Judge.**" Now, taking this definition (or rather limitation of the use and application of a word so familiar as to require no definition) which, although used only for the purpose of the Act in which it occurs, is altogether consistent with the common meaning of the term, and quite applicable to the present case, whether under that Act or not, I venture to ask whether it comprehends any simple civil debt which may be due under the provisions of an Act of Parliament? All statutory assessments, I might say all rates and taxes without exception, are of that character, and if the necessity of holding that these may be recovered as penalties, or as of that nature, by prosecutions under the Summary Procedure Act, be only avoided by reference to sec. 25 of the Act, it is, I think, clear, that the same reference is fatal to the proposition that the proceeding immediately in question might have been brought under that Act. For, by this 25th section it is enacted that "**nothing in the Act shall extend or be construed to extend**" to a proceeding "**under or by virtue of any statutory provision for the recovery of any rate, tax, or impost whatsoever,**"—terms which, I should think, include the assessment in question, and the proceeding brought for its recovery. But, although this precautionary provision is itself conclusive against the construction which it guards against, it does not follow, and, in my opinion, is not true, that such construction would otherwise have been allowable. It is, in truth, a misconstruction that it guards against.

But if an assessment under sec. 24 of the Public Health Act is distinguishable from statutory assessments in general, and is recoverable "**as a penalty or forfeiture,**" or "**is in the nature of a penalty not exceeding a certain sum to be awarded by the Court or Judge,**" I desire to know the reason. It was suggested in argument that the sewer-rate under that clause was imposed upon those who had polluted the ditch in lieu of which the sewer was constructed, as a penalty in respect of that pollution. The answer to this is almost too obvious to require expression. The statute contains abundant provisions for the punishment of those who commit a nuisance, but sec. 24 is not one of them. The

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No. 8. assessment thereby authorised is for the construction and maintenance of a public sewer, and is laid on the owners of premises which are for the time lawfully drained into it. It has no relation to anything that occurred before the sewer was made, and it would be no answer by any owner on whom it was laid that his premises had never been drained into the ditch, or even that they were not in existence contemporaneously with the ditch. It was further suggested that the owners of the premises benefited by the sewer ought themselves to have constructed it as a private sewer to be upheld by themselves, and that the rate is a penalty on them for not performing that duty. But this is mere extravagance, and is at once met by the consideration that statutory powers were needed for the construction of the sewer, which traverses private and public property, necessary to be invaded and used for the purpose, and that these powers are given to and required to be used by a public authority in which the sewer, when made, is vested as a public convenience.

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The only other argument, and that which I understand finds favour with your Lordships, is founded on the assumption that an owner of property in arrear of his assessment may be prosecuted and imprisoned under sec. 105 of the Act. I think the assumption is erroneous, and I take leave to say in the outset that it is so unlikely that Parliament should have intended anything so outrageous, and so far as I know unprecedented, as to subject an owner of property who failed to pay an assessment in respect of it, even after decree, to a sentence of imprisonment, not in lieu of payment, which would be absurd, but as a punishment to be suffered by him for his default, that I should be prepared to stretch construction very far indeed in order to avoid a construction which imputes that intention. But it is, in my opinion, so far from requiring astuteness in order to avoid a construction which attributes such intention to the Legislature, that I think it a construction which it is hard to reach.

Clause 105 applies only to the "recovery" of penalties and sums of money becoming due, "in so far as not otherwise provided for," which, of course, suggests the question whether the recovery of assessments laid on under the Act is not otherwise provided for, as, looking to the terms of sec. 105, one might reasonably expect it would be.

The group of clauses relating to "assessments" forms Part 7 of the Act, and comprehends clauses 93, 94, and 95, which, dealing with the several great assessments authorised by the Act, provide generally that they shall be raised and levied in the same manner, "and with the same remedies and modes of recovery," as one or other, according to circumstances, of three cognate assessments, well-known to ratepayers, viz., prison, police, and poor's assessments. To this extent therefore—viz., with respect to the assessments dealt with by Part 7 of the Act, it is, I presume, not doubtful that ratepayers in arrear are not liable to prosecution and imprisonment under sec. 105, and that precisely because the recovery of these assessments is "otherwise provided for."

I have already shewn, I hope satisfactorily, that assessments under sec. 24 are indistinguishable in their quality and character from other assessments under this or any other Act to meet the cost of benefits conferred more or less, immediately and directly on a more or less extended public, through the instrumentality of a public authority. But unlikely, as it therefore is, that Parliament should nevertheless have dealt with them exceptionally regarding the remedies constitutionally, or in accordance with the spirit of modern Legislature, allowable "in case of default in payment," it is proper to see whether this, at first sight.

unlikely thing has not been in fact done. The question, it will be observed, relates not to the rule for the laying on or levying of the assessment but to the remedies for recovery against parties assessed who are in "default in payment." Clause 24 specifies a very plain and reasonable rule for laying on the assessment thereby authorised, which, for intelligible and no doubt good reasons, is confined to owners, and so differs from that which is applicable to the greater and more important assessments dealt with by Part 7 of the Act. But with respect to the remedies "in case of default in payment" sec. 24 says that these shall be the same "as are hereinafter provided with reference to the general charges and expenses incurred by the local authority under this Act." Now, the assessment for these general charges and expenses is the subject of sec. 94 (sub-sec. 2), which is the central and most important sub-section of the most important clause of Part 7, and with respect to the remedies for recovery against persons in arrear the enactments of it are thus by reference applied, as it might have been expected they would be, to assessments under sec. 24. It so happens that in Part 7 itself all the assessments there dealt with are referred to the provisions regarding the assessment for general charges (sub-sec. 2) for, 1st, the rule of assessment, and 2d, the "remedies and mode of recovery." In sec. 24 the assessments thereby authorised being, for no doubt good reason, laid on according to another rule thereby expressly enacted, the reference to the provisions of sec. 94 (sub-sec. 2) is made only with respect to the remedies for recovery "in case of default in payment." And I really do not know what else could have been done, or, at any rate, what better could have been done, to shew that with respect to the remedies for recovery against defaulters the Legislature meant that all the assessments under the Act, including those under sec. 24, should be regarded and dealt with in the same manner.

But it is said, and this I understand to be the opinion of your Lordships, that this is not so, because the words "with the same remedies in case of default in payment thereof as are hereinafter provided," &c. do not refer to the remedies which may be taken against defaulters to compel payment by them, but only the powers which, by sec. 94 (sub-sec. 2), the local authority has to meet out of the assessment for general charges thereby authorised any deficiency occasioned by the ultimate failure of such defaulters under sec. 24. I do not think this is the meaning of the words. If it is, they are obviously superfluous; for according to this meaning they do nothing but what is completely and effectually done in the proper place, viz., in sec. 94 (sub-sec. 2), which declares the purposes to which the produce of the assessment for general charges and expenses shall be applied, these necessarily being all proper charges and expenses which are not otherwise effectually met. Charges and expenses properly incurred under sec. 24 are, no doubt, of that character, and must commonly, if not always, be defrayed in the first instance out of the general assessment which, so far as I see, is the only fund available for the purpose. It follows that any deficiency, however caused, in the produce of this, or indeed any special assessment within a more limited area, must be ultimately borne by, or made good out of, the general assessment; for otherwise the persons composing the local authority would have to meet it themselves, and have to return to the general assessment what they had originally taken out of it, but ultimately failed to recover by means of the special. This necessary provision for the indemnity of the local authority is, I repeat, the proper and only purpose of sec. 94 (sub-sec. 2), and the suggestion that the reference to it in sec. 24 is only for the purpose of unnecessarily announcing its

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existence in another part of the Act is one that I am unable to adopt. It does, no doubt, occasionally happen that words in a statute are so obviously superfluous that they may be disregarded as surplusage, but I cannot regard the words in question as of that character, and the general rule is to put such a meaning on words as will give them some efficacy or practical effect if they reasonably admit of it. Statutes which authorise assessments commonly, I think invariably prescribe remedies for recovery in case of default in payment, and generally do so by reference to the remedies already existing in cognate cases. Now, that is precisely what is done here—taking the words in their natural and obvious meaning. “Remedies in case of default in payment” are words which naturally mean remedies against the defaulters and not provisions for the indemnity of the local authority out of another fund in case the default shall continue. The former is so clearly their meaning, in my opinion, that I should have felt unable, even to attain a desirable result, to reject it in favour of the latter, which I think is strained and unnatural. But to do so with the necessary result of thereby attributing to Parliament the intention of putting a penal character upon assessments under sec. 24 of the Act, and placing defaulters in the predicament of offenders who are subject to prosecution and punishment by imprisonment, is repugnant to the principles which ought, in my opinion, to govern construction. In one view, indeed, this interpretation of the words carried out to its legitimate conclusion, would not have the effect of subjecting defaulters to prosecution under sec. 105, but only of leaving the local authority without any remedies against them, for according to this interpretation the “case of default in payment” is “otherwise provided for” than by sec. 105, viz., by the power given to include the amount of deficiency so caused in the assessment for general charges and expenses, and I observe that the Sheriff has held the fact that this was done to be a good defence to the respondent on the merits, which, as at present advised, I think is extravagant, but exactly on the grounds which induce me to think that the construction in question is so.

I therefore dissent from the opinion just expressed by Lord Craighill, which, as your Lordship concurs in it, must govern the judgment.

LORD JUSTICE-CLERK.—On this question I am not surprised, though I regret, that there should be a difference of opinion amongst your Lordships. The preliminary question in the case is by no means free from difficulty, and though I have come, on consideration, to agree with Lord Craighill in sustaining the competency of this appeal, it has not been without considerable hesitation. As your Lordships are not agreed, I shall state, shortly, the grounds of my judgment.

The petition in which the appeal has been taken was presented under the 24th section of the “Public Health Act, 1867,” which provides for the local authority, with the approval of the Board of Supervision, enclosing or replacing by a covered drain any watercourse, ditch, &c., which has become irremediably foul. It then empowers the local authority to assess the owners of premises contributing to the pollution of the watercourse, &c., so to be enclosed, for payment of all the expenses incurred in the operation. And, lastly, it empowers the local authority “to levy and collect the sums so assessed, with the same remedies in default of payment thereof as are hereinafter provided with reference to the general charge and expenses incurred by the local authority under this Act.”

The remedy for the general sums due by individual debtors under the statute is that contained in the 105th section, and under that section the proceedings in

the present case have been brought. The 105th section provides that "all applications to enforce any provision of this Act, or for the recovery of penalties herein imposed, or other sums of money becoming due to the local authority in virtue of this Act, in so far as not herein otherwise provided for, may be by summary petition," &c. And under such petition the Sheriff, Magistrate, or Justice "may, without prejudice to diligence by poinding or arrestment, grant warrant for the imprisonment of the person convicted or found liable in a penalty or sum of money, unless he shall pay the whole sums found due within a specified time, until the same be paid, such imprisonment not to exceed a specified time." Now, it is quite clear that that power to the Sheriff is not limited to penalties or even expressly to "sums of money in the nature of a penalty," but extends to all "sums of money becoming due to the local authority in virtue of this Act." Warrant of imprisonment, though only for a limited time, can legally be granted simply on default of payment, within a specified time, of any sum found due to the local authority.

The question then arises whether an application to the Sheriff or Magistrate under this 105th section of the "Public Health Act" is one of the causes to which the "Summary Prosecutions Appeals Act, 1875," applies. Under that Act an appeal on point of law may be taken on cases stated in any "proceeding which may be brought under the 'Summary Procedure Act, 1864,' and every other summary proceeding for the prosecution of an offence or recovery of a penalty competent to be taken before an inferior Judge." Was this, then, a proceeding which could have been brought under the Summary Procedure Act? That question sends us back to sec. 3, sub-sec. 3, of the Summary Procedure Act, which provides that "all proceedings for the recovery of a penalty, or sum of money in the nature of a penalty, which, under the provisions of any Act of Parliament," may be recovered by summary process before an inferior Judge, may be brought in the way provided by the Summary Procedure Act.

The question therefore remains—was this sum of money, for recovery of which the proceedings were instituted, "of the nature of a penalty"? I am of opinion that it was. The mode of recovery is sufficient in itself to indicate this. Imprisonment, not in virtue of the ordinary rules of personal diligence, but by special warrant of the Judge, for a limited time, may follow on default of payment. Though this imprisonment may not be precisely *in modum pænæ*, still this peculiar method of recovery indicates that the sum of money to be recovered is of the nature of a penalty. It may be a civil debt and yet of the nature of a penalty. The two cases cited by Lord Craighill are directly in point, for in them the debts, though quite as much as here civil debts, were found to be of the nature of a penalty.

The conclusion necessarily follows that, as this sum of money might have been recovered under the Summary Procedure Act, the cause is one in which appeal under the Summary Prosecutions Appeals Act is competent; and further, as decree might have been followed by imprisonment for a limited time, the cause is a criminal cause in the sense only that appeal lies here and not to the civil Court.

All that follows clearly enough, provided it is the fact, as required by the 105th section of the Public Health Act, that the recovery of the assessment is not otherwise provided for in the Act. The difficulty at this point arises on the 24th section, which concludes thus—"With the same remedies in case of default in payment thereof as are hereinafter provided with reference to the general

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No. 8. charge and expenses incurred by the local authority under this Act." Now, the real question of difficulty in the case is the question whether "default in payment" means failure on the part of the person assessed to pay, or failure on the part of the board, after using the direct means of enforcing payment, to recover. I am of opinion that the last is the correct alternative in construing this clause. The remedy provided for the recovery of charges and expenses by sec. 94 of the statute is a general assessment on the community, and embraces all demands on the part of the local authority not recovered under the other remedies of the Act. It applies to "all charges and expenses incurred by the local authority in executing this Act"—"and not recovered as herein before or after provided"—and these "may be defrayed out of an assessment" over the whole district of the local authority. This is a remedy provided only after the local authority has exhausted the other executorial of the statute, and is in no respect applicable to procedure against the individual debtor. I cannot think that this remedy was at all intended to be the only one applicable to an assessment under the 24th section. The mode in which this catholic assessment is to be recovered under the 94th section is "in like manner and under the like powers as provided in the prison or police Acts." But that only arises when the general assessment is imposed, the substance of the remedy being the power of general assessment.

If, no doubt, I could read the clause to mean, as my brother Lord Young does, "with the same remedies in case of default of payment as is provided for the recovery of a general assessment laid on in order to defray the general charges and expenses of the local authority," I should have agreed with him. But this is not what the clause expresses, nor is it, I think, what was intended. There could be no reason for this exceptional provision. And therefore, on considering this clause attentively, I have come clearly to be of opinion that it applies only to cases where the ordinary method of recovery fails, and is not available in the first instance. It contemplates an assessment not on individuals but on the whole community; and quite rightly, because it is quite reasonable that the deficit on any local assessment should fall, not on the local proprietors who have already paid their own share, but on the whole community, who, no doubt to a less extent, benefit by the operations assessed for.

We shall therefore sustain our jurisdiction in the appeal, and proceed to hear the case on the merits.

Counsel were then heard on the merits of the case.

LORD YOUNG.—I must now assume the jurisdiction of the Court, and doing so, I am of opinion that the judgment of the Sheriff is erroneous.

The fourth question is perplexing, as stated and taken in reference to the facts. It is this,—Is the local authority entitled to decree for the sum now sued for, seeing that they have already assessed and levied from the respondent, in respect of the same property, a rateable proportion of the same expenditure along with the rest of the community? Now, the facts from which that question is drawn are, as stated by the Sheriff, that the local authority had, in the first instance, paid the expense of constructing this sewer out of funds which were the produce of a general assessment. I have already explained my opinion as to the 94th section of the Public Health Act, and this is just illustrative of its operation.

the view I have expressed the expenses of this sewer has, in the first instance, been defrayed out of the funds raised by general assessment under sec. 94, and if the local authority should fail to recover from those primarily liable, then the balance of the cost will ultimately rest, just where it does now, on the general assessment. But the present is a proceeding to recover from those primarily liable. That it has been paid in the meantime out of funds in the hands of the local authority, the produce of a general assessment, is no answer to this demand under a particular assessment, any more than if it had been paid out of money advanced on the general credit of the local authority.

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The LORD JUSTICE-CLERK and LORD CRAIGHILL concurred.

THIS interlocutor was pronounced :—"Sustain the jurisdiction of this Court: Answer the first, second, and fourth questions in the case in the affirmative, and the third question in the negative: Reverse the determination of the inferior Judge; and remit to him to proceed accordingly: Find the respondent liable in expenses," &c.

MYLNE & CAMPBELL, W.S.—WM. SPIRKS, S.S.C.—Agents.

JOHN LOWSON Junior, Complainer.—*Fraser—M'Kechie.*

No. 9.

THE COMMISSIONERS OF POLICE OF THE BURGH OF FORFAR, Respondents.
—*Mackintosh.*

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Police—Jurisdiction—Suspension of Notice to Pave Footway—Competency.
—The Forfarshire Roads Act, 1874, sec. 22, and the General Police Act, 1850, sec. 212, laid upon the owners of property within the burgh of Forfar the obligation of making paved footways along the frontage of their properties, and empowered the Police Commissioners after the lapse of fourteen days from notice given to any such owner requiring him so to do to proceed against him by summary complaint, on which imprisonment for a limited time might follow. Notice was served upon an owner requiring him to pave the footpath in front of his property, and he at once, without waiting for a complaint to be laid against him, and disposed of by the inferior Court, brought a suspension of the notice in the High Court of Justiciary, and craved interdict against the commissioners carrying out any proceedings under the notice. The Court held that the suspension was premature, and refused to entertain it.

Jurisdiction—Civil or Criminal—Summary Procedure Act, 1864, sec. 28.—Opinion (per Lord Justice-Clerk), that the 28th section of the Summary Procedure Act was intended as a test of jurisdiction only in questions of review, and did not exclude an ordinary action in the civil Courts with regard to the subject-matter of such summary complaints as were thereby rendered criminal in relation to review.

THIS was a bill of suspension presented to the High Court of Justiciary by John Lowson junior, manufacturer, Forfar, against the Commissioners of Police of Forfar.

HIGH COURT.
Lord Justice-Clerk.
Lord Young.
Ld. Craighill.
Justiciary Clerk.

The statement in the bill was that the complainer had to complain of a notice served upon him, as proprietor of certain premises within the burgh of Forfar, by the Commissioners of Police of that burgh, of date 26th February 1877, bearing to be in terms of the provisions of "The Forfarshire Roads Act, 1874," sec. 22,* and in terms of the provisions of

* "The Forfarshire Roads Act, 1874," section 22, enacts that "the owners of all lands fronting or abutting on any road transferred to the commissioners of any burgh by or under the provisions of this Act, shall, at their own expense,

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the Act 13 and 14 Vict., cap. 33, and, in particular, of the provisions of clause 212 of the last-mentioned Act,* requiring him to cause the road fronting or abutting his property, within fourteen days from the date of service of the notice, to be provided with a footway well and sufficiently paved in manner set forth, and that under intimation that, in case of refusal, neglect, or delay on the part of the complainer to comply with the notice, the respondents would adopt such proceedings against the complainer as were authorised by the above mentioned Acts.

The complainer craved the Court to order intimation to the clerk to the commissioners, and to appoint him to lodge answers, and “meantime to interdict and prohibit the said commissioners from carrying out any proceedings under said notice; and thereafter, on advising this bill, with or without answers, to suspend the said notice, order, or requirement, with its grounds and warrants, and all following thereon, simpliciter.

The grounds of the complaint were that the complainer’s property was to a great extent not built upon, and, therefore, that the Forfarshire Roads Act, 1874, did not apply to it, and that, in other respects, the proceedings complained of were illegal and oppressive, and beyond the statutory powers of the commissioners. The cost to the complainer of carrying out the operations required by the commissioners would have amounted to more than £700.

As the reason for presenting *hoc statu* the complaint, the complainer stated,—“The proceedings threatened by the said notice are by statute criminal proceedings; and when the same are taken (as the complainer believes and avers will be, upon the expiry of the period mentioned in the said notice), the same will be by way of complaint as for a police offence, and the complainer will be tried in the ordinary Police Court of the burgh of Forfar. The magistrate who tries the complainer for the said police offence may grant warrant to imprison the complainer in default of payment of the fine to be imposed for non-compliance with the said notice. The complainer is apprehensive that under the said notice, which he believes and avers to be illegal and oppressive, proceedings may be taken against him upon which a warrant for his imprisonment will follow, and he therefore presents this application.”

Lord Adam, one of the Lords of Justiciary, when the complaint was

when required by such commissioners, cause footways to be constructed on the sides of such road in front of their respective properties, and to be well and sufficiently paved with flagstones or other flat hewn stones, or to be constructed in such other manner and form and of such breadth as such commissioners shall direct, but subject to the following provisions, viz. wherever the land along the sides of any such roads is not built upon, and not enclosed and used for pleasure-ground, or garden or nursery ground, or for manufacturing purposes, the obligation to make footways shall not come into operation unless and until such land is built upon or enclosed and used for some one of such purposes; and for carrying into effect the provisions contained in this section such commissioners shall have and may exercise and enforce all the powers and authorities conferred on them by the Police Act in force within such burgh at the time for carrying into effect the provisions of that Act in reference to footways on the streets of such burgh.”

* “The Act 13 and 14 Vict. cap. 33,” (The General Police Act, 1850), being the Police Act in force within the burgh of Forfar, enacts, sec. 212, with regard to proprietors laying down foot pavements in front of their properties, that “in case such owners shall refuse or neglect or delay to do so, any magistrate before whom such complaint shall be brought may fine and amerce such owners in penalty not exceeding double the amount of the estimated expense, and, on recovery, shall thereout defray the expense incurred in making such footways.”

presented to him, granted warrant of service upon the clerk of the Police Commissioners, and appointed the case to be heard on the day of _____, and meantime granted interdict as craved.

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It was objected for the respondents that the suspension was incompetent because premature; that suspension in the Court of Justiciary was a means of reviewing the decrees of inferior Judges in criminal and *quasi* criminal matters where review was competent, and was not a process of original jurisdiction; that, were the present suspension entertained, proof would be necessary, which was a thing unknown in the practice of the Court in such cases; and that the Court of Justiciary had never been in use to grant interdict.

Argued for the complainer;—He was not bound to wait until he was taken to the Police Court of the burgh of Forfar, where one of the commissioners who had issued the notice complained of would be sitting as magistrate. The commissioners had commenced on an illegal course, and he was entitled to have their proceedings stopped *in initio*, and was not bound to wait till they had gone a certain length. Proof might be necessary, but there was no objection either to a remit to the Sheriff to take and report proof, or to the case being remitted simpliciter to the Court of Session, as was occasionally done. The complainer wished the case deliberately tried, as it involved an important pecuniary interest to him, but he was precluded himself from going to the civil Court, because the subject-matter was one of those which had been made criminal by the 28th section of the Summary Procedure Act, 1864. Had this not been so, the complainer might have readily suspended at this stage in the Court of Session, and, if necessary, have then brought a declarator. He was not to be put at a disadvantage by the accident of this being a *quasi* criminal case within the meaning of the Summary Procedure Act. Though the Court of Justiciary was not in use to grant interdict in the ordinary sense it had power to stay procedure in inferior Courts at any stage.¹

LORD JUSTICE-CLERK.—I am not prepared to say that we have not jurisdiction to entertain a suspension on the subject-matter of the present complaint. If proceedings had been taken against the complainer under the sections of the statutes founded on and been followed by conviction I think I may assume that we should have had jurisdiction to entertain a suspension of them at his instance.

Nor do I mean to say that it is incompetent for us to interfere *pendente processu* in a case of this kind, and restrain an inferior Court and its officers from a particular line of proceeding, and direct them how to proceed.

But the present suspension is wholly premature. The complainer is really asking us to become the Court of first instance, and to judge between the Police Commissioners and him. We could not do that without proof. Quite irrespective, then, of the question of jurisdiction, this is a suspension which I am of opinion we ought not to entertain. We should be deranging the whole machinery of the statutes, which adequately provide for this matter in the ordinary cases, without substituting the deliberate procedure of a civil declaratory action, something equivalent to which, I understand the complainer to say, the special importance of his particular case requires.

I am therefore of opinion that this suspension should be dismissed.

I may add with reference to the 28th section of the Summary Procedure Act, which was mentioned in the argument, that, in my opinion, the provision

¹ The complainer referred to Hill v. Galbraith, May 28, 1874, *ante*, vol. i. Just. Cases, p. 13, and 3 Couper, p. 1.

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therein contained was intended to form the test of jurisdiction only in matters of review. I am very far from saying that it could prevent a direct declaratory or other action being brought in the civil Courts with regard to any matter which might otherwise come there.

LORD YOUNG.—The complainer's statement is that he is required by the notice which has been served upon him to construct within fourteen days works of such a serious character that they would cost him more than £700. I give no opinion upon the legality of the course taken by the respondents. I assume that the question is a serious one, relating to a serious duty on the one hand, and a serious pecuniary burden on the other. The statutes under which the notice was given empower the commissioners, on failure of an owner to comply with their requisition and construct a foot pavement, to proceed by complaint against the owner. It is another matter, and one of discretion for the commissioners, whether it would be seemly in any particular case to proceed by way of complaint in the Police Court. There is nothing to prevent the Police Commissioners bringing an ordinary action of declarator to have their right and the owner's obligation declared. Or if they prefer themselves at once to construct the works in question, it is quite competent, and in such a case as this I think they would be exceedingly well advised, to bring an ordinary action to recover the cost instead of a summary complaint.

If, however, the Police Commissioners follow out the statutory proceedings provided, and the complainer does not substantiate his defence before the magistrate, the result will be that the magistrate may fine the complainer in something like £1400, and then no doubt he may suspend, and raise every question upon which the validity of the magistrate's judgment depends. But a suspension of the present notice, on which nothing has followed, on which no complaint has been presented, and no conviction pronounced, is entirely premature, and cannot be entertained. As a general rule, except in cases so very special that there is hardly any recorded example, suspension in this Court is a mode of reviewing proceedings of inferior Courts, and not of interdicting those proceedings. Let those proceedings be carried out to their natural end, and then the party aggrieved may come here.

LORD CRAIGHILL.—I concur in thinking that the present suspension ought to be refused. The subject-matter is undoubtedly such as may be taken cognisance of by this Court at the proper time; but, as things are, it would be highly inexpedient, even assuming it to be competent, for us to interfere, when the police magistrate has not as yet been asked to decide the point which is the subject of controversy. I am satisfied that this question is of great importance to the suspender, and it is only natural that he should be anxious that it should be deliberately tried and decided. If he is unwilling that it should be judged of in the first instance in the course of a summary proceeding, such as that for which the Acts of Parliament referred to have made provision, it may not be out of place for him to consider whether, even at the stage which things have reached, the case might not be effectually submitted to the civil Court for its decision by one of the ordinary forms of action.

THE COURT recalled the interim interdict granted by Lord Adam, refused the bill, and found the complainer liable in expenses, &c.

ROBERT FINLAY, S.S.C.—T. J. GORDON, W.S.—Agents.

UNITED KINGDOM TEMPERANCE AND GENERAL PROVIDENT INSTITUTION,
Appellants.—*Black.*

JOHN LANG, Appellant.—*Keir—Maconochie.*

MURDOCH AND RODGER, Appellants.—*M^r Laren.*

THE PAROCHIAL BOARD OF CADDER, Respondents.—*Kinnear.*

No. 10.

June 14, 1877.
United King-
dom Temper-
ance, &c. In-
stitution v.
Parochial
Board of
Cadder.

Public Health—Nuisance from foul ditch or water-course—Public Health Act, 1867 (31 and 32 Vict. c. 101, secs. 18 to 22)—Procedure under.—A parochial board, as the local authority of a parish, presented petitions under sections 18 to 22 of the Public Health Act, 1867, against certain proprietors of subjects abutting on a foul ditch or water-course, to have them ordained to abate the nuisance thence arising. The Sheriff-substitute found that the true authors of the nuisance could not be determined without farther and probably protracted inquiry, and that the nuisance ought to be removed without delay, and accordingly ordained the parochial board to perform the necessary works. He thereafter laid the expense incurred upon the parties complained against. Held that not having given the respondents an opportunity themselves of abating the nuisance the Sheriff could not under section 22 of the statute decern against them for the expense incurred.

A PETITION was presented to the Sheriff of Lanarkshire at the instance of the Parochial Board of the parish of Cadder, as the local authority under the Public Health Acts, 1867 and 1871, against John Lang, as owner of a small property through which ran a foul ditch or water-course, which was complained of as a nuisance. The petition, which was founded on the Public Health (Scotland) Act, 1867, and particularly on sections 3, 16, 18, 19, 20, and 105 thereof, craved the Sheriff to "ordain the said John Lang" (as the author of the nuisance in the sense of the Act) "to remove the said nuisance, and that in such manner and within such time as to the Sheriff should seem proper, and, in case of non-compliance, to find him liable in the penalty of 10s. per day during his failure to comply."

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Lord Adam.
Justiciary
Clerk.

It appeared in the course of the proceedings that the nuisance complained of on Mr Lang's ground was caused in whole or in part by the United Kingdom Temperance and General Provident Institution and by Messrs Murdoch and Rodger, who were owners of property on the water-course higher up than Mr Lang, and from whose houses sewage was allowed to pass into the water-course before it reached Mr Lang's property.

The Sheriff accordingly, in the petition against Mr Lang, found that it was necessary to a just judgment that the Institution and Messrs Murdoch and Rodger should be called. A second petition was therefore presented against these parties as authors of the nuisance in the sense of the statute.

The following facts were proved or admitted in the cause:—"1. That each of the three parties were the owners, in the sense of the statute, of property through which a small water-run flowed, in the following order down the water-course:—(1) Murdoch and Rodger; (2) the Institution; (3) John Lang. 2. That in its course through the property of the two first named the water-run was covered or enclosed in pipes, and no nuisance was complained of as existing in their ground. 3. That the water-run was open in Mr Lang's ground, and that the nuisance complained of did exist there. 4. That the tenants of Murdoch and Rodger, and of the Institution, sent the sewage from their houses into the water-run. 5. That Mr Lang did not by himself, or by tenants, send any sewage or impure matter into the water-run in question. 6. A considerable bulk of sewage was sent into the water-run farther up by numerous feuars (not

No. 10. tenants) of lands which had belonged to Murdoch and Rodger." These feuurs were not made parties to the cause.

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No inquiry was made to ascertain who these upper feuurs were, or to what extent they were the authors of the nuisance in question.

No order was made upon any of the respondents to remove the nuisance.

The Sheriff-substitute (Guthrie), on 20th August 1874, found that it had not been satisfactorily ascertained who was the author of the nuisance, that that question could not be determined without farther and probably protracted inquiry, and that the nuisance ought to be removed without delay. Accordingly, after remitting to Mr Wharrie, an engineer, he, on 17th April 1875, ordained the complainers, the parochial board of the parish, to execute such works as might be necessary for the purpose of removing the nuisance complained of, in accordance with Mr Wharrie's report, and at the sight of Mr Wharrie.

The parochial board having completed the works recommended by Mr Wharrie, the Sheriff-substitute, on 8th May 1877, having conjoined the petitions, found that the cost of these operations, including the fees due to Mr Wharrie for his reports and trouble, amounted to £141, 19s. 4d., and found that the three defenders were primarily liable, jointly and severally, for the cost of the works, and decerned against them jointly and severally in favour of the local authority for said sum, and found the local authority entitled to expenses.*

An appeal on special case stated was taken for all three respondents.

The judgment of the Court was asked, *inter alia*, on the question (No. 6),—"Whether the whole facts warranted the orders, judgments, and decrees pronounced?"

LORD YOUNG.—We have here two petitions, the first directed against Mr Lang, whose property is situated on what the Sheriff-substitute represents as a small water-run or ditch, and the second directed against two proprietors higher up on the same water-run. The application in both instances is founded on the same ground, namely, that the water-run, from being used as an open sewer, had become a nuisance to the neighbourhood. The Sheriff is craved to ordain each proprietor to do what is necessary to abate the nuisance, and in case of non-compliance to subject him in a daily penalty so long as he leaves the order unobtempered. The petitions bear special reference to certain sections of the Public Health Act, 1867.

The Sheriff was satisfied on very moderate inquiry that the ditch was a nuisance. But at the same time he was of opinion that he could not satisfactorily ascertain in the petitions before him who were the authors of the nuisance, and that therefore he was not in a position to make an order upon any one in particu-

* The grounds of this judgment were—(1) that the defenders in the second petition were proved to be the authors of the nuisance, in respect that they were the owners of houses whose sewage flowed down upon Mr Lang's ground and created the nuisance complained of; (2) that the defender, Mr Lang, was both the owner of the premises on which the nuisance was found, and also the author of the nuisance in the sense of the statute, in respect that the nuisance existed or was continued by his default in not removing it; and (3) that the Act under which the proceedings were taken intends the petitioners, the local authority, to be indemnified for the expenditure incurred under the Act by any persons whom they may be able to reach without regard to the rights of those persons *inter se*, or against others, provided only these persons are in the sense of the Act responsible for the creation or continuance of the nuisance.

lar to abate the nuisance. Accordingly, under section 22 of the statute, which is applicable to that state of circumstances, he ordained the local authority to do what was necessary. But then, after the nuisance was remedied by the local authority under this order, the Sheriff was moved in the same proceeding to find the very parties, of whom he has said that he could not ascertain whether they or any of them were the authors of the nuisance, liable in the expense incurred, just as if they were the authors of the nuisance, and the Sheriff pronounced a finding accordingly. Now, that was a totally inept proceeding. Had the Sheriff been able to ascertain who was the author of the nuisance his proper course would have been to order him to do what was necessary to remove it, and to specify a time after which, failing compliance, the statutory penalty would begin to run. If he failed in compliance then the Sheriff might have granted warrant to perform the necessary operations at his expense. But finding that the author of the nuisance could not be ascertained, and ordering the local authority to perform the necessary operations on that footing under the 22d section of the Act, it was quite incompetent for the Sheriff thereafter to order the parties against whom the petition was presented to defray the expense to which the local authority had been put.

It must not, however, be understood that the local authority is without remedy. They may make up their minds as to who are really the authors of the nuisance, and therefore liable to them, and in a proper proceeding obtain decree against him or them for the amount of their disbursements. Or they may proceed under the 24th section, which I must say appears to me to be the one most applicable to the state of matters as disclosed to us in this case, and having completed the necessary works assess the cost upon the owners of all premises polluting the water-run in question.

The present proceeding has, however, entirely miscarried, and I therefore move your Lordship to sustain the appeal.

LORD ADAM.—I think that the appellant, Mr Lang, and also the appellants in the other two appeals, are all properly in Court ; for I am of opinion that the local authority had found the authors of the nuisance in the sense of the statute, when they presented their original petitions. In that character these appellants are brought into Court, and in that character they were bound to remove the nuisance, and, failing their doing so, were liable for the expense of executing the necessary works, and for the expenses of the application. If the Sheriff had followed out the statutory procedure he should have ordered them within a limited period to remove the nuisance. But he did not take that course. Instead of that, on 17th April, he pronounced an interlocutor to the effect that he could not in the proceedings before him ascertain who was the author of the nuisance, and ordained the local authority to execute the necessary works. But the Legislature intended that the parties should have, in the first instance, an opportunity of executing the works themselves. What the Sheriff should have done was, having first ordered the appellants to do what was necessary to abate the nuisance, then, on their failure, to have, under the 22d section, ordered the local authority to execute the necessary works, and laid the cost upon the appellants. I quite agree with Mr Kinnear that the Sheriff was not bound to wait until all the authors of the nuisance were ascertained. But his remedy was to take the parties before him, whether the whole authors of the nuisance or not, and ordain them to do what was necessary, leaving them to settle their rights of relief

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among themselves. But not having given the appellants an opportunity at their own hands of abating the nuisance it was incompetent for the Sheriff in the proceedings before him to lay the expense of what was done under his order by the local authority upon the appellants.

LORD JUSTICE-CLERK.—I quite concur in the judgment proposed by your Lordships. But I am anxious that the precise grounds on which we proceed should be understood. There are seven questions asked in the special case, and most of them I could answer, were it necessary, and did I think they arose, in favour of the respondents. But there is only one of these questions which requires to be answered, viz.—“Whether the whole facts warranted the orders, judgments, and decrees pronounced.”

Now, I agree with Lord Adam that the parties against whom the original petitions were presented were responsible, in part at least, for the nuisance, and that therefore if they had been ordained in terms of the 18th, 19th, and 20th sections of the statute to abate the nuisance, they would have been bound to do so. Had they failed to comply with his order, and had the Sheriff thereupon ordered the work to be done, and found them liable in the expense, he would have been within the statute. But the Sheriff took a course which prevents the expense of the necessary operations being recovered in the process before him. He gave the parties against whom the petition had been presented no opportunity of themselves performing the necessary works, on the ground that he could not satisfactorily ascertain in the proceedings before him who was the author of the nuisance. Having taken that course he cannot now turn round and say that nevertheless they are the parties who must pay.

But I wish it to be understood that if this mistake had not been made I am not prepared to say that these parties might not have been treated by the Sheriff and the local authority as in the sense of the statute the authors of the nuisance, and liable for its abatement, though any one of them might have been entitled to relief at the expense of the rest or of third parties.

THE COURT pronounced this interlocutor:—“With reference to the sixth question in the case, find that the facts did not warrant the interlocutor of 8th May 1877: Find it unnecessary to answer the remaining questions in the case: Sustain the appeal: Reverse the determination of the inferior Judge: Find the respondents liable in expenses,” &c.

MASON & SMITH—MACONCHIE & HARE, W.S.—MORTON, NEILSON, & SMART, W.S.—DOVE & LOCKHART, W.S.—Agents.

No. 11.

June 29, 1877.
France v.
Anderson.

GEORGE FRANCE, Appellant.—*Pearson*.
JAMES ANDERSON, Respondent.—*Trayner*.

Education Act, 1872 (35 and 36 Vict. c. 62), sec. 70—Certificate of School Board as Warrant for Prosecution.—The Education Act, 1872, sec. 70, enacts that previous to the prosecution of a parent for failure to provide education for his children, the school board shall “certify in writing that he has been and is grossly and without reasonable excuse failing to discharge the duty of providing elementary education for his child or children,” and shall transmit such certificate to the procurator-fiscal. *Held* that a prosecution of a parent had been improperly instituted, in respect that the school board had failed to inquire into the grounds of excuse stated by the parent, and to grant a certificate in writing, as prescribed by the section, and conviction set aside.

Observed (per Lord Young) that a parent must see that his child has sufficient elementary education between the ages of five and thirteen, such as is provided by and brought within his power by the statute. But that although he should remove his child from school before attaining the age of thirteen, provided he have reasonably attended to the duty of giving it elementary education, he is not liable under the statute.

Proof—Evidence Act, 1866 (16 and 17 Vict. c. 20)—*Witness.*—*Question,* whether in a prosecution of a parent under the 70th section of the Education Act, 1872, it is competent to examine him as a witness in exculpation.

THIS was an appeal from the Sheriff Court of Inverness under the Summary Prosecutions Appeals Act, 1875, taken by George France, ground-officer, Glenelg, in a prosecution at the instance of James Anderson, solicitor, Inverness, procurator-fiscal of Court, against him, under section 70 of the Education (Scotland) Act, 1872.*

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The proceedings were narrated in the special case.

The complaint, which was dated 25th May 1877, set forth that France had been, for a period of at least three months immediately preceding its date, and was then, "grossly and without reasonable excuse failing to discharge the duty of providing, as required by section 69 of the Education Act, 1872, elementary education in reading, writing, and arithmetic for Benjamin France, aged twelve years," his son, then or lately residing with him.

George France appeared before the Sheriff-substitute (Blair) on 6th June 1877, in answer to the complaint, personally and by his agent, and objected to the complaint as irrelevant, *inter alia*, on the following grounds:—"(1) That whereas there are three different grounds on which the school board may grant the certificate required by section 70 of the Education (Scotland) Act, 1872, and the said section provides that the procurator-fiscal shall prosecute for such failure of duty as in said certificate specified, it was incumbent on the prosecutor to libel upon the said certificate in the complaint in order that the defender may know with which failure of duty he is charged; and (2) that the procurator-fiscal has not set forth in the complaint his title to sue."

The Sheriff-substitute repelled these objections, and found the complaint relevant.

France then pleaded not guilty, and lodged a special defence, in which he averred "that he has provided for the period mentioned in the complaint, and is now providing for, the elementary education in reading, writing, and arithmetic, of his son Benjamin France. The said George France admits that he has not, for the period in question, sent his said son Benjamin to the parish school, which is the only school in the district; but he has repeatedly explained to the school board of the parish in which he resides, and he now explains to the Court, that his reason for not doing so is that he believes the teacher of said school to be a person of immoral character, who is at present charged in an action pending in your Lordships' Court with the crime of adultery, and in support of this allegation he has cited the Sheriff-clerk to produce for exhibition the action in which said charge is made, and in which several witnesses have sworn to the truth of the charge. That action has not yet been decided; but, pending the result of that action, the respondent (appellant in this appeal) considered, and still considers, that he had not only reasonable, but the most ample excuse, for not sending his child to said school."

After evidence was led the Sheriff-substitute convicted France of the offence charged.

* For section 70 of the Education Act, 1872, see *supra*, p. 17, note.

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In the course of the proof France tendered himself as a witness. It was objected that it was incompetent to examine him, as the prosecution was a criminal proceeding within the fair meaning of section 3 of the Evidence Act, 1866, 16 and 17 Vict. cap. 20.

The Sheriff-substitute sustained the objection.

In the special case the Sheriff thus stated the facts:—"The accused, George France, has a son, Benjamin France, who was born at Invereshie, in the united parish of Kingussie and Insh, on 4th June 1864. The said Benjamin France has not attended the public school of the district of Glenelg for upwards of three years, has not been attending any school for the last three months, and is not now attending any school. He has been living with his brother at Arnisdale, in the parish of Glenelg. His brother has been attending the public school at Arnisdale, but Benjamin has not. In December 1876 the default officer of the board, when, in accordance with his instructions from the school board, he enjoined the accused George France to send his son Benjamin to school, was informed by accused that Benjamin was not then at school, and at the same time received from the accused a letter in the following terms: . . . 'In reply to your inquiry why I do not send my son Benjamin, aged twelve years, to the public school at Glenelg, I have to state that, being aware that the school-master of Glenelg public school has been publicly charged with immorality in a Court of law, I do not see I would be justified by the laws of God or man in placing my child, while these charges remain undisposed of, under the tuition of that person.' The default officer informed the school board of this. When the lad Benjamin left the public school of Glenelg three years ago he could not read very well, but there was no evidence of his knowledge or want of knowledge of writing or arithmetic. The accused was, on 2d April 1877, told by the default officer that unless the lad Benjamin was sent to a school the board would prosecute him for failure to discharge his duty under the Education Act. Although it was alleged in the special defence, there was no evidence that the said George France has during the last three months discharged or endeavoured to discharge the duty of providing elementary education for the said Benjamin France.

"Upon these facts the Sheriff-substitute convicted the said George France of the contravention charged."

The following questions were, *inter alia*, stated for the judgment of the Court:—"1. Whether the facts, as stated, afford sufficient evidence in law to entitle the Sheriff-substitute to convict the said George France of the offence charged against him. 2. Whether the absence of any reference in the complaint to the certificate which the school board of the parish of Glenelg is directed by the 70th section of the Education (Scotland) Act, 1872, to transmit to the procurator-fiscal with a view to a prosecution against a parent respecting his failure of duty to provide for the education of his child renders the complaint defective in specification, so as to amount to irrelevancy, and if so, is it fatal to the conviction? 3. Whether the procurator-fiscal has set forth sufficiently in the complaint a proper title to sue? 4. Whether it was competent to receive the evidence of the accused as a witness for himself?"

The Court, when the special case was laid before them, required the respondent to produce the certificate transmitted to him by the school board of Glenelg in virtue of which he instituted the prosecution.

When the case was again called counsel for the respondent stated that no formal written certificate was ever transmitted to the respondent, but that the following had been the procedure:—

In December 1876 France was warned by the officer of the school

board of Glenelg to provide proper education for his son, as required by the Act of 1872. On 10th March 1877 France and other parents appeared before the board in answer to a summons, and presented a complaint "to the effect that owing to a *fama* in the parish regarding Mr Donald Fraser, schoolmaster, they could not conscientiously send their children to his school, and requested to be informed where they were to send their children for education." The minutes of meeting bore:—"The board being informed that the children of these parents have been attending an adventure school in the village agreed to make inquiry whether they were getting suitable education in that school or not; and if not, to order them to attend the public school, and failing their doing so, the compulsory officer be instructed to prosecute the defaulting parents in terms of the Education Act, 1872. The following were named as a committee to visit that adventure school, viz., Messrs Mollison, Millar, and Mackintosh, to ascertain whether satisfactory education is given there or not, and to instruct the compulsory officer accordingly." The committee of the board so appointed reported on 12th March that no such adventure school existed as alleged by the defaulting parents. On 19th March France was again warned by the officer of the board, under the instructions of the above-mentioned committee of the board, to send his son to school, and that in default a prosecution would be instituted. This warning was not complied with. On 4th May the clerk wrote to the respondent—"I send you herewith an extract minute of our school board"—(the minute of 10th March referred to above)—"resolving to prosecute the parents named in the minute, in terms of the Education Act, 1872; also copy letter from the compulsory officer certifying that these parents, after being duly warned, failed to send their children to school. I have therefore to request you, in accordance with the resolution of our school board, to take the necessary steps to prosecute the defaulting parents."

Counsel for the respondent submitted that, in these circumstances, the extract minute of meeting of 10th March of the school board, taken in connection with the letter of the clerk of 4th May, substantially amounted to the certificate required by section 70 of the Act.

LORD YOUNG.—I do not regard this case as attended with much difficulty. The whole proceedings lead one to the conclusion that the spirit and meaning of the statute in regard to the matter of compulsion has been misapprehended. It strikes one as remarkable at the outset that this prosecution should have been instituted just when the child in question was on the eve of emerging from the school age of thirteen; so much so that the case could not be disposed of by the Sheriff until the child had reached the age of thirteen complete. There could not, therefore, at the time the case was before the Sheriff, be any continuance of failure to send the child to school in the sense of the statute. I do not mean to say that if a parent's conduct has been very gross and inexcusable indeed before the expiry of the statutory period a prosecution in order to punish him for such conduct might not be sustained, although I must say that, in my opinion, it would be going somewhat out of the way merely to punish for the past, with no view to the benefit of the child for the future.

But passing by that, the real charge in any prosecution of this sort is that the parent has been and is grossly and without reasonable excuse failing to discharge the duty of providing elementary education for his child. Now, that, even taken in connection with the preceding clause of the statute, does not imply

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in the least that the parent is under any positive obligation to send his child to school, far less to any particular school. He must see to it that his child has sufficient elementary education between the ages of five and thirteen such as is provided by and brought within his power by the statute. But although he should remove his child from school before attaining the age of thirteen, provided he have reasonably attended to the duty of giving it elementary education, he is not liable under the statute.

Now, upon the statement of facts by the Sheriff, all we can gather is that for the last three months of his thirteenth year the parent did not send his son Benjamin to school. There is no statement in point of fact inconsistent with this, that the child was kept at some school, though not the particular school of Glenelg, till he was twelve years and nine months old. Then the statement of facts goes on to say, the said Benjamin France "has been living with his brother at Arnisdale, in the parish of Glenelg. His brother has been attending the public school of Arnisdale, but Benjamin has not." Upon these facts the Sheriff has convicted the parent of grossly and without reasonable excuse failing to discharge the duty of providing elementary education for his child. I confess I can see no evidence whatever in these facts of such gross and inexcusable neglect of that duty.

But it is not necessary to rest our judgment upon this branch of the case. The Legislature intended that in this matter of compulsory education parents were to be dealt with with consideration, if not with leniency. The statute, which for the first time introduced these compulsory powers with reference to education, requires that before a prosecution can be instituted against a parent the school board of the parish shall "certify in writing that he has been, and grossly, and without reasonable excuse, failing to discharge the duty," &c.

Now, there is no such certificate here, and I am not at all persuaded that if it had been put to the school board, "Will you certify that this parent is not providing this child with elementary education, and will you further certify that he is failing to do so without reasonable excuse, and not only so, but that his failure is gross," the school board would have been satisfied to grant such certificate.

There are three things of which the school board must be satisfied before they can conscientiously grant the requisite certificate. There must be failure; the failure must be without reasonable excuse; and, moreover, it must be gross. These terms are unusual in combination in a statute or elsewhere. They are meant to call the attention of the board, in the first instance, to the fact that it is not what they shall consider failure that they must be prepared to certify. But they must be prepared to characterise that failure as gross and without reasonable excuse. Now, we have here no such certificate, and moreover no evidence that the school board applied their minds to the case, so that they could conscientiously have given such a certificate. The prosecution without that certificate could not legally proceed, and therefore the conviction must be set aside.

The other questions which are brought before us in the case I do not suppose your Lordships desire to decide, but there is one of them on which it may not be out of place to say a few words, namely, the question as to the propriety or impropriety, the legality or illegality, of admitting the evidence of the parent against whom the prosecution was directed, in his own exculpation. That the parent could say, all his explanations, and all his grounds of excuse must be heard and considered by the school board in the first instance, is clear from the terms of the statute. Whether the Sheriff, in considering the case, or is not to have the benefit of the same explanations is an important question.

nd one on which, I confess, I am inclined to take a different view from the No. 11.
heriff. As the point was not argued before us I only indicate this as my June 29, 1877.
pinion; but if my view is the correct one it is important that Sheriffs who are France v.
ministering this clause of the statute should know that they are, at least, en-Anderson.
tled and, as I think bound, to hear the parent's own explanation of his conduct
efore convicting.

LORD CRAIGHILL.—On the last question alluded to I do not think it right to
ve any opinion, as there has been no argument upon it. On the first point I
ntirely concur with what has been said. If anything is plain it is that a certi-
ate by the school board, in the terms contained in the 70th section of the
atute, is a condition precedent to a prosecution. It is said, however, that the
ceedings of the Glenelg board in this case imply as much as would have been
ntained in the certificate. But when there is such a plain enactment there
an be no excuse for offering anything as an equivalent for what is expressly
quired. Even, however, if a certificate were not indispensable, the proceedings
efore the board could not be accepted as an equivalent; for it appears on the
ace of them that there was no such inquiry as was necessary to enable the
board to certify in the terms prescribed by the Act. In truth, it is apparent
that the school board never applied their minds to the case in such a way as to
qualify them for certifying all that was necessary. These proceedings therefore
are not, and were not intended to be, in effect a certificate in terms of the statute.

LORD JUSTICE-CLERK.—I concur in your Lordships' decision. Compulsory
education is an important subject, and I should be very sorry in dealing with
the proceedings of a school board to do so in any technical spirit. They have
a difficult duty to discharge in the administration of public education generally,
and their duty under section 70 of the statute in particular is a most delicate
and important one. I do not wish to place difficulties in their way, but, on the
other hand, care must be taken that there shall be no unwarrantable interference
with the discretion of parents.

The application in question is made under a clause which authorises a very
stringent remedy for a very grave neglect,—the neglect of a parent to give his
child the benefit of the national provision for elementary education, without
himself satisfactorily supplying it. But it is absolutely necessary that school
boards in applying that remedy should understand that they must walk
strictly by the terms of the statute. Now, what the statute makes essential
is this, that the school board must satisfy themselves, in the first place, that
elementary education is not given; and, secondly, that the failure to give it is
gross and without reasonable excuse. And having satisfied themselves of all
this, they must meet with and hear the explanations of the parent, and then
certify the same in writing before a prosecution can be legally instituted.

Now, in this case, if I had thought that the spirit of the statute had
been complied with, I might not have been so careful to insist upon the
letter. But I think that here the spirit of the statute has been departed
from. The fact was that the school board only inquired into one of the
excuses for the child's not attending the public school, namely, that it was
getting sufficient education elsewhere. They remitted to a committee of three
members to inquire into that matter, and failing a satisfactory result of their
inquiry authorised them to prosecute. The committee made their inquiry,

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Anderson.

and without any communication with the board, and without any inquiry into the other grounds of excuse,—namely, the objections to the moral character of the master of the public school,—the clerk of the school board at once communicated with the procurator-fiscal, and sent him authority to prosecute, and sent also the minutes of meeting of the board appointing the committee to inquire, and resolving, if the result of the inquiry is not satisfactory, to prosecute. There is nowhere to be found any certificate such as the statute requires, and, so far as I can judge from the proceedings there was no evidence before the school board on which they could satisfactorily judge whether the parent was keeping his child away from school out of mere indifference to education, or whether he had a reasonable ground of excuse, and therefore no evidence on which they could grant the requisite certificate. The proceedings are such as are much to be regretted as tending to discredit the cause of education generally, and it would have been infinitely better had the procurator-fiscal considered the terms of his authority, and finding them not equivalent to the statutory certificate had refused to prosecute, or had laid the matter before the Sheriff for his direction.

THIS interlocutor was pronounced:—"The Lord Justice-Clerk and Lords Commissioners of Justiciary having considered this case and heard counsel for the parties, answer the first question in the negative: Find it unnecessary to answer the remaining question in the case: Reverse the determination of the inferior Judge, and decern."

MORTON, NEILSON, & SMART, W.S.—J. & A. PEDDIE & IVORY, W.S.—Agents.

No. 12.
July 2, 1877.
H.M. Advocate v. Clark.

HER MAJESTY'S ADVOCATE.—*Sol.-Gen. Macdonald—Burnet, A.D.—Muirhead, A.D.*

JAMES DONALD CLARK.—*Balfour—Mackintosh.*

Crime—Culpable Homicide—Explosion of Dynamite through negligence of Custodian—Indictment—Relevancy.—In charging the offence of culpable homicide through an explosion of dynamite in the custody of the accused, which he had culpably, and in neglect or violation of his duty, allowed to remain in an exposed place of common resort (viz., a joiner's shop in connection with a smithy), the libel set forth that the dynamite "became ignited by means of spark from the said smithy, or by being brought into contact with some other substance, or in some other manner to the prosecutor unknown, and then and there exploded." An objection was taken that the words in italics gave too great latitude to the prosecution. Held that as these words were not to be held as introducing into the minor a third *species facti* different from or inconsistent with the two specifically mentioned, but only as a generalisation of these two specific modes, for the purpose of giving elasticity to the indictment, the indictment was relevant.

Question, whether it would be a relevant charge to libel the placing of an explosive substance in a place of danger, and the fact of its subsequent explosion without farther connecting the accused with the explosion.

HIGH COURT.
Lord Justice-Clerk.
Lord Deas.
Lord Adam.
Justiciary Clerk.

JAMES DONALD CLARK, engineer, in the employment of Charles Brannan and Sons, contractors for the formation of the Glasgow, Bothwell, Hamilton, and Coatbridge Railway, was charged before the High Court of Justiciary with culpable homicide, a quantity of dynamite under his charge having exploded and caused the loss of six lives under circumstances which, as alleged by the Crown, inferred culpable neglect on the part of the accused.

An indictment was brought against the accused at the Spring Circuit at Glasgow, but on an objection being stated to the relevancy it was, on an intimation of opinion on the part of Lord Craighill and Lord Adam, withdrawn, and a new indictment was brought in the High Court.

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This indictment charged "culpable homicide, as also culpable violation or neglect of duty, by a person having the custody or charge of dynamite, or bound to see to its deposit in a place where it would not be a source of danger to the lives and limbs of the lieges:" In so far as the firm of Charles Brand and Son, being contractors for the formation of a portion of the line of the Glasgow, Bothwell, Hamilton, and Coatbridge Railway, and the panel being employed by them as engineer and sub-manager of their works, "and the said Charles Brand and Son being in possession of a large quantity of dynamite, a highly dangerous explosive, for use at or in connection with said works, and it being the duty of you, the said James Donald Clark, as engineer or as sub-manager foresaid, to see and take care that said dynamite, with the exception of any part thereof which might at the time be required for blasting operations, was stored in the dynamite store or magazine at or near Burnbank, in the parish of Hamilton aforesaid, for which the said Charles Brand and Son, time hereinafter libelled, held a Government licence, or in some other place where it would not be a source of danger to the lives and limbs of the lieges: Yet nevertheless you, the said James Donald Clark, did, for several weeks prior to the 19th day of June 1876, culpably, and in violation or neglect of your duty as aforesaid, allow a number of boxes, all or some of them open, containing a considerable quantity of dynamite belonging to the said firm, the quantity thereof being to the prosecutor unknown, and which was not at the time required for blasting operations, to be kept in a joiner's shop at or near Burnbank aforesaid, then occupied by the said firm of Charles Brand and Son, and fail or neglect to see and take care that the said dynamite was stored in the said dynamite store or magazine, or in some other place where it would not be a source of danger to the lieges; and this you did, well knowing that dynamite was a highly dangerous explosive, and that the said joiner's shop was a place where the said boxes containing dynamite could not be kept without danger to the lives and limbs of the lieges, and that various of the lieges were constantly employed in and about the said joiner's shop, and a smithy thereto adjoining, from which it was separated only by a wooden partition, and that others of the lieges were in the habit of frequenting said shop and smithy; and on or about the 19th day of June 1876 part of said dynamite, the particular quantity being to the prosecutor unknown, which, through the culpable violation or neglect of duty above libelled of you, the said James Donald Clark, was in the said joiner's shop, became ignited by means of a spark from the said smithy, or by being brought into contact with some other substance, or in some other manner to the prosecutor unknown, and then and there exploded, in consequence whereof the several persons named and designed in the list appended hereto" were killed.

Counsel for Clark objected to the relevancy of the indictment, in respect (1) that the *species facti* alleged did not necessarily infer that Clark's negligence was the cause of the accident; and (2) that there was a want of specification of the immediate cause of the explosion, and an indefiniteness of statement which left it open to the prosecution to lead evidence which the accused could not anticipate.

Argued for Clark;—1. It was not enough for the Crown to set forth that there was neglect of duty in a matter connected with the accident; it was necessary farther to set forth that that neglect of duty was

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the immediate cause of the accident. The neglect of duty and the accident must be cause and effect, not antecedent and consequent merely, otherwise there would be no end to the remoteness of possible charges. Now, here neglect of duty was set forth sufficiently, but when the *specie facti* out of which that neglect of duty was to be inferred came to be examined it was seen that between the alleged neglect of duty of the accused and the accident, there was room for other agencies to be at work as the immediate cause of the accident. The explosion was averred to have been occasioned by the dynamite becoming "ignited by means of a spark from the smithy, or by being brought into contact with some other substance, or in some other manner to the prosecutor unknown." Such a statement did not exclude the possibility even of the malicious act of some third party being the true cause of the explosion. The indictment was therefore irrelevant.¹ But, 2. The indictment did not give sufficiently specific information to the accused. It set forth three ways by which the explosion might have been occasioned, (1) ignition, (2) concussion, (3) some other manner to the prosecutor unknown. Under such an indictment it was open to the prosecution to enter upon a line of evidence which the panel could not possibly anticipate. On this separate ground therefore the indictment was irrelevant.²

The Court directed the argument for the prosecution to the second branch of Clark's objection.

Argued for the Crown ;—The words "or in some other manner to the prosecutor unknown" must be read not as a specific averment of some new mode, but as a generalisation of the special modes already averred. It was perhaps unnecessary, but it was not unusual to add the words *ob majorem cautelam* in case the fact actually proved shewed some mode slightly different from, though of the same genus as, the special modes averred. But under such a generalisation it was not maintained that the Crown could prove anything differing in kind from the modes specified.

LORD DEAS.—This is a most important question. The article which is alleged to have exploded and to have caused such serious destruction of human life is one which has been comparatively recently introduced into use, and is one which like the nitro-glycerine in Galloway's case³ is most unusually dangerous. The indictment sets forth that such was the nature of the article ; that although it belonged to the panel's employers it was entirely under the panel's charge as their manager ; and that the panel's employers had a licenced store in which the whole of it not required for immediate use ought to have been kept. The indictment then goes on to state that the quantity of dynamite which exploded was not required for immediate use, and that instead of putting it into the store the panel put it into a joiner's shop belonging to his employers, attached to which there was a smithy (both being places notoriously frequented by all and sundry who chose to come and go), and in which, in point of fact, it is averred in the indictment, there were, at the time of the explosion, other persons present as well as the workmen employed in them. The indictment then sets forth, farther, that the dynamite became ignited by a spark from the smithy falling upon it, or by being struck by some hard substance, or in some other manner to the prosecutor unknown.

¹ Gray, Nov. 21, 1836, 1 Swin. 328 ; Macdonald, Crim. Law, 2d ed. 139.

² M'Que, Feb. 20, 1860, 3 Irv. 552, 32 Scot. Jur. 478.

³ Galloway v. King, June 11, 1872, 10 Macph. 788.

for unknown. There appears to have been a wooden partition between the joiner's shop and the smithy, and there is some want of explanation as to how a spark could pass from the one to the other. It does not follow, however, that the partition went the whole way up to the ceiling, so that *ex facie* of the indictment it cannot be said that there is necessarily any impossibility. Apart, therefore, from the words which follow, "or in some other manner to the prosecutor unknown," it seems to me we cannot hold that the indictment is irrelevant. Had the substance been a quantity of gunpowder, and had the individual in charge of the powder left it in an open box in the neighbourhood of a smithy fire, the result of which was that a spark fell among the gunpowder and some person was killed by the explosion, could any one doubt that the negligent individual who put it there would have been liable to indictment for culpable homicide? What is thus true of gunpowder is equally true of dynamite, which although a less common is a much more dangerous substance.

Excepting, then, for the words referred to, "or in some other manner," &c., it could not admit of question that this indictment is relevant. But these are well known words of style to be found in every indictment, and their object and effect are quite well understood. We do not need here to consider whether an indictment, which set forth simply that the dynamite became ignited by some cause to the prosecutor unknown, without any specification at all, would have been relevant. We do not require to consider that question, because the words that go before control the generality of the words "or in some other manner," &c. We have here a specification which we must presume to contain all that the prosecutor knows or has reason to believe, and if it were to appear on the proof that he knew or ought to have known much more than he has stated, or that the explosion had occurred from some cause of a totally different class, such as that some one had done it wilfully or maliciously, he would be stopped at once, and his indictment thrown overboard. He must confine himself to a proof either of the circumstances specified, or of circumstances of some analogous character, so as to place the panel at no unfair disadvantage.

Dealing with the case in this point of view I have no difficulty in sustaining the relevancy of this indictment.

I may add, with reference to what has been said, from the bar, of the case of *Galloway v. King*, that none of the Court had there any doubt that a relevant charge of culpable homicide would have lain against the defender in the case had the nitro-glycerine been negligently left in the hut. What had taken place was this—nitro-glycerine had been at one time partially used by King in his neighbouring works, but discontinued on account of some objection to it as dangerous or otherwise. It had been kept in a tin can, which the defender ordered to be emptied before being laid aside. The can was accordingly turned up over a stream of water and was believed to be emptied, but as the substance, as Dr Macadam explained in his evidence, becomes solid at one temperature and liquid at another, a portion of it had remained solid in the can, which was then thrown, as a useless article, into the hut, where one of a number of boys who took refuge there on a Sunday from a shower of rain, struck the can with a hammer which was lying in the hut, when an explosion took place which entirely destroyed the hut and seriously injured the boys, one of whom brought an action of damages against King, which we refused to sustain on the ground that all concerned had been excuseably ignorant of the peculiar tendency of the substance to become alternately solid and liquid, and that there could not reasonably be

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No. 12. attributed to King any culpable negligence in the circumstances of the case. It is obvious that our decision in that case is not applicable here.

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LORD ADAM.—I am of the same opinion. All that was set forth in the indictment, on which the panel was brought before Lord Craighill and myself at the Glasgow Circuit, was that the dynamite became ignited by some cause to the prosecutor unknown. That was all the information conveyed to the panel by the prosecution. Lord Craighill and I hesitated, in the absence of any precedent, to affirm that the indictment was relevant, and accordingly that indictment was withdrawn, and the present has been served. This indictment is quite different. In it two specific means of ignition are set forth—a spark from the smithy fire, and concussion. Now, I agree that had the indictment stopped there it would have been relevant. But if I thought that by the addition of the words “or by some other means,” &c., it was intended to introduce into the minor a third *species facti* different from the two already mentioned I should again hesitate to hold the indictment relevant. But that is not the case with which we have to do. We have to consider the indictment as libelling two specific methods of ignition, and including under the general words “or by other means,” &c., methods merely *ejusdem generis*, and not inconsistent with those specially libelled. In this view I concur in sustaining the indictment before us.

LORD JUSTICE-CLERK.—It is necessary to keep in view in dealing with the case that there can be no doubt in principle that the having a highly explosive substance in an exposed place, resorted to by the lieges, is a serious offence. Whether or not it amounts to culpable homicide depends upon the circumstances of each particular case. The question was raised on the former indictment in this case whether the mere fact of placing an explosive substance in a place of danger taken in connection with its explosion while in such place of danger is sufficient to infer liability. On that point I reserve my opinion. But I may say that I am not satisfied that if a person leaves an article which he knows to be highly explosive in a place where it is liable to be meddled with, his act does not sufficiently connect him with the explosion to render him responsible for the consequences.

Assume that the act of placing the substance in such situation was done maliciously, and with the intention that it should be exploded, and that it is, in point of fact, exploded by the active though unintentional intervention of some one else, would the person who placed it there not be fully responsible? Now, intention does not connect with the ultimate explosion any more than negligence. I am, therefore, not prepared to say that supposing there was no allegation of a specific mode that the libel would not be relevant.

But this case is relieved of all difficulty by the prosecutor condescending upon specific modes of explosion. He says, indeed, also “in some other manner to the prosecutor unknown.” But these words while they give elasticity do not cover any new or additional mode inconsistent with those averred. Therefore, as framed, I have no doubt that the libel is relevant.

THE COURT repelled the objection.

J. A. JAMIESON, W.S., Crown Agent—ALEX. MORRISON, S.S.C.—Agents.

ADAM COLQUHOUN, Appellant.—*M'Laren*.
ROBERT LEISHMAN, Respondent.—*Mair*.

No. 13.

July 13, 1877.

Public-House—Public-Houses Act, 1862, sec. 17—Conviction—Imprisonment Colquhoun v. Leishman.
in Default of Payment of Penalty.—In a prosecution under the 17th section of the Public-Houses Act, 1862, the Justices, after convicting an accused, imposed a penalty, and ordained him, “in default of payment within four days,” to be imprisoned for a period of six weeks. Held in an appeal at the instance of the prosecutor that the Justices were not entitled to substitute in the judgment the words “in default of payment within four days” for the statutory words “in default of immediate payment,” and remit made to the Justices with directions to amend their judgment.

THE Public-Houses Act, 1828, 9 Geo. IV. c. 58, sec. 30, enacts that every person contravening certain of the provisions of that Act shall upon conviction “forfeit and pay for the first offence the sum of £7, with the expenses of conviction, to be ascertained upon conviction; and in case such penalty and expenses shall not be paid within the space of four days next after such conviction shall have taken place the offender shall suffer imprisonment upon his own charges and expenses for a period of six weeks, . . . unless he shall sooner pay such penalty,” &c. There were similar provisions with regard to second and third offences, the only differences being increased penalties and more lengthened terms of imprisonment in default of payment.

The Public-Houses Act Amendment Act, 1862, 25 and 26 Vict. c. 35, sec. 17, enacts, that any person contravening it “shall be guilty of an offence, and on being convicted thereof shall, for each such offence, forfeit and pay the full penalties provided in the 30th section” of the Act 9 Geo. IV. c. 58, above recited, “and in default of immediate payment thereof shall be imprisoned for the entire periods respectively prescribed by the said 30th section.

In a prosecution under sec. 17 of the Public-Houses Act, 1862, the Justices convicted the accused, imposed a penalty, and “in default of payment within four days” ordered him to be imprisoned for a period of six weeks.

The procurator-fiscal of Court took a case for appeal under the Summary Prosecutions Appeals Act, 1875.

AFTER hearing counsel for the parties the Court pronounced this interlocutor:—“Find that the judgment is erroneous, in so far as it allows the respondent a period of four days within which to make payment of the penalty, and does not adjudge him to be imprisoned in default of immediate payment: Direct the Justices to substitute in the said judgment the statutory words ‘in default of immediate payment’ for ‘in default of payment within four days:’ Remit the matter to them with this direction: Find no expenses due,” &c.

TODD, MURRAY, & JAMIESON, W.S.—W. OFFICER, S.S.C.—Agents.

ROBERT LEISHMAN, Appellant.—*Mair*.
ADAM COLQUHOUN, Respondent.—*M'Laren*.

No. 14.

July 13, 1877.

Summary Prosecutions Appeals Act, 1875, sec. 3—Appeal—Competency of Leishman v. Colquhoun.
on ground of insufficient authentication of conviction.—In a prosecution for trafficking in exciseable liquors without licence, under the Public-Houses Act, 1862 (25 and 26 Vict. c. 35, sec. 17), the accused was tried at Petty Sessions before three Justices of the Peace, and convicted. The conviction was signed by one only of the Justices as chairman. The accused took no objection at the time of signing to the want of authentication of the

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Id. Craighill.
Justiciary
Clerk.

No. 14. conviction, but subsequently obtained a case for appeal under the Summary Prosecutions Appeals Act, 1875, in which the following question, July 13, 1877. *inter alia*, was stated for the judgment of the Court :—"Whether the conviction is not inept and null, being subscribed by only one Justice of the Peace."¹
 Leishman v. Colquhoun.

LORD JUSTICE-CLERK.—In regard to the objection stated in this special case to the validity of the conviction, on the ground of want of due authentication, we are of opinion that the objection is one which does not fall within the provisions of the statute,* first, because it is an objection to the want of authentication of the judgment and not on any question of law arising at the trial or to the determination of the Justices ; second, because it does not appear that any objection was taken by the complainer at the time to the want of authentication, or that the Court below gave any decision on that matter.

LORD YOUNG and LORD CRAIGHILL concurred.

THE COURT refused to entertain the question.

WILLIAM OFFICER, S.S.C.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

¹ Ranken v. Alexander, Feb. 15, 1836, 1 Swin. 44 ; Birrel v. Jones, Feb. 27, 1860, 3 Irv. 556 ; Lock and Doolen v. Steel, Feb. 6, 1850, J. Shaw, 36. Moncreiff on Rev. in Crim. Cases, pp. 215 and 333.

* The Summary Prosecutions Appeals Act, 1875 (38 and 39 Vict. c. 11) enacts :—"On an inferior Judge hearing and determining any cause, either party to the cause may, if dissatisfied with the Judge's determination as erroneous on a point of law, appeal thereagainst," &c., in the manner thereafter provided.

CASES

DECIDED IN

THE COURT OF SESSION, &c.

1876-77.

WINTER SESSION.

CHARLES ANDERSON, Appellant.—*Wallace*.
JAMES IRELAND, Respondent.—*Mackintosh*.

No. 1.

Nov. 6, 1876.
Anderson v.

Burgh Franchise—Alteration of Register—Burgh Voters Act, 1856, 19 and 20 Vict. c. 58, sec. 23—Qualification.—Held that the power given to the Sheriff by section 23 of the Burgh Voters Act, 1856, to correct mistakes in the list of voters, did not authorise him to alter the qualification of a voter from “tenant and occupant” to “joint proprietor and occupant.”

Observed (per Lord Ormidale) that a person claiming to be enrolled as a voter is not entitled to found upon an alternative qualification.

Observations (per Lord Ormidale) as to the framing of special cases for appeal to the Registration Appeal Court.

PRIOR to making up the roll of voters for the year 1876-77 the respondent, James Ireland, had stood enrolled as a voter for the burgh of Brechin, as tenant and occupant of a house belonging to the East Mill Company, Brechin.

It was objected by the appellant, Charles Anderson, solicitor, Brechin, that the respondent's tenure was defeasible, in respect of his occupying his dwelling-house as manager of the East Mill Company.

The special case set forth—“The said James Ireland produced in support of his right to be continued as a voter on the roll the writs, of which copies, so far as material, are appended hereto, and which are to be held as embodied in this case, and to constitute part thereof, viz.,* maintained that he was tenant and occupant under the East Mill Company as proprietors, and also that he was joint proprietor in respect of being a partner of the said East Mill Company, and that, in respect of one or other or both, he was entitled to be retained on the roll.

“The following facts were proved:—That the said James Ireland was a joint proprietor of the said East Mill Company's property, and that

* The words in italics, forming part of a printed form, had been left in by mistake. No copies of writs were appended.

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he has occupied the dwelling-house in connection therewith for many years.

The Sheriff repelled the objection, and continued the name of James Ireland on the roll, and altered his qualification to that of occupant and joint proprietor.

The questions of law for the decision of the Court of appeal were Whether the Sheriff had power to alter the qualification as above specified? or, Whether the qualification of tenant and occupant, as entered by the assessor on the roll, was not in the circumstances correct?

The argument was directed first to the question whether the Sheriff had power to make the alteration which he did on the register;¹ and second, to the question, whether, assuming the alteration made by the Sheriff to be *ultra vires*, the respondent's name was to be expunged from the roll of voters, or his former qualification to be restored.

LORD ORMDALE.—This case does not appear to me to fall under the 23d section of the Burgh Voters Act, 1856 (19 and 20 Vict. c. 58), and, therefore, I think the Sheriff could not alter the entry on the register of voters on the ground of mistake. The statutory provision referred to is intended to cover a mistake from carelessness or inadvertence, but by no fair construction can it be held to cover the present case where one title of qualification, namely, that of tenant, has been altered into another quite different, viz., that of proprietor. Besides, neither the voter nor the Sheriff appears to have proceeded on the ground of mistake. The only correct mode the voter had of getting the entry on the register altered in accordance with the change in his title was pointed out in the case of *Veitch v. Young*, Oct. 24, 1870, 9 Macph. 28.

On the first question, therefore, raised in the argument, I am satisfied the voter has failed. But the question remains, what course are we now to follow in disposing of the case. For myself, I am clear that we have no alternative but to remit to the Sheriff to delete the name of the respondent from the register in respect that he did not adopt the only correct method which was open to him of having the entry therein altered in conformity with his true qualification as a joint proprietor. This disposes of the case.

But I think it right to observe that the difficulty and embarrassment we have experienced might and ought to have been avoided had the case been stated more in accordance with the requirements of the statute. It refers to writs produced for the respondent as "appended hereto;" but, first, these writs are not appended, and, secondly, even had they been appended, we could not have looked at them. They are evidence merely. And the Sheriff's duty was not to refer us to evidence, but to present us with a statement of the facts of the case.

* 19 and 20 Vict. c. 58 (The Burgh Voters Registration Act, 1856), sec. 23, provides that "The Sheriff shall correct any mistake which shall be proved to him to have been made in any list, and shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote, and also the name of every person who shall be proved to him to be dead; and if in entering the name and qualification of any voter anything requiring to be specified be omitted, or if any description be insufficient for identification, such Sheriff shall expunge the name of every person so entered, unless the matter so omitted or insufficiently described be supplied to his satisfaction before he shall have completed the revision of the list."

¹ *Authorities referred to.*—*Veitch v. Young*, Oct. 24, 1870, 9 Macph. 28, 49 Scot. Jur. 3; *Smith v. Mackay*, Dec. 19, 1868, 7 Macph. 287, 41 Scot. Jur. 172; *Stewart v. Bruce*, Dec. 19, 1868, 7 Macph. 287, 41 Scot. Jur. 172.

use as found by him on the evidence. All this was fully pointed out and explained some years ago in the case of *Millar v. Wilson*, January 24, 1863, 1 Macph. 307, and subsequently in the cases of *Pringle v. Hilson*, January 23, 1865, 3 Macph. 420, and *Cameron v. Hilton*, Nov. 29, 1866, 5 Macph. 73. No. 1. Nov. 6, 1876. *Anderson v. Ireland*.

I think it right also to observe that in the present case the respondent appears to have maintained alternatively either that he was tenant and occupant under the last Mill Company as proprietors, or that he was a joint proprietor himself. Now, he was not, in my opinion, entitled so to plead. He was bound to take up his ground and state to the Sheriff the precise qualification on which he claimed. The Sheriff was entitled to tell him that he could not entertain the claim unless the qualification relied on was distinctly specified. Instead, however, of taking this course the Sheriff repelled the appellant's objection, and continued the respondent's name on the roll. And why? The reason is not given in so many words, but is obviously implied, viz., that though the voter had not the qualification of tenant and occupant he had the qualification of joint proprietor. That is the only meaning that I can extract from the Sheriff's statement of the case. The respondent is therefore enrolled by the Sheriff on a qualification which was not properly before him, for the respondent had previously been on the roll on the qualification of tenant and occupant, which I must hold the Sheriff was satisfied he did not possess, and there was no claim before the Sheriff founded on the qualification of joint proprietor.

LORD MURE.—The question we are now to consider is whether the Sheriff was entitled to alter, as he did, the qualification of the respondent, as entered on the register of voters. There is undoubtedly some distinction, as contended for on the part of the respondent, on the point of the Sheriff's power to alter the register between the County Voters Act and the Burgh Voters Act. Still I am not prepared to say that there is anything in the Burgh Voters Act to take the case of a party claiming or enrolled on a burgh qualification out of the rule laid down in the case of *Veitch*. Were it not for that decision I might have had some hesitation in concurring. But, having regard to the decision in that case, I think there can be no doubt that the qualification as here altered is, much more than in the case of *Veitch*, a substantially different qualification from that on which the respondent was enrolled, and that the alteration was one which it was not in the power of the Sheriff to make. On the second point I quite concur with your Lordship.

LORD CRAIGHILL concurred.

The Court remitted to the Sheriff to delete the respondent's name from the register of voters for 1876-77.

BRUCE & KERR, W.S.—D. & W. SHIREEN, S.S.C.—Agents.

WILLIAM NELSON, Appellant.—*J. P. B. Robertson*.
JAMES HAIRSTENS M'GOWAN, Respondent.—*M'Kie*.

No. 2.

County Franchise—Alteration of Register—County Voters Act, 1861, 24 and 25 Vict. c. 83, sec. 44.—Held (distinguishing from *Veitch v. Young*, Oct. 24, 1870, 9 Macph. 28) that the Sheriff was entitled, under the 44th section of the County Voters Act, 1861, to alter an entry in the register of voters by substituting "tenant" for "joint tenant" as the qualification of a voter, the mis-

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Lord Mure.
Jd. Craighill.
Sheriff of
Dumfries-
shire.

B.

take having occurred casually through the assessor mistranscribing from the valuation-roll to the register of voters.

WILLIAM NELSON was entered on the roll of voters for the county of Dumfries for 1876-77 as joint tenant of the farm of Branetrigg. He had been enrolled on that qualification for the previous year, but at Whitsunday 1876 had obtained a new lease in his own name as sole tenant of the farm of Branetrigg. He was entered as sole tenant of the farm in the valuation-roll for the year 1876-7, but the assessor (who was assessor both under the Valuation of Lands Act, 17 and 18 Vict., cap. 91, and under the County Voters Act, 24 and 25 Vict., cap. 83) did not make a corresponding alteration on the roll of voters by substituting "tenant" for "joint tenant."

At his Registration Court the Sheriff was moved by the appellant to alter the register* by striking out the word "joint." The motion was opposed by the respondent, William H. M'Gowan, as incompetent.

The Sheriff held in law, and also in respect of the case of Veitch v. Young, decided in the Registration Appeal Court, October 24, 1870, 1 Macph. 28, that it was not competent for the Sheriff so to alter the qualification of a voter on the register, and that the proper remedy was a new claim to that effect. He therefore sustained the objection, and expunged the name from the register.

A case was stated by the Sheriff on behalf of William Nelson for the Registration Appeal Court.

LORD MURE.—This is rather a delicate question, and on the first blush it would appear to be regulated by the decision in the case of Veitch v. Young, Oct. 24, 1870. It was there decided that the Sheriff was not entitled, under the 44th section of the County Voters Act, 1861, to alter an entry in the register of voters, by substituting the word "joint proprietor" for "proprietor."

Now, I am not prepared to differ from that judgment, and would carry it out in any similar case. But there is an element in this case which did not occur in that of Veitch—namely, that a mistake has been made by the official entrusted with the carrying out of the statutes applicable to the register of voters; and that it is this mistake which has led to the erroneous entry of the appellant's name on the register which the Sheriff was asked to correct.

The mistake was this: The assessor, who is entrusted by the Act of 1861 with making up the register of voters, did not comply with the Act by transferring correctly the appellant's qualification from the valuation-roll to the register of voters. The valuation-roll contains the names of all occupants of land in the county; and it is admitted that the appellant, who had been in previous years joint tenant of a farm, had in 1876 become sole tenant of the same farm. It is also admitted that he correctly returned himself to the assessor as tenant at the

* 24 and 25 Vict., c. 83 (County Voters Act, 1861), sec. 44, provides that "No misnomer, or inaccurate, or defective description of any person, place, or thing named or described in any list or register of voters, or in any notice required by this Act, shall prevent or abridge the operation of this Act with respect to such person, place, or thing, provided that such person, place, or thing shall be so named or described in such list, register, or notice as to be commonly understood; and it shall be lawful for the Sheriff, in his Registration Court, if it shall appear to him that there has been no wilful purpose to misnomer or deceive, or that such misnomer, or inaccurate, or defective description was not such as to mislead or deceive to allow any verbal, clerical, or casual error in any such list, register, or notice to be corrected or supplied."

time the valuation-roll was made up, and that his designation was correctly entered on the valuation-roll. These are the two leading admissions in the case; and it must be borne in mind that the entering in the valuation-roll is the tenant's own statement of his qualification. It is thus admitted that the appellant made a proper and correct return, and was correctly entered on the valuation-roll, so that the mistake, and the only mistake, lay with the assessor in not correctly transferring the name and qualification from the valuation-roll to the register of voters, but in retaining, through inadvertence, the old qualification as appearing on the register of previous years. At the Registration Court an objection was, in these circumstances, taken to the appellant's name being inserted in the register of voters, on the ground that he was tenant and not joint tenant of the farm; and the Sheriff, having the valuation-roll laid before him as required by the 24th section of the Act of 1861, with the appellant's own description of his qualification, which was admittedly correct and sufficient, was asked to give effect to the valuation-roll by the deletion of the word "joint" before the word "tenant" in the register of voters. The question, therefore, is whether the appellant is to be deprived of his vote because of a mistake thus committed by an official appointed to carry out the Registration Act. Now, it is the policy of the Registration Acts, as I understand them, that an omission or mistake of an official shall not prejudice a party entitled to a vote. There is a provision to that effect in the 19th section of the Act of 1861; and the only question which we have now to decide is, whether section 44 of the Act covers the present case. I am of opinion that it does; and that, without trenching upon the case of *Veitch v. Young*, we may, in respect of the provision in the latter part of the 44th section, remit to the Sheriff to correct the register by deleting the word "joint" as craved by the appellant, in order that the appellant may not, through the mistake or inadvertence of an assessor, be deprived of his qualification.

No. 2.

Nov. 6, 1876.

Nelson v.
M'Gowan.

LORD ORMDALE and LORD CRAIGHILL concurred.

THE COURT remitted to the Sheriff to alter the register.

JAMES SOMERVILLE, S.S.C.—T. J. GORDON, W.S.—Agents.

JOHN BROWN, Appellant.—*Scott*—*J. P. B. Robertson*.

JOHN PATTERSON, Respondent.—*R. V. Campbell*.

No. 3.

Nov. 13, 1876.

Brown v.
Patterson.

County Franchise—Tenant and Occupant—Defeasibility of Tenure—Schoolmaster.—On an objection to the qualification of a voter on the roll that his title was defeasible, the Sheriff found the following facts proved or admitted:—A was engaged by the Coltness Company by verbal agreement as schoolmaster of their private school at Newmains for a year from 24th August 1875 at a fixed salary and free house. At 24th August 1876 no further or other agreement was made between A and the Coltness Company, but at 18th September 1876, the date of the Sheriff's Registration Court, he was continuing in the performance of his duties as schoolmaster, and in the occupation of his house. The house was of the requisite annual value, was completely separate from the school, and had been the residence of the schoolmaster for many years. The return made to the assessor on behalf of the Coltness Company was A, teacher, Coltness, occupant of house belonging to B, let to Coltness Company, and by said company let to A. The Coltness Company paid the tenant's taxes on the house, but the tax papers were first rendered to A, who handed them to the company. A already stood enrolled as a voter, in respect of his having previously occupied another

No. 3. house in the same district on a precisely similar agreement with the Coltness Company.
Nov. 13, 1876. *Held (dub. Lord Ormidale)* that though A's engagement as schoolmaster was as a contract of service defeasible at the will of his employers, the objection is not, on the facts as stated, discharged the onus which lay upon him, in consequence of A's being already on the roll, of shewing that his tenure of the house was defeasible along with it.

Registration
 Appeal Court.
 Id. Ormidale.
 Lord Mure.
 Id. Craighill.
 Sheriff of
 Lanarkshire.
 B.

At the Registration Court for the southern division of Lanarkshire held at Wishaw on 18th September 1876, the respondent, John Patterson, objected to the qualification of the appellant, John Brown, who stood enrolled as a voter, as tenant and occupant of a house at Coltness, on the ground that his tenancy was defeasible.

The Sheriff-substitute (Spens) sustained the objection on the following facts being proved:—"The said John Brown, prior to 24th August 1875, was resident at Overton, where he taught a school belonging to the Coltness Company, and on the date of the Registration Court of 1876 stood enrolled as tenant and occupant on the register for South Lanarkshire. By verbal arrangement made with the Coltness Company he was engaged as schoolmaster of the Coltness Company's school at Newmains, which is not a public school in the sense of the Education Act, for a year from 24th August 1875 to 24th August 1876, at a fixed salary and a free house. On the 18th September 1876, the date of the Sheriff's Registration Court, no further or other agreement had been made with Mr Brown. He had entered on his duties on 24th August 1875, and from that date up to the date of holding the Court had lived in a house rent free. This house, though completely separate from the school, had been the residence of the schoolmasters of the school at Newmains for a period of about fourteen years. This house was entered in the valuation-roll as of the value of £14, 10s. per annum, and the return made to the assessor on behalf of the Coltness Company was John Brown, teacher, Coltness, occupant of house belonging to James Houldsworth, of Coltness, let to Coltness Iron Company, and by said company let to John Brown. The Coltness Company paid all the taxes applicable to Brown's tenancy, but the tax papers were in the first place rendered to Brown, who handed them in turn to the Coltness Company."

Brown took a case for appeal, in which the question of law stated for the decision of the Court was—"Whether the title of the said John Brown as tenant is defeasible."¹

LORD MURE.—This is an objection to a voter being continued on the roll, and the objection taken and sustained by the Sheriff was that the qualification was defeasible.

The facts put before us in the case are these:—(Reads the statement of facts quoted *supra*.)

It is this house at Newmains, of the requisite value, which the appellant has occupied as tenant since August 1875, under a yearly lease, and is still occupying, the right to which is said to be defeasible at the instance of the

¹ *Authorities.*—Walls v. Spence, Dec. 19, 1868, 7 Macph. 288, 41 Scot. Jur. 172; Robbie v. Meiklejohn, Dec. 19, 1868, 7 Macph. 296, 41 Scot. Jur. 176; Rose v. Grant, Dec. 19, 1868, 7 Macph. 309, 41 Scot. Jur. 183; Murray v. McGowan, Oct. 20, 1869, 8 Macph. 4, 42 Scot. Jur. 14; Cole v. Raeburn, Oct. 24, 1870, 9 Macph. 13, 43 Scot. Jur. 3; Hilson v. Scott, Oct. 24, 1870, 9 Macph. 14, 43 Scot. Jur. 5; Hilson v. Otto, Oct. 24, 1870, 9 Macph. 18, 43 Scot. Jur. 13; McGregor v. Caldwell, Oct. 22, 1873, *ante*, vol. i. 15; Wardrop v. Cockburn, Nov. 3, 1874, *ante*, vol. ii. 6.

landlord; and the question which we have to determine is whether on the facts as stated there is evidence of defeasibility. No 3.

I have come to the conclusion that in dealing with the case of a party who is on the roll—for the appellant was previously registered in the same district on a qualification which, if not identical, was exactly similar—these facts are not sufficient to instruct defeasibility. It is not stated in the case that the occupancy of this house which is “completely separate from the school,” and which is stated to be let by the Coltness Iron Company to the appellant, depends upon his holding the office of schoolmaster, or is let to him for any period less than one year; and it appears to me, upon the facts stated, that the appellant is now occupying the house for the second year by tacit relocation. He is therefore *ex facie* of the case in the position of a party who has been for more than a year in the occupancy as tenant of heritages of the requisite value, as appearing from the valuation-roll of the county. Nov. 13, 1876. *Brown v. Patterson.*

On this simple ground, therefore, that there is no evidence in the case which can lead to the conclusion that the appellant has occupied in any other character than that of a yearly tenant, and, without entering upon the general question of the right of schoolmasters to the franchise, I am of opinion that we ought to sustain this appeal, and reverse the determination of the Sheriff.

LORD CRAIGHILL.—I am of the same opinion. The question is not whether there is a tenancy, but whether the tenancy of the appellant is defeasible? This being the issue which the Sheriff had to try, there appears to me to be nothing in the facts as these have been presented in the case to warrant the conclusion that the tenancy of the house occupied by the appellant is defeasible at the pleasure of the Coltness Company. This is enough for our present decision, but were it necessary I should have no hesitation in finding that upon the facts as found by the Sheriff the tenancy of the house occupied by the appellant was indefeasible within the year for which he was appointed schoolmaster of the company's school.

The counsel for the appellant not only assumed, but conceded in the argument, that the tenure of the school, though the appellant had been appointed to the office of schoolmaster for a year, was defeasible, and that he might be turned out of the school during the currency of the contract, his only redress against what might be shewn to be the wrong inflicted upon him being to be obtained in an action for damages. I refer to this only for the purpose of explaining that the decision of such a question being unnecessary on the present occasion my opinion on the point is reserved.

LORD ORMDALE.—The first question that arises in this case is whether the position of the voter as schoolmaster is defeasible at the will of another, and the next question is whether the occupation of his house depends entirely on his continuing to hold the position of schoolmaster.

In regard to the first of these questions, I cannot doubt, that for no fault of his, and contrary to his remonstrances, his employers had the power at any time to put an end to his services as schoolmaster. If they did so without just and sufficient grounds they might be liable to him in damages, but that did not detract from their power to dispense with his services. The contract between them was just a personal one of service. So it might, like every other contract of service, be broken and put an end to by either party. The appellant might

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Nov. 13, 1876.
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Patterson.

have broken his contract, and said,—“I am not going to teach any longer in this school, I am going elsewhere,” and no Court could have compelled him to remain where he was, and continue to perform his stipulated duties as schoolmaster. In the same way his employers might have summarily dismissed him without reason assigned, and no Court would compel them to retain him in their employment. The only redress either party would have, in the event of the contract being broken, would be a claim or action of damages as for breach of contract. Clearly, therefore, the tenure or right of the voter as schoolmaster was defeasible at the will of his employers.

But that does not necessarily determine the present case. The question remains whether the appellant holds his house, which is the subject of his qualification, as a mere accessory or pertinent of his employment as schoolmaster, or in virtue of an independent right. It is on this point that I entertain considerable doubt. We must, however, be guided by the facts set out in the case. We there find it expressly stated that the house was “let” by the Coltness Iron Company to the appellant. It may have been “let” to him for a year whether he continued to be schoolmaster for that period or not, or the let to him may have been so qualified as to terminate with his position as schoolmaster. My inclination, were it not for the different view taken by your Lordships, would have been to hold that the house was a mere accessory of the school, and that the voter in being dismissed from the one lost the other. But, keeping in view that it was for the objector to establish a clear case in support of his objection,—the presumption being strongly in favour of the appellant from his being already on the roll,—I do not feel myself warranted in differing from the result at which your Lordships have arrived.

THE COURT reversed the decision of the Sheriff, and ordained the appellant's name to be restored to the roll.

WILLIAM LIVINGSTONE, S.S.C.—ALEXANDER MORISON, S.S.C.—Agents.

No. 4.

Oct. 18, 1876.
Weir v.
Buchanan.

ALEXANDER WEIR, Pursuer.—*Asher—Guthrie.*
MOSES BUCHANAN, Defender.—*Scott—MacLean.*

Process—Bankrupt—Caution for Expenses.—In an accounting arising out of joint mercantile transactions between the pursuer and defender in an action, the result of the Lord Ordinary's judgment was to render the defender insolvent. He accordingly offered a composition to his creditors, which was refused, but he was not rendered notour bankrupt. In the event of the Lord Ordinary's judgment being reversed the defender was admittedly solvent. On his presenting a reclaiming note, *held* that the circumstances were not such as to entitle the pursuer to caution for expenses.

1ST DIVISION.
Lord Young.
B.

THIS was an action at the instance of Alexander Weir, manufacturer in Ayr, against Moses Buchanan, commission agent, Glasgow, for payment of £1875, as the sum due to him on certain bills accepted for the defender's accommodation, and on certain mercantile transactions in which the parties had been jointly engaged.

The defender stated in defence that the result of an accounting would bring out a considerable balance on the transactions in question due by the pursuer to him.

The Lord Ordinary, on 19th July 1876, after a report from an accountant, found £1510 due to the pursuer.

The defender being unable to meet his debts, including the sum thus found due to the pursuer, called his creditors together on 13th August.

and made offer of a composition, which was refused on 4th October. On the first box-day in vacation (24th August) he lodged a reclaiming note against the Lord Ordinary's interlocutor of 19th July. No. 4.

When the reclaiming note appeared in the Single Bills the pursuer moved that the defender be ordained to find caution as a condition of being allowed to insist in his reclaiming note.¹ Oct. 18, 1876.
Weir v.
Buchanan.

The defender objected that he had not been made notour bankrupt, and that his insolvency depended entirely upon the result of the present action. If his defence was sustained, and the Lord Ordinary's interlocutor reversed, the result would be that he would be rendered solvent. This, therefore, was not a case for requiring caution.²

LORD PRESIDENT.—I understand that if the defender were to be successful in this reclaiming note, and to obtain judgment in terms of his pleas, he would not be insolvent. This has not been contradicted. His position, therefore, is that he is provisionally insolvent, and I am not aware that on that ground we have ever ordained a defender to find caution.

The circumstance that the action relates to a partnership accounting is not to be left out of view. Such questions are generally difficult and troublesome to extricate, and we know that Judges frequently differ upon them. We must not, therefore, in this discussion, take for granted that the Lord Ordinary is right. I think this is a very weak case for ordaining the defender to find caution, and am therefore for refusing the motion.

LORD DEAS and **LORD MURE** concurred.

THE COURT refused the motion, and sent the reclaiming note to the roll.

BOYD, MACDONALD, & LOWSON, S.S.C.—J. & R. D. ROWS, W.S.—Agents.

ANDREW MORRISON, Pursuer.—*M'Kechnie.*

ADAM SMITH and JOHN CALDER, Defendants.—*Henderson.*

No. 5.

Process—Decree by Default—Agent, negligence of—Reponing.—The pursuer of an action of reduction, through the fault of his agent, failed to appear either personally or by counsel and agent at the diet of proof. Decree by default was accordingly pronounced against him. The Court, in the special circumstances of the case, allowed him to be reponed on paying to the defender the full expenses to which he had been put by the default. Oct. 18, 1876.
Morrison v.
Smith et al.

The pursuer, Andrew Morrison, raised this action against Adam Smith, writer in Falkirk, and John Calder, one of Smith's clients, for reduction, 1st Division.
Lord Young.
B.

¹ *Maxwell v. Maxwell*, March 3, 1847, 9 D. 797, 19 Scot. Jur. 357; *Gilchrist v. Proctor*, Nov. 25, 1847, 10 D. 149, 20 Scot. Jur. 39; *Carne v. Manuel*, June 28, 1851, 13 D. 1253, 23 Scot. Jur. 583; *Harvey v. Farquhar*, July 12, 1870, 8 Macph. 971, 42 Scot. Jur. 564; *Horn v. Sanderson and Muirhead*, Jan. 9, 1872, 10 Macph. 295, 44 Scot. Jur. 176.

² *Ballintyn v. Connon and Co.*, July 19, 1851, 13 D. 1399; *Methven v. Millie*, July 18, 1851, 13 D. 1398, 23 Scot. Jur. 655; *Stephen v. Skinner*, March 31, 1860, 22 D. 1122, 32 Scot. Jur. 509; *Bell v. Anderson*, Feb. 25, 1862, 24 D. 603, 34 Scot. Jur. 301; *Russell v. Crichton*, March 5, 1839, 1 D. 617, 11 Scot. Jur. 508; *Nicol v. Sykes*, Dec. 7, 1848, 11 D. 214, 21 Scot. Jur. 50; *Heggie v. Heggie*, June 6, 1855, 17 D. 802, 27 Scot. Jur. 410; *Lang v. Brown*, Nov. 30, 1858, 31 Scot. Jur. 19; *M'Queen v. Murdoch*, March 9, 1861, 23 D. 725, 33 Scot. Jur. 350; *M'Alister v. Swinburne*, Nov. 7, 1873, *ante*, vol. i. 166.

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Oct. 18, 1876.
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Smith *et al.*

on the ground of fraud, of a certain assignation of policies of insurance for £1000 on the life of the deceased Thomas Morrison, the pursuer's brother. The pursuer employed Robert H. Arthur, S.S.C., as his agent in the Court of Session.

The case was put out in the Adjustment Roll on 10th June 1876, when no appearance was made for the pursuer. The Lord Ordinary continued the case till the following day, and appointed "R. H. Arthur, S.S.C., whose name appears on the record as agent for the pursuer, then to attend."

On the 11th June appearance was made by counsel, and an explanation given to the Lord Ordinary that the failure to attend on the previous day had been by inadvertence.

On the 21st June the record was closed, and a proof fixed for 5th July.

At the diet of proof on 5th July no appearance was made for the pursuer, and decree of absolvitor by default, with expenses, was pronounced in favour of the defenders.

The defenders' account of expenses was audited, and on 20th July the Lord Ordinary decerned for the taxed amount.

The pursuer, on the first box-day in vacation (24th August), lodged reclaiming note to be reponed against the decree by default of 5th July, but did not reclaim against the interlocutor decerning for expenses.

It was stated for the pursuer that he himself was resident in Glasgow; that he had employed Mr Arthur to conduct his case, and had furnished him with ample funds for that purpose; that Mr Arthur had neglected his duty, and misapplied these funds; and that he had now put the case into the hands of other agents. He asked to be reponed without any condition as to expenses, on the ground that the decree for expenses of 20th July 1876 was standing against him.

The defenders objected to the pursuer's being reponed, in consequence of his continued delays throughout the whole procedure in the case,¹ and contended that in no event should he be reponed, except on condition of paying a substantial amount of expenses, as the reponing him against the interlocutor of 5th July might possibly be held a ground for suspending the decree for expenses of 20th July, which proceeded upon it.

LORD PRESIDENT.—There can be no doubt that there has been a great deal of improper delay on the part of the pursuer in this case. But how far he is personally responsible for that delay, and how far it is attributable to his agent, is not so clear. I am of opinion, however, on the information before us, that the fault lay chiefly with the agent.

The interlocutor against which the pursuer now seeks to be reponed is one pronounced by the Lord Ordinary in consequence of the pursuer's failure to appear at a diet of proof. Now, that is a fault of a very serious kind indeed, and it is impossible for us to repone the pursuer except on very serious conditions as to expenses. Therefore, while I am not prepared to say that this reclaiming note to be reponed should be refused altogether, I think that the expenses which the pursuer must be ordained to pay should represent fully the expenses to which the defender has been put by the pursuer's default. And as we are not in a position to fix the amount of these expenses, I think it should be left to the Lord Ordinary to ascertain and decern for them.

An apparent difficulty was presented to us, in the fact that the defender had

¹ Arthur v. Bell, June 16, 1866, 4 Macph. 841, 38 Scot. Jur. 440; Anderson v. Garson, Dec. 16, 1875, *ante*, vol. iii. 254; Trustees of Free Tron Church v. Morrison, March 16, 1876, 13 Scot. Law Rep. 384.

g obtained decree of absolvitor by default, with expenses, proceeded to have No. 5.
 is account of expenses audited, and thereafter obtained decree for the taxed
 amount, and that the interlocutor decerning for expenses is not brought under Oct. 18, 1876.
 review. Now, that does undoubtedly introduce an element of difficulty. But Morrison v.
 here can be no doubt, first, that we cannot touch that interlocutor, and, second, Smith *et al.*
 at that being so, we ought to dispose of the reclaiming note to be reponed as
 no such interlocutor existed. Of course, in the event of a charge being given
 or the expenses decerned for on 20th July, the amount to be now fixed by the
 Lord Ordinary as the condition of the pursuer's being reponed, so far at least as
 it consists of expenses incurred prior to 20th July, will, if paid, be taken as a
 payment to account. On the question whether, on the pursuer being reponed
 against the decree of absolvitor by default, the decree for expenses, of which it
 was the warrant, may be suspended or not, I give no opinion.

What I propose is to repon the pursuer against this decree by default on
 payment of the expenses occasioned by the default, and to leave the Lord Ord-
 nary to ascertain the amount.

LORD DEAS.—It is a very delicate matter for the Court to interfere in cases
 such as this. It is a most wholesome rule that judgment allowed to go by de-
 fault should not be opened up except in very special circumstances. But I am
 disposed to concur with your Lordship that we have here such special circum-
 stances. The pursuer's position is that of a cashier or book-keeper to a plumber
 in Glasgow, and the sum in dispute is certainly a large sum for a person in that
 position. If he has a good claim at all it will be a very great hardship to de-
 prive him of it for a fault which cannot well be said to have been his own, for
 I agree with your Lordship that the fault has rather lain with the agent than
 with the party, who had not the opportunity of knowing how his case was being
 conducted, and that is a material consideration in the case. Upon the whole, I
 am for opening up the decree; but the case is too special to form a precedent for
 any other.

LORD MURE concurred.

THIS interlocutor was pronounced:—"Remit to the Lord Ordinary
 to repon the pursuer against the decree contained in the said in-
 terlocutor reclaimed against on payment of the expenses occa-
 sioned to the defenders by the pursuer's default."

J. & A. HASTIE, S.S.C.—WADDELL & M'INTOSH, W.S.—Agents.

COLIN DUNLOP AND COMPANY, Petitioners and Appellants.—*M'Laren—* No. 6.
Moncreiff.

JAMES MEIKLEM, Respondent.—*Asher—Lang.*

Oct. 24, 1876.
 Dunlop & Co.
 v. Meiklem.

Lause—Removing—Title to Sue.—In a summary petition for removing from
 a mill and lands the petitioners set forth that they were principal lessees of the
 subjects, and had let the same to the respondent for a year, which had now ex-
 pired. The respondent pleaded that the petitioners had no title to sue; he
 denied that they were lessees as alleged by them, and averred that his right was
 derived, not from them, but from the proprietor. The petitioners led no evi-
 dence of their own title, but they proved that although the respondent had
 formerly possessed under the proprietor, that possession had been terminated by
 a decree of removing at the instance of the proprietor, and that the respondent

No. 6.

had verbally agreed to take the subjects from the petitioners for one year. Held that the respondent was not entitled to impugn the petitioners' title.

Oct. 24, 1876.
Dunlop & Co.
v. Meiklem.

Lease—Removing—Personal Objection—Acquiescence—Rei Interventus.—Circumstances in which a tenant, who had given the landlord to understand that he was to remove, and had allowed him and the incoming tenant to act on that belief, was held barred from objecting to want of notice to remove.

Question, whether in the case of a lease for one year of a piece of arable land along with a house a formal warning is necessary.

Question, whether a forty days' warning for the 11th November is timeously given on the 2d October.

2D DIVISION.
Sheriff of
Lanarkshire.
I.

ON 16th May 1876 Colin Dunlop and Company, ironmasters, Quarter, near Hamilton, presented a summary petition of ejection in the Sheriff Court at Hamilton against James Meiklem or M'Ilquham, miller, in which they set forth that they were the principal tenants of Thinacre Mill, near Quarter, with dwelling-house, garden, pertinents, and land adjoining, extending to ten acres or thereby; that the said subjects were let by the petitioners to the respondent as tenant under them for the space of one year from Martinmas 1874 as to the land, and Whitsunday 1875 as to the mill, house, and pertinents, at the rent of £55 for the year.

The petitioners further stated that on or about 30th September 1875 they intimated to the respondent that the let of the subjects would not be renewed to him, and that he had been repeatedly informed by the petitioners' manager, or others representing them, that he would require to remove from the subjects at the expiry of the times above mentioned. They also stated that the respondent was, on 2d October 1875, timeously warned to remove by a sheriff officer at their instance; that they had let the subjects to a new tenant, Richard Stewart, with entry to the land on Martinmas 1875, and to the mill and houses at Whitsunday 1876; that Stewart had since ploughed and manured the land, but that the respondent refused to remove from the house at Whitsunday 1876, and consequently they prayed for a warrant of summary ejection and removal.

Meiklem, in a minute of defence, denied the petitioners' title, and specially denied that the petitioners had been or were principal tenants, or that they let or sublet the subjects in question to him as alleged. He explained and averred that he and his ancestors had possessed the subjects on yearly tack from the Duke of Hamilton from 1709 until the present time, and added that in 1874 the petitioners, or rather their manager, alleged they had become tenants of the premises in question, and that they held him as their subtenant on the same terms as when he possessed under the Duke of Hamilton.

He further denied that any such intimation had been given on 30th September as alleged by the petitioners. He produced the notice of removal served on 2d October, which bore to be a notice to remove from both land and houses at Martinmas 1875, and maintained that the notice was inept on several grounds,—1st, because it should have been given forty days before Whitsunday 1875; 2d, because it was a notice to remove from the houses at Martinmas, whereas the petitioners admittedly could only insist on removal from the houses at Whitsunday 1876; and 3d, because the warning was not even forty clear days before Martinmas (if warning forty days prior to that term was sufficient), but only thirty-nine days.

On 1st June the Sheriff-substitute (Spens) pronounced this interlocutor:—"Finds in point of law that the warning given to respondent to remove is inept and insufficient, and sustains the defences founded on

that ground : Finds it unnecessary to consider the other defences : Dis-
misses the action : Finds the respondent entitled to expenses." No. 6.

The petitioners appealed to the Sheriff (Dickson), who allowed them to amend the petition by adding the words—"Farther, the respondent informed the petitioners on or about 30th September last, and at other times, that he would remove from the subjects at the expiry of the said space of one year."

Oct. 24, 1876.
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The Sheriff adhered to the Sheriff-substitute's interlocutor in so far as it found that the warning referred to in the petition was inept and insufficient, and in so far as it sustained the defence to the action so far as laid upon the warning, *quoad ultra* recalled the said interlocutor, and, before answer, allowed both parties a proof of their averments.

A proof was accordingly taken.

The petitioners led no evidence in support of their allegation that they were principal lessees of the subjects, but they proved that the Duke of Hamilton had obtained a decree in absence against Meiklem, by which he was decreed to remove from the arable lands at Martinmas 1874, and from the mill, house, and pertinents at Whitsunday 1875; and also that in November 1874 Meiklem verbally agreed with Mr Robert Speirs, the petitioners' manager, to take the subjects from the petitioners for one year—that is, from Martinmas 1874 for the land, and from Whitsunday 1875 as to the mill and house. With regard to what subsequently happened it was proved that Meiklem had several conversations in the course of the year 1875 with Mr Speirs as to a deduction from his rent which he claimed in consequence of an alleged withdrawal of water by the petitioners. On 30th September 1875 he had an interview with Mr Speirs, and Mr Shaw (the petitioners' cashier). Mr Speirs deponed with reference to this interview,—“I went up to see the respondent in connection with some claims for water damage he had against the company. We could not get these arranged. We could not arrange as to the water damage, and at last, just before I was leaving I said to him, ‘Well, miller, it will be all right about the mill?’ He answered, ‘Yes, I am making ready to leave the mill.’ These are the words that the respondent used. After that, Mr Shaw said to him, ‘Shall we give you a warning away?’ and the respondent replied, ‘Any way you like; it is all one to me.’ I understood from what the respondent said that he was quite prepared, and was going to leave at the end of the year's lease which I had given him.”

Mr Shaw's evidence was to the same effect. Meiklem, however, denied that anything was then said about his removing, and swore that at a previous meeting with Shaw and Speirs he distinctly told them, in answer to a question by one of them, that he would not go without legal warning.

The warning mentioned in the petition was given by a sheriff officer on 2d October 1875.

In December 1875 the petitioners advertised the subjects to be let. One Richard Stewart, after being shewn over the mill by a son of Meiklem, agreed with the petitioners to take the subjects, with entry to the lands as at Martinmas 1875, and to the mill and house at Whitsunday 1876. Upon 5th February 1876 Stewart went to the garden accompanied by two men and pruned the gooseberry bushes. They did not see Meiklem, but his daughter, a girl of seventeen, made some objections to their operations. From the 22d February to 15th March Stewart and those acting for them laid down about fifty cartloads of dung upon the lands, and upon the 28th March the neighbouring farmers gave him a day's ploughing, by which the whole of the land was ploughed in one

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day. Meiklem happened to be absent that day, but he saw the manure laid down without making any objection. In the course of the spring he took out a number of gooseberry bushes and a few plum trees from the garden, as if he was going to remove. After the land had been manured and ploughed by Stewart, Meiklem sowed and harrowed the land, and when remonstrated with he said that he had not been legally warned away. This was the first intimation made by him that he intended to object to the warning which he had received. In the course of his examination as a witness Meiklem admitted that when he took out the gooseberry bushes and plum trees he intended to remove at Whitsunday 1876. Being asked whether he had consulted a law-agent with regard to the warning between the date of the ploughing match and the date of his sowing and harrowing the land, he replied that he did consult a law agent, but whether before or after the ploughing match he did not remember. In another part of his evidence he stated that when he got the warning on 2d October he saw at once that it was bad. He said that he was willing to pay Stewart for the manure.

Upon 18th July 1876 the Sheriff-substitute pronounced this interlocutor:—"Finds the petitioners have failed to prove their title to sue: Sustains, therefore, the defences founded on that head: Finds it unnecessary to pronounce other findings, and dismisses the petition accordingly: Finds the petitioners liable in expenses."

On appeal the Sheriff adhered.*

The petitioners appealed to the Court of Session.

Argued for the petitioners;—The respondent had no right of possession except what he derived from the petitioners. He could not therefore impugn their title. It was only where the person sought to be removed derived his right from some source other than the pursuer of the action of removing that the plea of want of title could be maintained.¹

Argued for the respondent;—It was an important circumstance in the present case that the respondent's possession had been uninterrupted. The petitioners had never been in actual possession of the subjects. Although the Duke of Hamilton had taken a decree of removing against the respondent it had not been enforced. The respondent's agreement to hold for a year under the petitioners at the most only amounted to a recognition of their title for that year. He was in no way barred from challenging their title after the expiry of that period. There was therefore nothing to take the case out of the ordinary rule that the pursuer of an action of removing was bound to set forth his title, and to prove it if it was denied.² Here, while the petitioners' title was explicitly denied.

* "NOTE.—The defender challenges the pursuers' title as principal tenants for the period after the lease which he took from them terminated, viz., after Martinmas 1875 and Whitsunday 1876, as to the lands and mill, &c., respectively. It lay on the pursuers to prove their title so challenged, but they have not done so. The case is not within the principle urged for the pursuers, that a tenant may not challenge the title of the party from whom he has his lease, for the defender's lease was only up to the terms above mentioned; while the question is as to pursuers' title after these terms.

"It is with considerable regret that the Sheriff has found himself obliged to sustain this technical defence; for there seems to be no real doubt that the pursuers are still principal tenants in the mill and land in question. It appears to have been through mere oversight that they have not proved their tenancy."

¹ *Stair*, 2, 9, 41; *Ersk.* 2, 6, 51; *M'Nair v. Lord Blantyre's Tutors*, July 2, 1833, 11 S. 935.

² *Traill v. Traill*, Oct. 25, 1873, *ante*, vol. i. p. 61.

they had offered no proof that at the date when they presented this petition they had any right whatever to the subjects. No. 6.

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LORD JUSTICE-CLERK.—I think that the Sheriff's interlocutor sustaining the objection to the petitioners' title must be recalled. Mr Meiklem's possession under the Duke of Hamilton was at an end. The result is either that he was holding by tacit relocation under the petitioners, or that he had no title at all. I think he was holding under the petitioners, and therefore that he cannot impugn their title.

LORD NEAVES concurred.

LORD ORMDALE.—I am of the same opinion. There was no necessity for a written title on the part of the petitioners. They can make out a sufficient title in a question with the respondent by shewing that they let the subjects to him for a year, and that at the end of it he was bound to remove. But the respondent says the warning he got to remove was bad, and that he was not bound to remove. If so, he must now be possessing by tacit relocation under the petitioners, and if so, he cannot dispute the title of his authors. He does not allege that he got any new or different right from the Duke of Hamilton after his right derived from the petitioners had come to a termination. It appears to me, therefore, that the Sheriffs have been premature in dismissing the petition on the question of title, and that the petitioners were entitled to judgment on what may be called the merits of the dispute between them and the respondent.

LORD GIFFORD concurred.

Parties were then heard on the merits.

Argued for the appellants;—Formal warning was not necessary in the case of a piece of land let along with a house for a single year. In any view warning forty days before Martinmas 1875 was sufficient.¹ Where there was a double ish forty days' warning before the first ish was sufficient. The provision to that effect in the Sheriff Court Act, 1853, sec. 29, although in form applying only to summonses of removing, was in practice applied universally. It was not necessary that there should be forty clear days between the day of notice and the term-day; in reckoning the forty days, the proper way was to count either the day of notice or the term-day, though not both. It did not invalidate the warning that notice to remove from the house was given too soon. There was such acquiescence and *rei interventus* as to bar the respondent from objecting to the notice.²

Argued for the respondent;—This was a case in which a solemn warning under the Act 1555 was required. To be effectual the warning ought to have been given forty days before Whitsunday 1875.³ But assuming that notice forty days before Martinmas 1875 was sufficient, the notice given was altogether bad, first, because it was a notice to remove from both houses and lands at Martinmas 1875, whereas, in any case, the lessors could only insist in removal from the houses at Whitsunday 1876;

¹ Brown v. Hill, July 3, 1718, Hume, p. 563; Duke of Argyll v. Russell, M. Appx. No. 2, "Removing"; M'Nair v. Lord Blantyre's Tutors, *ut supra*; Forsyth v. Bruce, Nov. 22, 1827, 6 S. 101; Blair v. Hunter, Feb. 8, 1840, 2 D. 546, 12 Scot. Jur. 331.

² See cases cited in note 1.

³ Hunter's Landlord and Tenant, vol. ii., pp. 45-46, and cases there cited.

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and, secondly, because the notice was only thirty-nine instead of forty clear days before the term.¹ No undertaking on the part of the tenant to remove without warning had been proved. Indeed, the petitioners plainly shewed by their attempt to give a legal warning that they were not relying on any agreement by the respondent to dispense with warning. *Rei interventus* was out of the question, for (even granting that a Martinmas warning was sufficient) as soon as the 1st October 1875 was allowed to expire before the notice was given tacit relocation had come into operation, and nothing which afterwards followed could affect that result. It was not a case of a defective notice which could be validated by *rei interventus*. The notice was utterly bad, or rather, there was no notice at all until too late. In these circumstances, the subsequent actings of the petitioners and of Stewart were entirely at their own risk. They chose to assume that the lease was at an end when it was not. There was no acquiescence in their proceedings on the part of the respondent. All that could be said was that he did not prevent them. He, or others for him, did object to Stewart's operations in the garden, and he was not bound to repeat his protest at every step. As for the manure which Stewart had put into the ground, that, at the utmost, could only give Stewart an equitable claim to recompense, which the respondent was quite willing to admit.

LORD NEAVES.—I am of opinion that this case is to be determined, not by reference to technical rules as to how and when warning should be given, but by the actings of the parties. The question is whether it is not possible for the parties to agree that without a formal warning the possession is to come to an end. To hold that such an arrangement is not competent where it has been followed by *rei interventus* would be very dangerous. For a tenant to profess to be about to remove, and to allow an intending incoming tenant to plough and manure the farm, and then enjoy the fruits of that other's labour, is a proceeding not to be encouraged even *inter rusticos*. Here there was a communication between the respondent and those acting for the petitioners in the autumn of 1875, which was followed up by the subjects being advertised, and by various acts on the part of the incoming tenant. The respondent admits that he had at one time the intention of removing, and he allowed that intention to be known by his mode of dealing with the subjects.

It must be kept in view that the rights on the part of the lessor to remove the tenant, and the right on the part of the tenant to go, are correlative. Tacit relocation can only come into operation by mutual consent. If there is no taciturnity—if the parties state to one another their intention of bringing the contract to an end—then it is the privilege of the tenant to go, and the privilege of the landlord to insist that he does go. It is quite plain that the parties were dissatisfied with each other, and that the tenant was told that he must go. The question is, whether the tenant's removing was so made matter of arrangement between the parties as to entitle the lessors to proceed upon that footing. Now, I think that the fair import of what the respondent said to those acting for the petitioners was—"Do as you like about formal warning. You may take that step if you think it necessary to preserve legal evidence; but between ourselves it is not necessary. I shall remove whether I am warned or not." I cannot think, after that conversation, if the tenant had wished to go he could have been prevented. This is followed by the tenant pulling up his gooseberry bushes as

¹ Hunter's Landlord and Tenant, vol. ii. p. 48.

preparing to remove. On the other hand, the petitioners enter into an agreement with another man, who makes himself publicly known as the new tenant; and in that character the neighbouring farmers give him a day's ploughing. In short, the respondent, having got a notice to quit, which seems bungled in some way or other, makes no communication or remonstrance for six months; but now, when he sees that the landlord has got into a scrape, says—"I find you have done something that I can take hold of; I will reverse all that has been done since, and refuse to go." I think that it would be contrary to good faith to allow such a proceeding.

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The difficulties and uncertainties which exist as to time of warning in the case of a subject of this kind are an additional reason for the parties taking the matter into their own hands and making their own bargain, and for our enforcing that bargain. I think that the respondent is barred by personal objection from founding on any flaws in the notice to remove; and therefore, without going into the abstract question how warning should be given in such cases, I think that the prayer of the petition should be granted.

LORD ORMDALE.—This case, although in itself of little moment, requires to be carefully dealt with, for whatever we may decide in regard to general principles will of course be applicable to other analogous cases, however large and important the interests involved in them may be. At the same time, I have to remark that it does not occur to me that in the peculiar circumstances of this case we require to decide any of the larger questions which have been argued. I do not think it necessary for us to determine whether there was here a lease to which the statute of 1555 applies. I am rather disposed to think that a verbal lease for one year only is a contract or transaction to which the statute cannot be applied at all, seeing that to admit of its application warning of removal would have to be given the tenant, not only before his obtaining possession, but, it might be, even before the agreement with him was entered into. Accordingly, it seemed to be conceded that if a regular and unobjectionable warning had been given one day sooner than the notice was served on the respondent, that is to say, forty free days before the term of Martinmas, it would have been sufficient. But it is said the notice was bad, first, in point of time and, second, because it was a notice to remove from the houses as well as the lands at Martinmas. I do not wish to decide the question as to the time when warning of removal ought to be given under a yearly tenancy such as we have here. I rest my judgment on the ground stated by Lord Neaves, that the conduct of the tenant was such as to lead not only the lessors, but their new or incoming tenant Stewart, into the belief that he was going to remove from the houses at Whitsunday 1876, and that he had actually ceded the possession of the arable land as at Martinmas 1875. I therefore entirely concur with Lord Neaves in opinion that we should dispose of this case as a special one, on the ground, which the circumstances, I think, sufficiently support, that the respondent, by his own acts and conduct, must be held to have dispensed with any more formal warning than that which was given him, and is barred from maintaining his present defence.

LORD GIFFORD concurred.

LORD JUSTICE-CLERK.—I entirely concur, upon the grounds on which your

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Lordships propose to put the judgment. I consider this a very clear case. Although the protection afforded by the statute to tenants is of a very wide and stringent character, a tenant is bound to act honestly, and not to mislead his landlord. It is plain that the tenant in this case did mislead his landlord in a scandalous manner. He received a notice to quit, in which, he says, he observed a defect; but before that, it is proved that he had a conversation with the landlord's manager, in which he gave the manager to understand that he was to remove. He allows the new tenant to plough and manure the lands, and then, at the last moment, he turns round and maintains that he was not bound to remove.

I wish to refer the bar to a passage in Mr Robert Bell's *Treatise on Leases*. On page 504 of the second edition, the last edition published in the author's lifetime, he says, "The tenant, to save trouble, may agree to remove; and in that case he ought to give a letter or other written obligation to the landlord binding himself to remove, and to dispense with any warning or process of removing. Even a promise to remove, when proved by the oath of the tenant, will be a sufficient ground of removing, without either warning or the calling of an action in Court, in terms of the Act of Sederunt July 28, 1744." Then he refers to a case of *Edmonston v. Bryson, Kilkerran*, Proof, No. 7, and continues, "I believe this matter has been carried still further, and that a chain of circumstances, indicating the intention of parties that the tenant should leave his farm at the expiry of his lease, has been held sufficient to supply the want of a warning or action of removing; and that this has been found in the following cases, though none of them appear to have been collected." And then he refers to three cases. I think that the circumstances of the present case fit completely within the rule laid down by Mr Bell.

We indicate no opinion as to whether a lease for one year of a small piece of arable land along with a house renders a formal warning necessary; but I may add that Mr Robert Bell, in a passage immediately following that which I have read, upon an examination of the cases on this point, expresses an opinion "that a tenant may be removed from a lease set for one year only without the formality of a warning or action of removing."

THIS interlocutor was pronounced:—"Sustain the title of the appellants: Find on the proof that the respondent, after the date of the warning libelled, undertook verbally to remove from the whole subjects before the term of Whitsunday 1876, and further, that he acquiesced in the warning he had received, and allowed the incoming tenant to plough and manure the lands without objection: Therefore sustain the appeal, recall the judgment appealed from, and remit the case to the Sheriff with instructions to grant the prayer of the petition: Find the appellants entitled to expenses in both Courts, and remit to the Auditor to tax the same and to report, and decern."

ALEXANDER MORISON, S.S.C.—J. & W. C. MURRAY, W.S.—Agents.

PETER BEATTIE (Inspector of Poor of Barony), Pursuer.—*Burnet.*

A. L. SMITH (Inspector of Poor of Hamilton), Defender.—*Lorimer.*

W. S. PATERSON (Inspector of Poor of Cardross), Defender.—*Macdonald*
—*Moncreiff.*

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Poor-Law Act—Settlement.—1st, Circumstances in which held that an absence of some months did not break the continuity of residence in the acquisition of a settlement under the Poor-Law Act. 2d, It is a ruled point that facts and circumstances indicating intention to return or not to return to the disputed parish may be an element in a question of residential settlement.

In this action of declarator the question for decision was, whether the settlement of the pauper, Robert Miller, at the time of his death, was in Hamilton, which was the parish of his birth, or in the parish of Cardross, where it was said he had acquired a residential settlement. Upon the answer to this question the pecuniary liability to support the deceased's wife and children depended. It appeared clearly upon the proof that Miller had resided continuously at Cardross from May 1862 to the end of 1868, with the exception of one disputed period of a few months prior to Whitsunday 1867. The question between the parties consequently came to be whether that period was or was not to be regarded as an interruption to the continuity of the residence. The material facts bearing upon this question may be sufficiently gathered from the opinion delivered by Lord Deas.

The Lord Ordinary pronounced the following interlocutor:—"Finds that the deceased Robert Miller, mason, sometime residing at No. 50 Meuse Lane, Cowcaddens, Glasgow, who died in December 1871, resided continuously within the parish of Cardross for the period between May 1862 and the end of 1868, and thereby acquired a residential settlement in that parish, the benefit of which accrued to his widow and children: Therefore decerns against the defender, William Stuart Paterson, inspector of poor of, and as representing the parochial board of the parish of Cardross, in terms of the conclusions of the summons against him: Assolzie the defender, Alexander Laidlaw Smith, inspector of poor of, and as representing the parochial board of the parish of Hamilton, from the conclusions of the action directed against him, and decerns: Finds the defender, William Stuart Paterson, liable in expenses to the pursuer, and to the other defender, Alexander Laidlaw Smith," &c.

The inspector of Cardross reclaimed.

At advising,—

LORD DEAS.—Miller, who was by trade a mason, became a resident in the parish of Cardross in May 1862. In the end of 1866 he was still residing in that parish. He tenanted a house in Levenhaugh Street, Dennystown, which is in the parish of Cardross. The furniture was his own. In December 1866 or January 1867 he had a quarrel with his wife, and left her without money, and without informing her where he was going. In January he got a job at Arrochar from Mr Duncan, builder, Dumbarton, who had been one of his usual employers in the execution of contracts in different parts of the country. Miller continued at that job in Arrochar till May. His wife remained in the meantime, for about three weeks, in the house in Levenhaugh Street. At the end of that time she locked up the house and furniture, took the key with her, and went to Dumbarton, on the opposite side of the river Leven, and in a different parish, in order, apparently, to find the means of subsistence. She

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hired a furnished room in Quay Street, Dumbarton, where she supported herself by her labour till April, when she heard that her husband was at Arrochar, and forthwith joined him there. They remained together there for about six weeks, when the job being finished they returned to Dennystown. They could not resume possession of the house there because their lease of it had just expired, and the furniture had been sequestrated for non-payment of the rent. They consequently went into lodgings in Dennystown. In the following September they paid some money to the factor, and came to an arrangement by which they got back their furniture. Soon after they took another house in Bridgend, Dennystown, and it was not disputed that unless the period of absence in Arrochar fell to be deducted the residential settlement was complete.

In these circumstances it was contended for the parish of Cardross that the continuity of the pauper's residence there was broken by his absence during the three or four months preceding Whitsunday 1867. In support of this proposition it was contended that an intention on the part of the pauper either to abandon his residence in a particular parish or to retain it was not an admissible element of evidence in a case of this kind. An opinion to that effect was expressed by Lord Neaves in the note to his interlocutor in *Hay v. Beattie*, Dec. 1, 1857, 20 D. 146. But no decision was pronounced to that effect, and it is plain that the course of recent decisions has been the other way. I do not intend to go over the cases. But I may refer to the case of *Greig v. Miles*, July 19, 1867, 5 Macph. 1132, 39 Scot. Jur. 617. That was the case of a sailor who was absent on voyages for more than half of the whole five years, and yet the residence was held by the whole Court (the Lord President and Lord Benholme alone dissenting) to be continuous. I refer to that case particularly, because, in the subsequent case of *Moncrieff v. Ross*, Jan. 5, 1869, 7 Macph. 331, the Lord President, although he dissented from the judgment, observed that the case of *Greig v. Miles* had set up the rule that the word residence may be sufficiently satisfied by constructive residence. I do not think we could have a better authority for saying that the rule has been established, and, accordingly, it was acted on in that same case of *Moncrieff v. Ross*. This was followed by a unanimous decision by the Second Division in *Milne v. Ramsay*, May 23, 1872, 10 Macph. 731, 44 Scot. Jur. 435. Therefore it can hardly be doubted that according to the course of decisions, the intention of a man to retain or abandon his residence is to be held an element to be taken into account in such cases, and that the mere fact of his bodily absence, though for a considerable period, is not of itself conclusive that the continuity of the residence has been broken.

I fully admit that the mere intention to return will not of itself preserve the continuity, and that, on the other hand, the length of absence may be such as in some cases to prove of itself that the continuity has been effectually broken. But in the present case I think the pauper retained his connection with the parish. He left his wife and his furniture there. I see no proof or presumption that he intended otherwise than to return to the parish. He did return so soon as his temporary object was served, and, in these circumstances, there appears to me to be no authority for holding that the continuity of his residence was broken. The only case which has been founded on to the contrary is *Allan v. Shaw and King*, Feb. 24, 1875, *ante*, vol. ii. 463. That was a narrow case. But there the pauper retained no connection with Shotts, the alleged parish of his residential settlement, but set up house for a time with his wife and family in another parish where he was working.

On the whole, as consistency in the decisions is of more than usual importance in this class of cases, I am for adhering to the interlocutor.

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LORD MURK.—This is a case of some nicety. The difficulty is to say whether it falls under the authority of the case of Allan v. Shaw and King, Feb. 24, 1875, or of the earlier cases of Greig v. Miles, Moncrieff v. Ross, and Milne v. Ramsay, referred to by Lord Deas. It is clear upon the evidence that the continuity of the pauper's residence in Cardross for five years was not broken, unless it was by his absence when working as a mason at Arrochar for several months in 1867, during the latter part of which period his wife was with him. In the case of Greig v. Miles a sailor was absent in pursuit of his calling at different periods for more than half of the five years. In Moncrieff v. Ross a fisherman was also absent for long periods, though he retained his house. Milne v. Ramsay was the case of a shoemaker, who was away on several occasions, sometimes in the prosecution of his trade as a shoemaker, at others as a farm-servant, and on one of these occasions for as much as six months at one time. In all these cases, however, the absent parties retained their houses, which were occupied by their families during their absence, and it was on that account held that these long periods of absence were not sufficient to break the continuity. In the case of Allan, where the contrary was decided, the pauper had not only removed himself from one parish to another, but after a time removed his family also, and so gave up all connection with the former parish. Now, if, in the present case, the wife and family of the pauper had continued to reside in Cardross parish during the whole period of his absence at Arrochar, we should have had the same circumstances to deal with as in the earlier cases. Because, when the pauper went to Arrochar he left his wife and furniture in his house in Cardross, which was rented by him till Whitsunday 1867, when he returned and again resided with his wife in Cardross parish, though not in the same house, for the lease of it expired at that term. But the specialty of this case is that shortly after the pauper went to Arrochar his wife left the house in Cardross and went to reside in Dumbarton parish, and that for about three months during the spring of 1867 neither the man nor his wife lived in Cardross. The question, therefore, to be decided is, whether the fact of the wife going away of her own accord to another parish when her husband was absent makes such a distinction as to lead to the conclusion that there was a break in the continuity of the residence. I have come to be of opinion, though not without considerable hesitation, that the circumstance of the wife having thus left the house is not sufficient to infer a break in the continuity. For the man remained tenant of the house and left his wife to reside there while he was absent, and I do not think that the mere fact of her having left the house during a part of the time, when he was away, is enough to take the case out of the general rule.

LORD PRESIDENT.—There is no doubt that a five years' residence as the foundation of an industrial settlement may, according to the authorities, be composed to a certain extent of periods of constructive residence. It has not been held that the whole five years may be so composed, nor has it been decided what portion of it may. That will be a difficult question when it arises, if it ever does. But all the length that the decisions have gone has been to hold that, though a man may go away occasionally for a few weeks or months, if he leaves

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his family and retains his house, his occasional absence will not break the continuity. I participate in Lord Mure's difficulty, because, if we adhere to this interlocutor it will be carrying the principle of constructive residence a step further. But, looking to the authorities, I cannot say that they will not warrant the judgment proposed.

THE COURT adhered.

MACKENZIE, INNES, & LOGAN, W.S.—BRUCE & KERR, W.S.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

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Forrest v.
Robertson's
Trustees.

JOHN CLARK FORREST (Trustee in Stewart S. Robertson's Sequestration Pursuer.—*Lord Adv. Watson—R. V. Campbell.*

GEORGE AULDJO JAMIESON AND OTHERS (Stewart S. Robertson's Trust-Disponees), Defenders.—*Adam—Kinnear.*

DAVID J. ROBERTSON AND HIS CURATOR, Defenders.—*Balfour—J. P. B. Robertson.*

Bankrupt—Revocation—Trust-Disposition—Marriage-Contract—Provision for Children.—A person who held two estates by disposition from his father, the one under reservation of the father's liferent, and the other absolutely, conveyed the first estate to trustees, and the second he conveyed in liferent to his father and in fee to the trustees. He reserved from his conveyances to the trustees his own liferent, power of management during his lifetime, and a power to burden to the extent of an annuity of £100 to any wife he might marry. The care of the trustees on the possession and management was only to be after the death of the grantor and of his father. The purposes of the trust were that the trustees should hold the estates till the eldest of any sons the truster might have should attain majority, and then convey them to the son. The trustees were at first in feist, and they concurred in granting certain leases, and also in granting a disposition of a small part of the estate.

Fourteen days after the date of the trust-deed the grantor executed a marriage-contract, which, *inter alia*, bore that he, in virtue of the power reserved to him in the trust-deed (described as granted in favour of "trustees for the purposes therein specified"), burdened the estates with an annuity of £100 payable to his widow, and made provision for any children he might have, "other than the child who shall succeed to the estates . . . under the direction with reference to a destination of these estates contained in the said trust-disposition." The grantor was married seventeen days after the date of the trust-disposition. Several sons were born of the marriage.

The grantor having become bankrupt, his trustee brought an action of reduction of the trust-deed. *Held* (1) that the deed was not in itself valid against creditors; and (2) that it was not, by the reference in the marriage-contract, made part of the marriage settlement so as to be valid against creditors in respect of the marriage and the birth of a son.

Lord Deas *dissented*, on the ground that the trust-deed was an absolute conveyance, executed in contemplation of marriage, delivered to and acted on by the trustees recognised in the marriage-contract, and that the two deeds formed the antenuptial marriage settlement, and were effectual against creditors.

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Lord Young.
B.

THIS action was raised by the trustee in the sequestration of Stewart S. Robertson to set aside a trust-conveyance executed by the bankrupt on 12th April 1862.

By disposition dated 2d December and recorded in the Register of Sasines on 10th December 1861, David Souter Robertson of Lawhead conveyed, under reservation of his own liferent, the lands of Lawhead Tarbrax, and others, to his eldest son, Stewart S. Robertson, and he also conveyed to him the estate of Easterhouse absolutely.

By trust-disposition dated 12th April 1862 Stewart S. Robertson conveyed the estate of Lawhead to George Auldjo Jamieson and others.

trustees, reserving his father's liferent, as was done in the deed conveying the estate to him. The disposition further bore—"And I do hereby dis-
 ppose to the said David Souter Robertson, my father, in liferent, for his
 liferent use and enjoyment, and subject to his uncontrolled management
 during all the days of his life, and to the said trustees in trust as afore-
 said, and to their foresaids in fee, heritably and irredeemably," the lands
 of Easterhouse; "but always with and under the exceptions specified in
 the said instrument of sasine, together with my whole right, title, and in-
 terest in the said several lands and others; but reserving always, as I do
 hereby specially reserve from the above-written conveyance of the said
 several lands and others in favour of the said trustees, my liferent use,
 possession, and enjoyment of the said lands and others, and the uncon-
 trolled management thereof during all the days of my life from and after
 the death of my said father, and reserving also full power to me, either
 in contemplation of or after my marriage, to burden and affect the said
 several lands and others with an annuity or jointure in favour of any
 wife I may marry, not exceeding £100 per annum, to be made payable,
 the said annuity or jointure, to my wife, should she survive my said
 father and me, out of the said lands and others, or any part thereof, at
 two terms of the year, Whitsunday and Martinmas, by equal portions,
 commencing the first payment of the said annuity at the first of these
 terms which shall happen after the death of my said father and me, for
 the subsequent half year, and so forth half-yearly thereafter during the
 life of my said wife after the death of my said father and me, and which
 power of granting such annuity or jointure hereby reserved by me may
 be exercised by my granting a bond of annuity to be contained in any
 contract of marriage, or by a separate bond to be executed by me in con-
 templation of or subsequent to my marriage; and it is hereby expressly
 provided and declared that, subject to the reserved liferent rights in
 favour of my said father and me, and my reserved right to burden and
 affect the said lands with an annuity or jointure as aforesaid, these pre-
 sents are granted, and shall be accepted by the trustees acting in the
 trust hereby created, in trust, to the intent and purpose that they may
 and shall, immediately upon the death of my said father and me, enter
 upon the possession and management of the said lands and others above
 conveyed, and hold the same as a trust-estate, and apply the same, and
 the proceeds thereof, for the uses and purposes following, viz.—In the
 first place, for the payment of the expenses attending the execution of
 this trust and the management thereof. Secondly"—(This head provides
 for payment of the wife's annuity and expenses of management). "Thirdly,
 in the event of my dying survived by issue of my body, the said trustees
 shall hold the said lands and others, and shall apply the free balance or
 surplus of the annual income of the trust-estate, after deducting the bur-
 dens, expense of repairs, interest of debts, and annuity hereinbefore
 directed to be paid, and the expenses of management applicable to the
 collecting and recovering of the income or such portion of the said free
 balance or surplus as may be necessary for the maintenance, education,
 and advancement of my eldest or only son, or failing my having a son, or
 in the event of the decease of all my sons previous to the period herein-
 after prescribed for conveying the said trust-estate, then for the mainten-
 ance and education of my eldest or only daughter, the said trustees having
 the fullest discretion as to what proportion of the said free balance or
 surplus shall be applied in any year for these purposes, and any balance
 of the said surplus arising in any year after applying the same as afore-
 said shall be applied in payment of any debt which may then affect the
 trust-estate, or be added to and form part of the capital of the trust-estate

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under the management of the trustees. Fourthly, upon my eldest or only son attaining the age of twenty-one years, or failing sons, upon my eldest or only daughter attaining that age, or being married, whichever event shall first happen, my trustees shall convey and make over the trust-estate as then held by them, and, subject to any debts or incumbrances which may affect the same, to such eldest or only son or eldest or only daughter, as the case may be, and to his or her heirs or assignees whomsoever. Fifthly, failing my having children, or in the event of their all predeceasing the period prescribed for making over the said trust-estate to them as aforesaid, the trustees shall, in the event of my brother, the said David Souter Robertson junior, being then in life, continue to hold the said trust-estate, and shall pay over to him the whole free balance or surplus of the annual income thereof, after deducting as aforesaid; and in the event of his predeceasing the period of payment to him of the said free balance or surplus, under this direction, or upon his death, should he survive that period, the trustees shall apply the said free balance or surplus wholly or partially, as hereinbefore provided in the case of my children as aforesaid, for the maintenance, education, and advancement in life of the eldest or only son of my said brother, or of his eldest or only daughter, and shall make over the said estate to such eldest or only son or eldest or only daughter, and his or her heirs or assignees, at the period or in the manner hereinbefore directed with reference to my children. Sixthly, in the event of my dying childless, or of all my children and their issue predeceasing the period before prescribed for making over the said trust-estate to them by the said trustees as aforesaid, and in the event of my said brother dying childless, or his children and their issue predeceasing as aforesaid, the trustees shall make over the said trust-estate as held by them at the time to the heirs and assignees whomsoever of my said father. . . . Also I give full power to my trustees to make up and complete all proper titles in their persons to the lands and others hereby conveyed, with the fullest powers of administration and management of the trust-estate under their charge."

A notarial instrument, following on the disposition of 12th April 1862 was recorded in the General Register of Sasines on 17th April 1862 on behalf of the trustees and David S. Robertson, "for their respective rights and interests in the lands and others thereby disposed."

On 26th April, in contemplation of a marriage which had been arranged between the said Stewart S. Robertson and Ann Scrivenor Hamilton, a marriage-contract was executed by these parties and by David S. Robertson, the father of Stewart S. Robertson, and Miss Eliza Hamilton, the sister of the bride, whereby Stewart S. Robertson bound himself to pay an annuity of £300 to his widow in the event of her survivance, restricted to £150 in the event of her entering into a second marriage; "and in security so far of the personal obligation above-written for payment of the said annuity, and restricted annuity, and without prejudice thereto, the said Stewart Souter Robertson, in virtue of a power to that effect reserved to him in a trust-disposition, dated 12th April 1862, of the estates of Lawhead, Tarbrax, and Easterhouse, in favour of George Auldjo Jamieson, accountant in Edinburgh, and other trustees, for the purposes therein specified, hereby provides and disposes to the said Ann Scrivenor Hamilton, in liferent during all the days of her lifetime, after the death of his said father and him, in case she shall survive them, not only a free yearly annuity of £100, to be uplifted and taken free of all burdens and deductions, at two terms in the year, Whitsunday and Martinmas, by equal portions, commencing the first payment of the said annuity of £100 at the first of these terms which shall happen after the death of his said father and him for the subsequent

half year, and so forth half-yearly thereafter during the life of the said Ann Scrivenor Hamilton, after the death of the said Stewart Souter Robertson and his said father, furth of, in the first place, All and Whole the lands of Lawhead, Tarbrax, and others, . . . and furth of, in the second place, All and Whole the lands of Easterhouse and others, . . .

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. . . or furth of any part or portion of the said lands and others, eadiest rents, maills, farms, profits, and duties of the same, but also All and Whole the said lands and others themselves, in real security, and for payment to the said Ann Scrivenor Hamilton of the said annuity of £100, part of the said annuity of £300 payable to her as aforesaid, to be holden, he said annuity of £100, upliftable furth of the said lands and others, and also the said lands and others themselves, *a me vel de me*." (Here there is a provision as to payment of the annuity of £100 by David Souter Robertson in the event of his surviving his son.) "Further, the said Stewart Souter Robertson, in contemplation of the said intended marriage, binds and obliges himself and his foresaids to make payment to the child or children to be procreated of the marriage hereby contracted who shall be alive at his death, other than the child who shall succeed to the said estates of Lawhead, Tarbrax, and Easterhouse, under the directions with reference to the destination of these estates contained in the said trust-disposition thereof in favour of George Auldjo Jamieson and others, as trustees foresaid, and to the issue then alive of any such child or children who shall not succeed as aforesaid, who shall have previously died leaving issue, of the sum of £5000 sterling at the first term of Whitsunday or Martinmas after the death of the said Stewart Souter Robertson, . . . and the said sum of £5000 shall be divisible between or among the said children and issue of children entitled thereto as aforesaid, if there shall be more than one child alive, or who shall have died leaving issue, in such proportions as the said Stewart Souter Robertson shall appoint by any writing under his hand; and failing such appointment, the said provision of £5000 shall be divisible equally among the children and issue of children of the marriage entitled thereto as aforesaid, the issue of any deceased child being entitled to the share which such child would have drawn if he or she had been alive."

The marriage-contract trustees were to hold the estate of the husband for the following purposes:—"First, for payment of the expenses of executing this trust. Second, for payment of the annual interest or produce of the sums of money and others hereby assigned, during the subsistence of the marriage hereby contracted, to the said Stewart Souter Robertson or his assignees. Third, after the death of the said Stewart Souter Robertson, if he shall be survived by the said Ann Scrivenor Hamilton, then the interest of the trust-estate shall be applied in payment of the foresaid annuity or jointure of £300, or restricted annuity, to the said Ann Scrivenor Hamilton, in so far as the same may not be received from the said estates of Lawhead, Tarbrax, and Easterhouse; and should there be any surplus interest or income in any year after satisfying the said annuity, the same shall, in the discretion of the trustees, be either applied towards the maintenance and advancement in life of the said younger children of the marriage, or added to the capital of the trust-estate hereby assigned, to be divided as after-mentioned. Fourth, on the death of the said Stewart Souter Robertson, if he shall survive the said Ann Scrivenor Hamilton, or upon her death, should he predecease her, the trustees shall hold the trust-estate hereby assigned for behoof of the younger child or younger children of the marriage, in or towards implement, as the case may be, of the before-written obligation by the said Stewart Souter Robertson for payment of the sum of £5000 to the younger children of the marriage; and which

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sum of £5000, or whatever lesser sum the trustees shall then hold in virtue of the assignation before-written, shall be payable to and divisible between or among the child or children of the marriage (other than the child who shall succeed as aforesaid to the said estates of Lawhead, Tarbrax, and Easterhouse), and the issue of children entitled thereto, as hereinbefore provided in the case of the before-written personal obligation for payment of the said sum to the younger child or children of the marriage. Fifth," "And failing any child or children of the marriage, or issue of such child or children, then the trustees shall hold the said trust-estate hereby assigned for the representatives or assignees whomsoever of the said Stewart Souter Robertson." The deed then proceeded,—“For which causes, and on the other part, Miss Eliza Hamilton, residing at Fairholm, sister of the said Ann Scrivenor Hamilton, in contemplation of the said intended marriage, and in terms of an arrangement to the effect after specified, undertaken by her in treaty for the said intended marriage, hereby binds and obliges herself but only in the event of her succeeding to the entailed estates of Fairholm and others, in the counties of Lanark and Edinburgh, of which she is at present the presumptive heiress of entail, to make payment to the said Ann Scrivenor Hamilton, and her heirs and assignees whomsoever, of the sum of £2000 sterling, with interest thereon at the rate of four per centum per annum from the date of her succession to the said estates during the not payment, payable, the said principal sum of £2000, by half-yearly instalments of £100 each, commencing payment of the first of these instalments two years after the first term of Whitsunday or Martinmas subsequent to the succession of the said Eliza Hamilton to the said entailed estates.”

Ann Scrivenor Hamilton conveyed all her property, including the obligation by her sister, to the trustees, excluding her intended husband's *jus mariti*, and he renounced his *jus mariti* with regard to all the property of his intended wife:—“And it is hereby provided and declared, that the said trustees shall have the fullest powers of managing, recovering, and realising the said estate, and particularly the said sum of £2000 which the said Eliza Hamilton has become bound to pay as aforesaid, as and when the same shall be received by them under the said obligation.”

On 29th April 1862 Stewart S. Robertson was married to Ann Scrivenor Hamilton, and five children were born of the marriage, the eldest son being David J. Robertson.

David S. Robertson granted a letter of obligation to pay an annuity of £100 to Stewart S. Robertson's wife in the event of her surviving her husband, in the event of her annuity not being paid from the husband's estate, and this letter was referred to in the marriage-contract.

On 15th September 1874 the estates of Stewart Souter Robertson were sequestrated, and John Clark Forrest was appointed trustee.

The trustee brought an action against George Auldjo Jamieson and others, as trustees under the trust-disposition of 12th April 1862, concluding for declarator that the estates of Lawhead, Tarbrax, &c., under reservation of the liferent of David Souter Robertson senior, and the estate of Easterhouse, were transferred to and vested in him, as trustee for behoof of the creditors, from the date of sequestration; that the trust-deed of 12th April 1862, and the notarial instrument following thereon, were revoked by the sequestration, “without prejudice to the liferent conveyance of the said lands of Easterhouse and others to the said David Souter Robertson senior.”

A supplementary summons was brought containing conclusions for reduction of the trust-deed and notarial instrument following thereon.

David J. Robertson, the eldest son of Stewart Souter Robertson, was listed as a party to the action, and Mr James Bruce, W.S., was appointed his curator *ad litem*. No. 8.

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The pursuer pleaded;—(1) The trust-disposition in question is *sua natura* revocable, and has been revoked by the sequestration. (2) The said deed, if irrevocable by the bankrupt's gratuitous acts and deeds, is invalid in competition with his onerous creditors, represented by the pursuer. (3) The operation of the said trust-disposition being postponed to the bankrupt's death, the lands and others in question fall under the intervening sequestration of his estates. (4) The said trust-disposition not being a *de presenti* divestiture of the bankrupt *inter vivos*, and being expressly or by necessary implication subject to the bankrupt's debts, the defenders' infetment forms no bar to this action. (5) The said trust-disposition being in fraud and to the hurt and prejudice of the bankrupt's creditors, the same should be set aside. (8) Evidence of the communings, conditions, stipulations, or other extrinsic facts alleged by the defenders is incompetent to modify or affect the terms and construction of the deeds referred to by the pursuer, or to exclude challenge in this question with the pursuer. (9) The marriage-contract forms no bar to this action, in respect—1. It was subsequent in date, and is extrinsic to the trust-disposition and the infetment thereon; 2. It leaves the trust-disposition an independent deed, and subject to all the exceptions now pleaded against it; 3. It in any case contemplates only a possible succession at the bankrupt's death, defeasible by the bankrupt's creditors.

David J. Robertson and his curator stated;—(Stat. 1) "The said Stewart Souter Robertson was married on 29th April 1862 to Ann Scrivenor Hamilton." (Stat. 2) "The engagement of marriage between the said Stewart Souter Robertson and Mrs Ann Scrivenor Hamilton or Robertson, on which the said marriage followed, was formed in July 1861. The disposition by David Souter Robertson, dated 2d December 1861, and also the trust-disposition under reduction, were executed in contemplation of the said marriage, and with a view to make provision for the same. The former deed was executed by the said David Souter Robertson in order that his son might settle the lands thereby conveyed in terms of the deed under reduction. The deed under reduction formed part of the marriage settlement between the said Stewart Souter Robertson and Ann Scrivenor Hamilton; it was stipulated for and obtained on behalf of the said Ann Scrivenor Hamilton, and the marriage took place on the faith of the settlement of the lands thereby made." (Stat. 4) "The trustees accepted office and completed their title to the said lands, the notarial instrument following on the said trust-disposition having been recorded on 17th April 1862."

The trustees pleaded;—(1) The trust-disposition in favour of the defenders being an irrevocable and delivered deed, and they being infet in virtue thereof, are entitled to be assoltized from the first declaratory and reductive conclusions of the action. (2) The trust-disposition not being gratuitous, but having been granted as a condition of obtaining a conveyance to the said lands, is not reducible on any of the grounds stated. (3) Upon the death of David Souter Robertson and Stewart Souter Robertson, the defenders are entitled to enter into possession of the lands conveyed by the trust-disposition, and to administer the same in terms of the trust.

David J. Robertson pleaded;—(1) The averments of the pursuer are not relevant or sufficient to entitle him to decree. (2) The trust-disposition under reduction being an irrevocable and delivered deed, and the trustees having completed their title thereon, decree cannot be obtained.

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(3) The trust-disposition not being gratuitous, but having been granted as a condition of obtaining a conveyance to the said lands, is not reducible on any of the grounds stated. (4) The said trust-disposition was onerous, and cannot be set aside, in respect it formed part of the matrimonial settlement aforesaid, on the faith of which marriage has ensued. (5) The settlement of the lands in favour of the eldest son of the marriage having been an onerous provision, cannot be recalled by the said Stewart Souter Robertson, or by those deriving right from him, and the defender the said David J. Robertson is entitled to have decree accordingly. (6) The pursuer being in right only of the liferent reserved by the said Stewart Souter Robertson is not entitled to work the minerals in the said lands.

The Lord Ordinary pronounced this interlocutor:—"Finds that the trust-disposition in question is not valid against the creditors in the sequestration of Stewart Souter Robertson, represented by the pursuer: Therefore repels the defences, and finds and declares in terms of the first two conclusions of the original summons, and reduces, decerns, and declares in terms of the conclusions of the supplementary summons: Grants warrant to and ordains the keeper of the Register of Sasines to record an extract of the decree in the division of the General Register of Sasines applicable to the county of Lanark: Finds the defenders liable to the pursuer in expenses and remits the account," &c.*

* "JUDGMENT.—Three questions were argued in this case, with much ability and a copious references to authorities:—(1st) Whether the trust-deed of 12th April 1862 is, with respect to the fee of the property thereby conveyed, good against the creditors of the truster? (2d) Whether, although not originally good against creditors, it is rendered so by the references thereto in the truster's marriage contract of 26th April 1862? And (3d) Whether, if neither originally good against creditors, nor rendered so referentially by the execution of the marriage contract and the marriage following on it, it became good on the birth of a son of the marriage?

"My opinion is against the defenders on all these questions.

"1. On the first question the defenders contended that the truster having conveyed the fee to trustees by a delivered deed, on which infeftment followed, it was thereafter beyond his own power, and consequently beyond the power of his creditors. The pursuer answered that, having regard to the quality of the conveyance as voluntary and gratuitous, and the purpose of the trust, which is to govern the truster's succession, or the descent of his property after his death, the deed could have no effect against creditors; and I think the answer is good. The arguments *hinc inde* are too obvious to require expression. The gratuitous character of the deed is indisputable, but the defenders urged that its purpose was not to govern succession, because the granter was thereby immediately divested of the fee which he conveyed to his trustees, and in which they were infeft. But the validity of a deed to place property beyond the reach of creditors depends on considerations superior to the theory of conveyancing. A man may impoverish himself by improvident gifts as well as by reckless expenditure, without remedy to his subsequent creditors. But here was no *de praesenti* gift except in the form and style of the deed by which the maker designed to regulate his succession with respect to the property which he meant to retain for his own use and enjoyment as long as he lived. It is trite law that a gratuitous entail, however formal and strict, and with the fetters applied to the entailor himself as institute, is not good against the entailor's creditors; and although an institute (or heir) of entail is a fiar, yet a fee tail (or tailzied fee, if that be the preferable term) is substantially and radically different from a fee-simple, and is, in truth, undistinguishable for any practical purpose whatever from the life estate, which the maker of the deed now in question thereby retained to himself. No entail is bad against the entailor's creditors not upon any technical rule of conveyancing, but on the consideration that it is against public policy to allow a man gratuitously to put an estate, the enjoyment of which he retains while

David J. Robertson and his curator reclaimed,—

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During the argument the defenders were allowed to make an addition to the record. They then stated that the trust-disposition of 1862 was delivered to the trustees, who acted upon it. "They completed their title to the said lands by notarial instrument duly recorded on 17th April 1862. Further, as vested in the fee of the said lands, the said trustees executed various deeds affecting the estate. In 1866, the said George Auldjo Jamieson and James Auldjo Jamieson, as the acting trustees under the said trust-disposition, along with the said David Souter Robertson the eldest, and the said Stewart Souter Robertson, for their respective rights and interests in the said lands, granted to Eben Waugh Fernie, residing at Almondell, Linlithgowshire, a lease of the minerals of Lawhead, Tarbrax, and Easterhouse, for the space of thirty years from Martinmas 1866. The said lease, which was dated 29th March and 2d and 5th April 1866, was thereafter assigned by the testamentary trustees of the said Eben Waugh Fernie to Robert Galloway, Torphichen Street, Edinburgh, and the assignation having been intimated to the said David Souter Robertson the eldest, Stewart Souter Robertson, and the said trustees they, along with the said David Souter Robertson and Stewart Souter Robertson executed a minute of acknowledgment of intimation, dated 26th and 29th December 1870 and 12th January 1871. A bond and assignation in security of the said lease having been at the same time executed by the said Robert Galloway in favour of the testamentary trustees of the said Eben Waugh Fernie, was intimated to the said David Souter Robertson the eldest, Stewart Souter Robertson, and the said trustees, and along with the said David Souter Robertson and Stewart Souter Robertson the said trustees executed a minute of acknowledgment of intimation of the last-mentioned dates. In 1867 the Caledonian Railway Company agreed to construct a branch line to Tarbrax, and the said trustees, considering that this line would greatly benefit the estate, resolved to grant, free of any money payment, a conveyance of a part of the trust-estate which was desired by the company for the purposes of the line. Accordingly a disposition of the said part of the trust-estate, dated 15th, 25th, and 26th June 1867, was granted to the company by the said George Auldjo Jamieson and James Auldjo Jamieson, as trustees then acting as aforesaid, with consent of the said David Souter Robertson the eldest, and Stewart Souter Robertson, and by the said David Souter Robertson and Stewart Souter Robertson, for all right of liferent or other

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lives, beyond the reach of his creditors, by any device whatever, for securing it to his heirs after his death. I am not prepared to hold that while this cannot be done by an entail it may be accomplished by a trust having precisely the same end and object, whereby the trustees are immediately infeft in the fee for behoof of heirs to whom the estate is destined after the truster's death.

"II. On the second question, I am of opinion that the references made to the trust-deed in the marriage-contract do not affect the character of the prior deed, nor its validity in a question with creditors. The trust conveyance and purposes of it, I assume, have been imported by reference into the contract in such a manner as to make them part of the contract, and give them validity as onerous accordingly, but I think this has not been done. On the contrary, I agree with the pursuer's argument that the language of the reference is such as to shew clearly that it was intended that the rights or prospects of succession referred to should stand on the deed that gave them, and upon it only.

"III. The third question is not, in my opinion, even arguable on the part of the defenders, and, at least, I cannot assent to the proposition that the claim put forward by the pursuer is dependent on the circumstance whether or not there is a son of the marriage now in life."

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right which they respectively for themselves or others had or could claim in the lands thereby disposed in any manner of way. No money consideration was paid by the railway company to any of the granters of the said disposition."

The pursuer, in answer, stated that the deed and notarial instrument following thereon were prepared by Messrs Tods, Murray, and Jamieson, W.S. the agents of Stewart Souter Robertson, and that one of the trustees, Mr. Jamieson, was a member of that firm. "Further explained that no minute of acceptance of the pretended trust was made by the said trustees; that they held no meetings, and had no intromissions, and in no way interfered with or controlled the possession and management of the lands in question by the bankrupt and his father, whose mere instructions they followed in giving their concurrence as aforesaid. Further explained that, as the reclaimer in the said lands, the bankrupt, from time to time between the date of the said trust-disposition and his sequestration, expended the sum £700 upon improvements on the lands in question, thereby adding to the value of the said lands at the cost of his general estate now in the pursuer's hands."

The reclaimers argued;—The maker of the deed could not have revoked it, and his creditors could not be in a better position. The deed vested the estates in the trustees, who were bound to hold them for the purposes of the trust, and they were not entitled to denude in favour of creditors. The deed was *de presenti* in form, and conveyed the estate irredeemably, which shewed that it was not a *mortis causa* deed. If there had been an unlimited power to burden, the effect of the deed might have been that the liferent of the granter would have been virtually a fee; but here the power of burdening was restricted to granting an annuity of £100 a-year to a wife. The disposition took effect at once, and the only thing which was postponed was the possession and management. The marriage-contract and the trust-deed must be read together as constituting the provisions which were made in contemplation of the marriage which followed, and were thus highly onerous deeds. Under these the beneficiaries acquired rights which could not be defeated by the bankrupt nor his creditors.¹

The pursuer argued;—The trust-deed was a *mortis causa* deed not intended to come into operation till the granter's death. This was plain from the full management being left in the granter's hands during his lifetime. The mere fact that a tenant or a purchaser preferred to have the concurrence of the trustees in any act of management would not affect the question. The whole purposes were *mortis causa*, and did not take effect till the death of the granter.²

¹ Bell's Comm. (5th ed.), vol. i. pp. 33, 34; Dickson v. Cunningham and Others (Kilbucko case), Oct. 1, 1831, 5 Wilson and Shaw, p. 657 (Lord Braxfield's opinion, p. 663, note); Vans Agnew v. Lord Stair (Sheuchan case), July 31, 1821, 1 Shaw's Appeals, 333; Leckie v. Leckie, Nov. 22, 1776, M. 11,581, and Approved Presumption, No. 1; Somerville v. Somerville, May 18, 1819, F.C.; Turnbull v. Tawse, April 15, 1825, 1 W. and S. 80; Spalding v. Spalding's Trustees ante, vol. ii., p. 237; Howden v. Fleeming, July 16, 1868 (Lord Westbury's opinion), 6 Macph. H. L. 113, 1 L. R., Scotch and Irish Appeals, p. 373; Smitton v. Tod, Dec. 12, 1839, 2 D. 225, 12 Scot. Jur. 241.

² Bell's Comm. vol. i. p. 47 (5th ed.); Herries, Farquhar, & Co. v. Brown and Others, March 9, 1838, 16 S. 948, 10 Scot. Jur. 352; Murison v. Dick, Feb. 1854, 16 D. 529, 26 Scot. Jur. 239; Grant v. Robertson, July 15, 1872, 1 Macph. 804, 44 Scot. Jur. 547; Goddard v. Stewart, March 9, 1844, 6 D. 100, 16 Scot. Jur. 449; Fernie v. Colquhoun, Dec. 20, 1854, 17 D. 233, 26 Scot. Jur. 86; Globe Insurance Company v. Murray, Dec. 15, 1854, 17 D. 218, 1 Scot. Jur. 80.

The marriage-contract could not be said to affect the trust-deed at all. No. 8.
 t merely referred to it as an existing fact.

At advising,—

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LORD PRESIDENT.—In this case two questions have been argued to us—First, Whether the trust-deed of the 12th of April 1862 is good against the creditors of the truster? and, secondly, Whether, upon the assumption that that deed is not in itself effectual against creditors of the truster, it is rendered so by the references made to it in the subsequent marriage-contract of the truster of the 16th of April of the same year?

These are important questions, but the view which I take in regard to both of them is in accordance with the judgment of the Lord Ordinary.

The subjects conveyed by the trust-disposition of the 12th of April are, in the first place, the lands of Lawhead, Tarbrax, and others; and, in the second place, the lands of Easterhouse and others. With regard to the first parcel of lands, the truster had acquired them from his father by a disposition made on the 2d December 1861, under which the father reserved his own liferent use and possession of these lands. The other parcel of lands—Easterhouse and others—were conveyed by the same disposition, but without any reservation of the father's liferent. The truster conveys both these subjects to certain gentlemen as trustees; and he reserves, with reference to the first parcel of lands, the liferent use and possession of his father, the said David Souter Robertson, as reserved in the disposition of the 2d of December; and with regard to the other parcel of lands, he disposes them to his father in liferent, "for his liferent use and enjoyment, and subject to his uncontrolled management during all the days of his life, and to the said trustees in trust as aforesaid, and to their foresaids in fee, heritably and irredeemably." He then further specially reserves from the above-written conveyance of both parcels of lands his own "liferent use, possession, and enjoyment of the said lands and others, and the uncontrolled management thereof during all the days of my life from and after the death of my said father; and reserving also full power to me, either in contemplation of or after my marriage, to burden and affect the said several lands and others with an annuity or jointure in favour of any wife I may marry, not exceeding £100 per annum, to be made payable" at certain terms. And it is "expressly provided that, subject to the reserved liferent rights in favour of my said father and me, and my reserved right to burden and affect the said lands with an annuity or jointure as aforesaid, these presents are granted, and shall be accepted by the trustees acting in the trust hereby created, in trust, to the intent and purpose that they may and shall, immediately upon the death of my said father and me, enter upon the possession and management of the said lands and others above conveyed, and hold the same as a trust-estate, and apply the same and the proceeds thereof for the uses and purposes following." Now, before coming to a consideration of the uses and purposes of the trust, it is important to note what is the effect of the deed up to this point. The father being the original owner of the lands of Lawhead, Tarbrax, and others, is liferenter by reservation of these lands, and he is liferenter by constitution of the other lands of Easterhouse and others, in virtue of the conveyance in liferent given to him by this deed. After the death of the father the liferent use and possession of both parcels of land devolves upon the son, the truster, and there is not only a full liferent use, possession, and enjoyment of the lands reserved, but there is also a

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reservation of the uncontrolled management thereof during all the days of the life of the truster after the death of his father; and it is only after the death of both these liferenters that this trust is to come into operation, for it is expressly provided in the passage that I last quoted that the disposition is granted and is to be accepted in trust to this intent, that the trustees are to enter into possession of the lands and hold them as a trust-estate only after the death of both the father and the truster. Now, for what purpose is this trust-estate to be taken possession of and administered by these trustees after the death of the truster? There is provision in the first and second purposes for payment of certain expenses; and then, "Thirdly, in the event of my dying survived by issue of my body, the said trustees shall hold the said lands and others, and shall apply the free balance or surplus of the annual income of the trust-estate [after certain deductions] "for the maintenance, education, and advancement of my eldest or only son, or failing my having a son, or in the event of the decease of all my sons previous to the period hereinafter prescribed for conveying the said trust-estate, then for the maintenance and education of my eldest or only daughter," the trustees having a full discretion as to how to administer for his or her benefit; and, "Fourthly, upon my eldest or only son attaining the age of twenty-one years, or, failing sons, upon my eldest or only daughter attaining that age or being married, whichever event shall first happen, my trustees shall convey and make over the trust-estate as then held by them, and subject to any debts or encumbrances which may affect the same, to such eldest or only son or eldest or only daughter, as the case may be, and to his or her heirs or assignees whomsoever." Then, failing the truster having children, it is provided, in the fifth place, that the estate shall devolve upon his younger brother and his family under certain provisions which it is needless to enter upon in detail, because they are not dissimilar to those that are provided with regard to his own family. And then, in the sixth place, in the event of both the brothers—both the truster and his younger brother—dying childless, or the children predeceasing the time of conveyance, "the trustees shall make over the said trust-estate, so held by them at the time, to the heirs and assignees whomsoever of my said father."

These seem to me to be the material parts of the deed, and with regard to its general character and purpose there is really no room for dispute. It is a voluntary deed, and it is a gratuitous deed; and except in so far as it provides a liferent to the truster's father and to the truster himself, the purposes of the deed are purely and entirely testamentary. Everything that follows the decease of the truster and his father is a regulation of the truster's succession. I think it is impossible to dispute that. But, then, during the truster's lifetime the trust does not come into operation at all. He remains in possession of his estate with the full liferent enjoyment of the estate, and with uncontrolled power of management and administration. In short, the description of the truster's position, as we find it upon the face of this deed, is very like in all practical effects to that of an heir of entail in possession with the full beneficial enjoyment of the estate and the uncontrolled management of the estate. The result of all this seems to me to be, that until the death of the truster this trust-deed is dormant in regard to the fee of the estate. It cannot come into operation till then. Indeed, it is said, in express words, that it is only upon that occurrence that the trustees are to take and hold the estate as a trust-estate for purposes to be then carried into effect. Now, what are the purposes? 7.

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vide the estate to the truster's eldest son ; failing his having a son, to his best daughter ; and failing that, then to provide the estate to certain other beneficiaries, being his younger brother and his children ; and failing all that, the estate is to revert and belong to the heirs and assignees whomsoever of the truster's father, from whom both parcels of land originally came by disposition of a gratuitous character also in favour of the truster. The deed, therefore, it appears to me, so far as it is a trust-deed at all, and after the trust comes into operation, is simply a voluntary gratuitous testamentary deed, with a full reservation of the whole lifeerent enjoyment of the estate to the truster and uncontrolled powers of management.

Now, upon the authorities, I am of opinion that that is not a deed which is effectual against creditors. It would be quite idle to go over all the cases which bear upon this subject, and still more all the cases that have been cited to us, whether they bear upon the question or not. I content myself by saying that I think the result of all the authorities clearly is that such a deed as I have described this to be cannot be effectual against creditors.

That being so, the second question arises—Whether this deed, although not effectual in itself, has been made effectual against creditors by the way in which it is referred to and dealt with in the truster's marriage-contract ? Now, I do not doubt that such a deed as this might be dealt with in a marriage-contract in such a way as to incorporate the deed with the contract, and make it part of the stipulations of the onerous contract that the provisions of the prior deed should receive effect ; and if that were so, it is not necessary to dispute that the deed might thereby be rendered effectual against creditors, although not so in its original constitution. But has this been done in the marriage-contract ? That is the important question.

Now, the marriage-contract provides an annuity of £300 a-year in favour of the truster's wife, then his promised spouse ; and in part security of the personal obligation which he undertakes for the payment of this £300 annuity he exercises the power conferred upon him by the trust-disposition, of settling an annuity of £100 per annum upon his wife, and making that a burden upon the lands conveyed by the trust-deed. There is a further security granted for the lady's annuity which does not enter into the question we are now considering—a personal security granted by the truster's father. But this is the first reference in the marriage-contract to the trust-deed, and it amounts to no more than this, that the truster exercises the power reserved to him in the trust-deed of settling an annuity of £100 a-year upon his wife, and securing it upon the lands conveyed by the trust-deed. Then, further on, the truster, in contemplation of the marriage, “ binds and obliges himself and his foressaids to make payment to the child or children to be procreated of the marriage hereby contracted, who shall be alive at his death, other than the child who shall succeed to the said estates of Lawhead, Tarbrax, and Easterhouse, under the directions with reference to the destination of these estates contained in the said trust-disposition thereof in favour of George Auldjo Jamieson and others, as trustees foressaid, and to the issue then alive of any such child or children who shall not succeed as aforesaid who shall have previously died leaving issue, of the sum of £5000 sterling, at the first term of Whitsunday or Martinmas after the death of the said Stewart Souter Robertson, with a fifth part more of penalty,” and so forth. And then, further, the truster, without prejudice to the personal obligations undertaken by him, assigns to certain trustees his general estate, and that

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in security for payment of this sum of £5000 to the children of the marriage other than the child who shall succeed to the estates of Lawhead, Tarbrax, and Easterhouse under the trust-disposition; and a clause follows declaring that the assignation is expressly restricted to the £5000, and that his general estate is not further bound, and that the assignation shall receive no further effect. Then, it is provided that in the event of the lady predeceasing her husband, and there being no child or children of the marriage, the trustees shall in that case make over and reconvey the whole trust funds and estate then in their hands to the said Stewart Souter Robertson, or shall hold the same for his behoof and at his disposal as he shall choose, and in the event of the lady surviving him, and there being no younger children other than the child or issue of the child entitled to succeed to the estates of Lawhead, Tarbrax, and Easterhouse, the trustees are to pay over the same to such child or issue at such terms and on such conditions as the said Stewart Souter Robertson shall point out by any writing under his hand. And then follow the provisions on the part of the lady, which do not, so far as I can see, affect the question we are now considering at all.

Now, then, what is the nature and effect of the references in this marriage contract on the trust-disposition? In the first place, the truster exercises the power reserved to him by that trust-disposition of settling an annuity of £100 a-year on his wife, secured on the lands conveyed by the trust-disposition, and the only other reference to the deed is this, that the provisions of £5000 made by the husband in the marriage-contract, and in consideration of the marriage, which is to follow, are made in favour of the children of the marriage who do not succeed to the lands conveyed by the trust-disposition. If nobody succeeds to the lands conveyed by the trust-disposition then that reference to the trust-disposition will really have no effect at all, and the children will all succeed equally to the £5000, or in such proportions as may be appointed under a power reserved. But if the eldest son succeeds under the trust-disposition, then the £5000 will go entirely to the younger children, excluding the eldest. But there is no provision in this marriage-contract that the lands shall descend to the eldest or any other son. In short, the provisions of the trust-deed are not made stipulations or conditions of this marriage-contract; and if the provisions of the trust-deed are not made stipulations or conditions of this marriage-contract, then I do not see how the trust-deed can receive any greater support or efficacy from the reference to it in the marriage-contract than it had in its own original conception. It is referred to as matter of fact that the lands of Tarbrax and Easterhouse are settled upon the eldest son of the truster, and, failing him, upon certain other parties. That is assumed as a matter of fact, but it is not made matter of contract. The fact that the trust-deed exists is no doubt a fact assumed; and just because that provision has been made in the trust-deed that certain provisions are made in the marriage-contract that if the trust-deed receive effect, and the lands thereby conveyed descend to the eldest son, then the eldest son is not to participate in the £5000. But that is all; and as it is not made matter of contract that the disposition of the fee in the trust-disposition shall receive effect, it appears to me that the trust-disposition derives no strength whatever from the reference in the marriage-contract.

I am therefore of opinion upon the whole matter that this trust-deed, whether taken by itself or taken in connection with the marriage-contract, is not good against creditors. Whether it is a revocable deed in the event of the truster remaining solvent is a totally different question, upon which I give no opinion.

purely gratuitous testamentary deed may be made irrevocable, and yet may be bad against creditors. The truster may be personally bound, but for all that the estate may not be defended against the diligence of creditors. That is a distinction which runs through all the authorities, and a distinction, I think, perfectly sound on legal principle; but whether the deed in the present case is or is not a revocable deed I do not presume, nor do I think it necessary, to enquire, because I am quite clear upon the other point, which is the only point of any importance here in this case with the trustee in the truster's sequestration, that it is not good to exclude the diligence of creditors. I am therefore adhering to the Lord Ordinary's interlocutor.

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LORD DEAS.—On 2d December 1861 Mr David Souter Robertson (whom I shall call Souter Robertson the first) conveyed one of several landed estates belonging to him to his eldest son, Stewart Souter Robertson (whom I shall call Souter Robertson the second), under reservation of his own "liferent use and possession thereof, and of the houses and others erected thereon, during all the days" of his lifetime. This deed was completed by registration, in lieu of infestment, in the Register of Sasines on 10th December 1861.

On 12th April 1862 Souter Robertson the second disposed the fee of the same estate, with his "whole right, title, and interest therein," under the two reservations after-mentioned, to trustees (who are defenders in this action), heritably and irredeemably, for the purpose, in the event (which has happened), of his being survived by issue of his body, of applying (under deduction of expenses and other outlays) such portion of the free income "as may be necessary for the maintenance, education, and advancement of my eldest or only son, or failing my having a son, or in the event of the decease of all my sons previous to the period hereinafter prescribed for conveying the said trust-estate, then for the maintenance and education of my eldest or only daughter," the trustees having full discretion as to the proportion to be so applied, and the surplus, if any, to "be applied in payment of any debt which might then affect the trust-estate, or be added to and form part of the capital of the trust-estate under the management of the trustees." The deed further provided—"Fourthly, Upon my eldest son attaining the age of twenty-one years, or, failing sons, upon my eldest or only daughter attaining that age or being married, whichever event shall first happen, my trustees shall convey and make over the trust-estate as then held by them, and subject to any debts or incumbrances which may affect the same, to such eldest or only son, or eldest or only daughter, as the case may be, and to his or her heirs or assignees whomsoever." The fifth and sixth purposes provided for the event of the truster dying without issue, or of all his issue predeceasing the period at which the trust-estate was to be made over to them, and need not be here narrated. Nor need any notice be taken of a liferent of the lands of Easterhouse conveyed back to the truster's father, Souter Robertson the first, which is not challenged in this action, any more than the validity of the original conveyance by Souter Robertson the first to his son Souter Robertson the second.

The first of the two reservations which I have mentioned was thus expressed—"Reserving always, as I do hereby specially reserve, from the above-written conveyance of the said several lands and others, in favour of the said trustees, my liferent use, possession, and enjoyment of the said lands and others, and the

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The second of the two reservations was in these terms—"Reserving also full power to me, either in contemplation of or after my marriage, to burden and affect the said several lands and others with an annuity or jointure in favour of any wife I may marry, not exceeding £100 per annum, to be made payable, the said annuity or jointure, to my wife should she survive my said father and me out of the said lands and others, or any part thereof, at two terms in the year Whitsunday and Martinmas, by equal portions, commencing the first payment of the said annuity at the first of these terms which shall happen after the death of my said father and me, for the subsequent half year, and so forth half-yearly thereafter during the life of my said wife after the death of my said father and me, and which power of granting such annuity or jointure hereby reserved by me may be exercised by my granting a bond of annuity to be contained in a contract of marriage, or by a separate bond to be executed by me in contemplation of or subsequent to my marriage."

The deed further bore—"Also I give full power to my trustees to make and complete all proper titles in their persons to the lands and others hereby conveyed, with the fullest powers of administration and management of the trust-estate under their charge."

These full powers of administration and management could, of course, only commence on the cessation of the powers of administration and management reserved to the father and son, Souter Robertson the first and Souter Robertson the second, as successive liferenters. But the right conferred to the fee of the estate was immediate and absolute, and the power to complete titles, which was at any rate incidental to and implied in the dispositive clause, was obviously intended to be also immediate. Accordingly, the title of the trustees and of Souter Robertson the first, "for their respective rights of fee and liferent as aforesaid," was forthwith completed by notarial instrument (in lieu of infeftment), duly recorded on 17th April 1862.

That the trust-deed was duly delivered to and forthwith acted on by the trustees is amply proved by the documents in process.

The record of sasines bears, under date 17th April 1862, that there was presented to the notary-public, on behalf of the trustees appointed by the trust disposition of the 12th of that month, and on behalf of the liferenters for their respective interests, the notarial instrument which is engrossed in the new General Register of Sasines, and which is equivalent to infeftment in the old form as of the first-mentioned date. Four years afterwards the trustees became parties to a lease of the minerals in the lands, dated in March and April 1866. Afterwards they became parties to assignments of that lease, executed in December 1870 and January 1871. And in the interval, viz., in June 1866, they, in their avowed and express character of "heritable proprietors of the lands" disposed, with consent of the liferenters, a portion of the lands, "heritable and irredeemably," to the Caledonian Railway Company by deed, which was recorded in the Register of Sasines on 19th July 1867.

I pause here to observe that, whatever may be said against the efficacy of the deed in a question with the granter's creditors, it is unquestionably in its terms an absolute and irrevocable conveyance of the fee of the estate. Upon the face of the deed and of the public records Souter Robertson the second stands feudally divested of, and the trustees feudally invested in, the fee of that estate.

A power is reserved to the truster to affect the estate with an eventual annuity No. 8.
to his wife of £100 per annum, but that power only suggests the observation
that by the terms of the deed the truster reserved and retained no other power Oct. 27, 1876.
over the fee of the estate. The same remark applies to the reservation of his Forrester v.
eventual liferent, which liferent is in no respect amplified by calling it a "life- Robertson's
ent use, possession, and enjoyment." Every liferenter has "the use, possession, Trustees.

and enjoyment" of the estate for the time being. Nor is the nature of the right changed by adding "and the uncontrolled management thereof during all the days of my life from and after the death of my said father." Some liferents are more ample than others, with respect, for instance, to mines and minerals, the granting of leases, &c. How far the words "uncontrolled management" may explain or amplify the nature of this liferent it is unnecessary to inquire, because it is quite obvious that there remains, in any view, a right of fee in the trustees for behoof of the truster's eldest son (whom I shall call Souter Robertson the third), which, by the terms of the deed and of the existing investiture, cannot be disposed of or affected by Souter Robertson the second, except in security of the £100 annuity; and the existence of this fee, whatever limitations may have been placed on its value, is sufficient to raise the present competition.

Now, I am not disposed to say that all this would be sufficient to exclude the grantor's creditors if the trust-deed were gratuitous. But if the trust-deed be an antenuptial marriage deed it is then undoubtedly an onerous deed, and that substantially resolves the present question into this—Is the trust-deed to be regarded as an antenuptial marriage deed or not?

I am prepared to answer that question in the affirmative.

To constitute an antenuptial marriage deed or marriage settlement it is not essential that the deed should be in its form a mutual deed. A unilateral deed followed by marriage may be quite enough. In the recent cases of *Smith Cuninghame's Trustees*¹ and of *Mercer v. Anstruther's Trustees*,² amidst all the differences of opinion that arose both here and in the House of Lords on various points, nobody doubted that Mr Anstruther's unilateral trust-deed, followed by marriage, constituted a valid marriage settlement, securing to his widow all the provisions contained in it, so far as the funds he thereby dealt with were held to have been his own or at his disposal. Still less is it necessary that the marriage provisions should be all contained in one deed, or that each deed should bear expressly to import into it the contents of the other deed with the formality, which would be necessary to exclude the objection to an entail, that it had been attempted to be made by reference. It is quite enough that the marriage deed, although unilateral, was made by the one party in contemplation of the marriage which followed, and relied on by the other party.

In the present case there was not only the unilateral deed, delivered to trustees for behoof of the future heir of the marriage, but there was the bilateral marriage-contract, in which the unilateral deed is narrated and referred to in terms which, I think, make it impossible to say that the wife and her friends were not entitled to rely upon it as having secured to the heir of the marriage the only provision which the husband made for that heir in contemplation of the marriage. Marriage settlements are, of all deeds, to be construed according to

¹ March 6, 1871, 9 Macph. 618, 43 Scot. Jur. 285; April 25, 1872, 10 Macph. (H. L.) 39, 44 Scot. Jur. 407.

² July 19, 1870, 8 Macph. 1013, 42 Scot. Jur. 579.

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good faith, and not to be defeated by defective expression or want of technicalities. It is not in the mouth of the husband, or of any one claiming in right of the husband, to say that, although the terms of the deed were such as might naturally lead the wife and her friends to believe that the heir of the intended marriage had been provided for, this belief must be held to have been delusive wherever the deed at all admits of being construed otherwise.

This contract of marriage provides an annuity or jointure of £300 to the wife in the event of her survivance, restrictable to £150 in the event of her entering into a second marriage; and in security so far of this personal obligation, and without prejudice thereto, "the said Stewart Souter Robertson, in virtue of a power to that effect reserved to him in a trust-disposition dated 12th April 1862, of the estates of Lawhead, Tarbrax, and Easterhouse, in favour of George Auldjo Jamieson, accountant in Edinburgh, and other trustees, for the purposes therein specified, hereby provides and disposes to the said Ann Scrivenor Hamilton in liferent during all the days of her lifetime after the death of the said father and him, in case she shall survive them," a free yearly annuity of £100 furth of the lands of Lawhead, Tarbrax, and others, and the lands of Easterhouse and others, which are all thereby disposed to her in security.

Here there is a distinct and express recognition of the trust-deed as a valid and completed deed, by which the lands stood disposed to the trustees "for the purposes therein specified," and these purposes are, I think, referred to as purposes which the granter had no power to interfere with, except in virtue of and to the extent of heritably securing to his future wife a certain eventual annuity.

But if it could have been doubted that this reference to the trust-deed was sufficient to call attention to it as a deed executed in contemplation of the marriage, the doubt would, I think, be entirely removed by the exception which is made in it of the future heir of the marriage from all interest in the provision made by the contract for the other children of the marriage. The contract binds the intended husband "to make payment to the child or children to be procreated of the marriage hereby contracted, who shall be alive at his death other than the child who shall succeed to the said estates of Lawhead, Tarbrax, and Easterhouse, under the directions with reference to the destination of these estates contained in the said trust-disposition thereof in favour of George Auldjo Jamieson and others, as trustees foresaid, and to the issue then alive of any such child or children who shall not succeed as aforesaid who shall have previously died leaving issue, of the sum of £5000 sterling, at the first term of Whitsunday or Martinmas after the death of the said Stewart Souter Robertson," &c.

Could it reasonably be supposed to occur to the other contracting party or parties that this meant that the heir of the marriage was not to be provided for by the husband at all? On the contrary, I cannot look upon this as anything short of a representation that the estates of Lawhead, Tarbrax, and Easterhouse had been already secured to the heir of the marriage by a deed executed in contemplation of the marriage.

It is true that the trust-deed does not mention the particular marriage. But the proximity of dates is of itself sufficient to shew, beyond all reasonable doubt, that the marriage in view was the marriage which afterwards took place on 29th April 1862. The trust-deed was executed on 12th April, probably in order that the conveyance contained in it might be completed by recording the notarial instrument before the contract should either be presented for signature or the marriage celebrated. The notarial instrument was recorded on the 17th April—

The marriage-contract was executed on the 26th—and the marriage was celebrated on the 29th, all of the same month and year. To suppose that the marriage contemplated by the trust-deed was any other than the marriage contemplated by the contract, dated only a fortnight afterwards, would be somewhat extravagant. The trust-deed was, in my opinion, just as much an antenuptial marriage deed as if it had been embodied in or expressly adopted by the marriage-contract. The two deeds formed together the antenuptial marriage settlement, and if this were to be held questionable on the face of the deeds—which I think it is not—I could have no doubt at all of the relevancy of the averments contained in the defenders' second statement in the record, nor of the competency of proving these averments either by writing or by the real evidence of facts and circumstances.

These averments are in substance—1st, That the engagement to marry, which resulted in the marriage, was made in July 1861; 2d, That the conveyance by Souter Robertson the first to his son Souter Robertson the second, in December 1861, was granted with the view of enabling the latter to settle the lands on entering into that particular marriage; 3d, That the trust-deed was executed in contemplation of, and by way of provision for, that same marriage; 4th, That the marriage took place on the faith of that deed as forming part of the marriage settlement.

Assuming it to be proved or admitted that the engagement to marry preceded the execution of the trust-deed, I should be disposed to hold that the third and fourth of the above heads were matter of presumption requiring no proof. The second head (namely, the object of the conveyance by Souter Robertson the first) if it stood alone, might be of doubtful relevancy; but it is much the least material of the four. Of the relevancy and competency of proving all the other three heads, either by writing or by the real evidence of facts and circumstances, I have no doubt at all. There has been no renunciation of probation on either side, and I do not mean to suggest that the pursuers are precluded from even yet joining issue upon the above averments if they choose to do so. But the case has been decided by the Lord Ordinary, and pleaded to us by the pursuers, upon the footing that the facts averred by the defenders are irrelevant, and so long as that is the shape of the case the truth of the defenders' averments, so far as relevant, must be assumed.

Taking the case so, it does not appear to me to matter whether there have been several deeds or only one deed executed before marriage. If executed with a view to that particular marriage, and marriage has followed, the deed or deeds must be regarded as in the highest sense onerous, and the obligations contained in them fulfilled accordingly.

In the present case, besides the onerous consideration of the marriage itself, there were important considerations given by the lady and her friends in return for the provisions made for her and her issue, among which last provisions I think it impossible to suppose that they did not reckon the fee of the estate provided to the heir of the marriage. The marriage-contract bears, *inter alia*, that Miss Eliza Hamilton, sister of the bride, "in terms of an arrangement to the effect after specified, undertaken by her in the treaty for the said intended marriage, hereby binds and obliges herself, but only in the event of her succeeding to the entailed estates of Fairholm and others, in the counties of Lanark and Edinburgh, of which she is at present the presumptive heiress of entail, to make payment to the said Ann Scrivenor Hamilton, and her heirs and assignees

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whomsoever, of the sum of £2000 sterling, with interest from the date when the succession might open to her." And by the immediately following clause the bride herself conveyed to the trustees named in the deed the whole means and estates, heritable and moveable, then belonging to her, or to which she might acquire right during the subsistence of the marriage, including all sums to become due and payable under the said obligation undertaken by her sister Eliza Hamilton (excepting only her paraphernalia and sums she might acquire by bequest, gift, or otherwise, under the amount of £100), all to be held in trust for her liferent use, exclusive of the *jus mariti*, and for the liferent of her promised husband, if he survived her, and for the issue of the marriage in default of issue. The eventual liferent of Miss Eliza Hamilton's £2000, and the eventual liferent of the bride's whole means and estates, thus stand irrevocably conveyed to Souter Robertson the second, and are of course attachable by his creditors. The treaty for the intended marriage, to which Miss Eliza Hamilton is said to have been a party, is obviously spoken of as a treaty which had preceded the execution of the marriage-contract. Miss Eliza Hamilton, so far as we see, had no interest to bind herself as she did, except to aid her sister in obtaining under that treaty better terms for herself and her issue than she might otherwise have got; and if these terms are not to be fairly fulfilled, the considerations in respect of which the wife disposed of her whole means and estate by the contract, and prevailed on her sister to dispose of a portion of her means and estate, will not have been made good to either of the two.

The question is not one, as the Lord Ordinary seems to put it, between Souter Robertson the second on the one hand, and his creditors on the other; but between Souter Robertson the third, the heir of the marriage, on the one hand, and Souter Robertson the second and those in his right, on the other.

The case has no analogy whatever to a gratuitous entail, to which it is likened by the Lord Ordinary, nor to a gratuitous deed of any kind, by which, as his Lordship rightly observes, it would be against the policy of the law to allow a man to put his estate beyond the reach of his creditors without putting it beyond his own reach. But it is not against the policy of the law to allow a man to put the fee of his estate beyond the reach both of himself and his creditors by an antenuptial marriage deed, completed by sasine (or its equivalent) in the public records, as the trust-deed was here; and if he reserves his own liferent, as is usually done in marriage-contracts or other antenuptial deeds, the effect of that simply is, that the creditors can attach the liferent which is his, but that will not enable them to attach the fee, which is not his.

The Lord Ordinary arrives at his result by putting and answering three questions. The first is, Whether the fee was at once put beyond the reach of the creditors by the trust-deed? He answers this in the negative, and then asks, second, Whether, although not originally good, the deed became good for that purpose (that is, for the exclusion of creditors) by the reference made to it in the marriage-contract? Having answered this also in the negative, his Lordship asks, third, Whether, although not good till then, it became good on the birth of a son of the marriage? and to this question also he gives a negative answer.

Now, with the greatest possible deference to his Lordship, this mode of reasoning is altogether fallacious. It ignores the only real question in the case, namely, Whether the trust-deed and the marriage-contract are, each of them, part and portion of what constituted the marriage settlement? In my opinion

they are so, just as much as if they had been embodied in one continuous paper, with one testing-clause. Neither the trust-deed nor the marriage-contract would have been effectual for any purpose if marriage had not followed. But the effect of the trust-deed, the marriage-contract, and the marriage itself, are not to be separately met and overcome after the fashion of the *Horatii* and *Curatii*. They must all be taken together, and the question then put, What is their combined force and effect?

If they were to be separately considered at all, it would be a more apt illustration to ask whether there can be any doubt that the trust-deed would have taken effect as an antenuptial marriage deed if no other deed had been executed prior to the marriage? And if it would have done so, can the marriage-contract be regarded as intended to prevent the trust-deed from operating as it otherwise would have done? I am not able to take that view of the meaning of the contract. There is no inconsistency between the contract and the trust-deed. Separate trusts are created by the two deeds—the one for behoof of the life-tenants of the heritable estate and the heir, and the other for behoof of the widow and younger children. But there is nothing inconsistent or even remarkable in that. The provisions of the trust-deed are to no extent superseded by the provisions of the contract. The younger children are not at all provided for by the trust-deed, and the heir is not at all provided for by the contract. The two deeds are not only capable of standing together, but the usual purposes of a marriage settlement, where there are landed estates and personal funds to settle, are not accomplished unless the two deeds do stand together. The contract neither supersedes nor recalls anything in the trust-deed, either directly or by implication. On the contrary, the contract narrates and refers to the trust-deed as a good and subsisting deed, and on that assumption provides for the issue of the marriage in so far, and in so far only, as the issue had not been already provided for.

As regards the third question put and answered in the negative by the Lord Ordinary—Whether, if not previously good, the trust-deed became good by the birth of a son of the marriage?—it is really a mere question of words. There is a sense in which the trust-deed became effectual only by the birth of an heir of the marriage; for if there had been no heir of the marriage, male or female, there would have been no creditor in the obligation, whether contained in the trust-deed or in the marriage-contract, it being trite law that in marriage settlements there is no onerosity as to such provisions beyond the issue of the marriage. But that does not prevent the trust-deed from being a good deed *ab initio*, to provide for the eventuality of there being an heir of the marriage, and this was done just as effectually by the conveyance of the fee of the estate to the trustees for behoof of the expectant heir as if there had been a direct conveyance in favour of an existing beneficiary.

Upon the assumption that the trust-deed is to be regarded as an antenuptial marriage deed, the whole law applicable to it is to be found in the important and authoritative case of *Herries, Farquhar, & Co. v Brown, &c.*, 9th March 1838, 16 S. 948.

In that case the husband, Mr Macdonald, bound himself by the marriage-contract to pay to the children of the contemplated marriage, if more than one besides the heir on whom the estate of Clanranald was thereby entailed, £20,000, and if only one child besides the heir £10,000, payable at such times and in such proportions as he (Mr Macdonald) should appoint, and failing such appoint-

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ment, then equally, within six months after his death, bearing interest in any event from the date of his death; and in security of this obligation he granted a precept of sasine, which was followed by infestment in favour of trustees named in the contract in the said lands of Clanranald and others therein described. The contract further contained a precept of sasine, on which infestment followed, for infesting Mr Macdonald himself and the heirs-male of the marriage, whom failing the other heirs therein mentioned, in the said lands and estate, under the fetters of a strict entail, subject always to the burden of the provisions to the younger children and a life annuity to his wife.

Thereafter Mr Macdonald contracted large debts, and his creditors brought a declarator and supplementary declarator to have it found that neither the provision to the younger children nor the entail in favour of the heir of the marriage could compete with, and, still less, could be preferable to the debts so contracted.

As regarded the provision to the younger children (five in number) Lord Fullerton, Ordinary, found that these children were onerous creditors of their father to the amount of that provision, and therefore that the trustees infest in security thereof were entitled to compete and interfere with the diligence of the creditors according to the right and preference legally conferred by such security.

After a hearing in presence before the whole Court this judgment was unanimously adhered to. In the present case the trustees for the heir of the marriage are infest as absolute fiars of the estate. In that case the trustees for the younger children were infest in security only of their provision of £20,000, and for which provision they were held preferable to the father's subsequent creditors. In that respect therefore the judgment is *a fortiori* in favour of the preference claimed by the trustees for the heir over the creditors (who are all subsequent creditors of the father in the present case).

It is unnecessary to follow out the other branch of the case of Herries, Farquhar, & Co., which was resumed before the First Division of the Court, and argued in cases between the creditors of the father and the heir-male of the marriage, further than to observe that, in respect of the obligation undertaken by the father in his marriage-contract to execute an entail of the Clanranald estate, subject to the burden of the provisions to the younger children, it was found that the subsequent creditors of the father were "not entitled to do any diligence against the said lands or the price thereof so as to affect the rights of the said heir or heirs therein," reserving to the creditors under their decree against the father "all competent diligence against him and his life-interest in the said estate, or any part of the same, or the price thereof"—a judgment in its terms very analogous to what, I should say, would be the appropriate judgment in the present case, varying it only so far because here the heir is entitled to the absolute fee, whereas there he had only a right to succeed after his father as heir of entail.

The judgment in the case of Herries, Farquhar, & Co. has ruled the law and practice of the country for now close upon forty years, and if your Lordships were to agree with me in thinking that the trust-deed in the present case was part and portion of the marriage settlements of Souter Robertson the second, I do not suppose you would hesitate in applying to the case the principles recognised in that judgment.

I have thought it right, however, thus briefly to refer to it not only because it contains the law of this case on the assumption of the trust-deed being an ante-

nuptial marriage deed, but likewise because I think the elaborate opinions then delivered, by some of the ablest Judges of recent times, naturally suggest that such a deed as this trust-deed, executed in contemplation of marriage, ought not readily to be disconnected with the high onerosity of the marriage itself.

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LORD MURE.—With reference to the first question which was raised for our consideration,—viz., Whether this trust-deed, taken by itself, is sufficient to protect the estate against the diligence of the granter's creditors?—I have not had much difficulty in coming to the conclusion which your Lordship and the Lord Ordinary have come to, namely, that it is not sufficient. In that conclusion, as regards the deed itself, I do not understand that, taken by itself, Lord Deas differs in opinion. Upon the view of the deed itself I think that it is a voluntary and gratuitous deed, and that it is substantially a *mortis causa* deed made with a view to regulate the succession of the parties to that particular estate. There is no doubt that under it the trustees seem not only to have taken infetment, as they were quite entitled to do, but to have been parties to certain leases and arrangements which took place under it. But looking to the terms of the trust-deed itself, by which the whole uncontrolled management is left to the two liferenters during their lives, and to the clause which your Lordship in the chair referred to, by which it is only after the death of the survivor of the liferenters that the trustees are to enter into the possession and management of the estate, I do not think it can be held that they have at this present moment the position of being trustees in the management and possession of that estate. I think, therefore, that, as the deed is substantially in its terms a *mortis causa* deed, it cannot be held to protect the estate against the diligence of the granter's creditors.

Upon the other part of the case, namely, the effect of the marriage-contract which is said to have been entered into a short time after the date of the deed, I confess that I have had more difficulty—I mean with reference to the decision in the case of Herries, Farquhar, & Co., which Lord Deas has referred to. And that raises the question, Whether this trust-deed of Mr Stewart Souter Robertson was so dealt with in his marriage-contract as to make it part and parcel of that antenuptial contract, in the sense that it made the obligations undertaken under that marriage-contract the consideration for the granting of the trust-deed? Now, no doubt the trust-deed is referred to in the contract—your Lordship has gone over the clauses, and I do not mean to repeat them,—but as I read that contract it is referred to simply with a view to enable the party to avail himself of the clause of reservation, by which he is entitled to settle an annuity upon his wife, and make that annuity a real burden upon the trust-estate. Having referred to it for that purpose, the marriage-contract proceeds to create a new trust,—a marriage-contract trust, separate and distinct altogether from the trust created by the original trust-deed. Different trustees are named; there is a conveyance to them of certain moveable estate to which Mr Souter Robertson was entitled under the marriage-contract between his father and his mother; and these trustees are made the trustees for carrying out the terms of that marriage-contract trust, and for dividing the property so put in trust amongst the children of the marriage. And then there is a provision,—“For which causes, and on the other part,” the sister of Mrs Souter Robertson settles a certain sum of money upon her, and conveys it to those marriage-contract trustees, with a view to division among the children of the marriage. That is substan-

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tially the nature of that trust. Now, I do not see that this counterpart by the wife and her sister is made in any degree dependent on the terms of the first trust-deed. It is granted in respect of the provision which Mr Souter Robertson settled upon his children—viz. the £5000 settled by the new trust-deed—and the provision by the relation of the lady is the counterpart for that, to make the provision of £2000 in favour of these children in the same way. Now, then, is that a case in which the trust-deed is made part and parcel of the marriage-contract in the sense in which the trust-deed in Herries, Farquhar, and Company was to be held? I have come to the conclusion, after careful perusal of the case of Herries, Farquhar, and Company, that it is not,—that what has been done here does not bring this case within the provisions of the rules laid down in Herries, Farquhar, and Company. I think the mere reference to the deed as an existing deed, or referring to the fact that that particular estate had been settled in a particular way, is not such a reference as we find in the marriage-contract in the case of Herries, Farquhar, and Company. I do not see that this estate was settled in consideration for anything done under the marriage-contract. Nor do I see it stated in the marriage-contract that anything was done under the contract in consideration of the existence of that trust-deed. In the case of Herries, Farquhar, and Company it was quite the contrary. There the trustee under the first trust-deed became a party to the marriage-contract expressly, and undertook to reconvey the estate held by him in trust for the purpose of paying off the debts to Clanranald and the other heirs of entail. And the ground on which the Court came to the conclusion with regard to this undertaking on the part of the trustee, and the consideration in respect of which that undertaking took place, was in respect of the peculiarly onerous terms of the marriage-contract itself. As I read the opinions of the Judges, the mere fact of the marriage having been entered into was not held to make the transaction of itself so onerous as some of the authorities might imply. But, in the opinion of Lord Mackenzie, on that second branch of the case, viz. whether the entail stood good, his Lordship distinctly alludes to the fact of its having proceeded on most onerous considerations. He says (p. 978),—"Macdonald subsequently entered into the marriage-contract, 1812, and the trustee, Brown, was made a party to it in the express character of trustee infest in the lands. On most onerous considerations various stipulations were undertaken by Macdonald, the trustee, and him, the trustee; and in particular a sum of £10,000 was paid by the father of Lady Caroline to the trustee for the purposes of the trust. In consideration of this Macdonald, with consent of the trustee, Brown, bound himself to execute a strict entail of the lands which should remain after satisfying the trust, 1811, in favour of himself and the heir-male of the marriage, now defender, and the other heirs there mentioned. It was expressly declared that the fetters of this entail should be laid on Macdonald himself as well as on the heirs of entail, and that it should be an irrevocable deed. The trustee, Brown, went along with this whole obligation as an express consenter, &c. This was an obligation which was clearly binding on the trustee, and which was undertaken for a full onerous consideration"—the full onerous consideration being the £10,000 that the marriage-contract bore was advanced by the lady's father.

Now, in the present case, we have no stipulation in the marriage-contract that this estate of Tarbrax shall go to the eldest son,—no provision that it is to be held by him. On the contrary, the original trust-deed, as I read the marriage-contract, is simply referred to with reference to the fact that an estate had been

settled under which there was a power reserved to burden it with an annuity in favour of the widow of the truster, who was then entering into the marriage; but I can find nothing in the terms of that deed which entitles me to say that there was any such onerous consideration as that which occurred in the case of *Hurries, Farquhar, and Company*, and in respect of which onerous consideration alone it was that the Court, as I read that judgment, came to the conclusion that the estate was protected against the creditors. On that ground I concur with your Lordship and the Lord Ordinary in holding that neither the marriage-contract, nor anything that was done at the time of the marriage, can be held to have placed this estate in the position of being protected against the creditors.

THE COURT adhered.

ALLI WILIE, W.S.—TODD, MURRAY, & JAMIESON, W.S.—BRUCE & KERR, W.S.—Agents.

JOHN ALAN M'DONALD, Pursuer.—*Fraser—Trayner.*

COLONEL ALASTAIR M'IAIN M'DONALD, Defender.—*Lord-Adv. Watson—M'Laren—Balfour—Mackintosh.*

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Appropriate and Reprobate—Implied Condition—Entail—Entailer's Debts.—By an antenuptial contract of marriage the wife's fortune was conveyed to trustees, with directions, on the death of the survivor of the spouses, to pay over the trust-funds to the children of the marriage, in such proportions, and at such time, and under such conditions, as the spouses should by joint deed appoint. A portion of the wife's funds, amounting to £25,000, was during the subsistence of the marriage advanced by the marriage-contract trustees on heritable bond over two estates (adjoining the husband's patrimonial estate) which had been purchased by him. The parents, on the narrative that it was their wish to entail those estates on the children of the marriage and their heirs, along with the husband's patrimonial estate, which was settled by the marriage-contract upon the eldest son, subject to the husband's power of making a strict entail, and upon the further narrative that the husband had agreed to execute an entail of the whole estates, and had executed the same, proceeded, in the exercise of their power of division, to provide that the above-mentioned sum of £25,000, secured over the husband's estates, should be "settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate," the said sum being "the share of the trust-funds which we do hereby allot and apportion as the share of our eldest son, or, failing him, of the heir of entail succeeding to the said entailed estate, it being our desire and appointment that the said trustees under our marriage-contract . . . should, immediately on the death of the survivor of us, renounce and discharge the said heritable bond, and disburden the said lands and estates" of the same. The relative deed of entail by the husband, which was declared to be onerous and irrevocable, was executed on the same day as the deed of division, and each deed bore to be granted in consideration of the other. Infestment was taken upon the deed of entail in favour of the spouses as liferenters and of the eldest son as fiar.

After the death of his parents, the eldest son claimed that the above-mentioned sum of £25,000 should be paid over absolutely to him, and this he was found entitled to by a judgment of the House of Lords.

In a subsequent action brought against the eldest son by his brother (who was the next heir-substitute in existence under the deed of entail), for declarator that the eldest son was bound to make his election between the £25,000 and the two entailed estates, subject to the condition that they should be disencumbered of the £25,000, and that the defender had elected to take the £25,000, and was bound to denude of these estates, held that the eldest son was not put to his election, but that although he had taken the money absolutely, and kept it up as a debt against the entailed lands, he was also entitled to remain in possession of these lands.

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Opinion (per Lord Justice-Clerk), that, although no case of election was raised in regard to the £25,000, the expressed intention of the granter of the entail that his eldest son should pay off the debt of £25,000 affecting the lands created an implied condition of the entail which he was bound to implement. Opinions *contra*, per Lords Neaves, Ormidale, and Gifford.

2D DIVISION.

Ld. Curriehill.

I.

(*Vide* M'Donald v. M'Donald's Trustees, June 17, 1875, *ante*, vol. ii. H. L. p. 125).

The following narrative is taken from the note of the Lord Ordinary:—
“In this action the pursuer, John Alan M'Donald, calls upon the defender, Alastair M'Iain M'Donald, his elder brother, and heir of entail now in possession of the entailed estates of Loch Garry and Kinloch Rannoch, in Perthshire, to denude of said estates in favour of him (the pursuer), in respect that he was bound to elect between these estates and a provision of £25,000, appointed to him by his father and mother, the late Sir John and Lady M'Donald, under a deed of appointment and division executed *unico contextu* with the deed of entail, and that he has elected to take the money.* The circumstances in which the action has been raised are as follows:—

“In 1826 Sir John M'Donald, then Lieutenant-Colonel M'Donald of Dalchosnie, was married to the now deceased Adriana M'Inroy (afterwards Lady M'Donald), daughter of the deceased James M'Inroy of Lude. By antenuptial contract of marriage entered into between them, dated 24th September 1826, Sir John M'Donald, in contemplation of the marriage, disposed to himself and Lady M'Donald, in conjunct fee and liferent, but for her liferent use allenary in case she should survive him, and to the heirs-male of the marriage, whom failing, the heirs-male of Sir John's body in any subsequent marriage, whom failing, certain other heirs thereunto specified, All and Whole his estate of Dalchosnie, in the county of Perth, reserving, nevertheless, full power to Sir John to execute a strict entail of the whole or any part of the said estate, providing only that he should in such entail first call to the succession the series of heirs specified in the contract, in the order therein narrated, and thereafter such other heirs as he should think proper, and should noways defeat or injure Lady M'Donald's liferent right. On the other hand, Lady M'Donald conveyed the whole share and interest of every kind and description in the estate of her father, the said deceased James M'Inroy, to certain trustees, who were to hold the same in trust for the conjunct liferent right and use allenary of the spouses, and after the death of the spouses to pay over or assign the whole to the child or children to be procreated of the marriage, in such proportions, and at such time, and under such conditions as Sir John and Lady M'Donald should, by any joint deed, or as Lady M'Donald, if the survivor, should, by any deed or writing signed by her, direct or appoint; and failing any such direction or appointment, to hold the same after the death of the survivor of the spouses for behoof of the children of the marriage, in certain shares and proportions specified in the contract. The shares were to be payable to the sons at the age of twenty-five, and to the daughters at that age or on marriage, but were not, in any case, to become vested interests until the death of the survivor of the spouses.

“It will thus be seen that, in virtue of the contract, the eldest son of the marriage and his male descendants had, subject to his mother's liferent, a right of succession to the estate of Dalchosnie which Sir John M'Donald could not gratuitously defeat, but which he might limit by the

* There was also an alternative conclusion for damages sustained by the pursuer in respect of the defender making the said election and reprobating the deed of division and deed of entail.

etters of a strict entail. On the other hand, an indefeasible right to the whole of Lady M'Donald's fortune was conferred upon the whole children of the marriage as a class, including the eldest son, the amount to be received by each being subject to appointment by the spouses, and the vesting being postponed till the death of the survivor of the spouses.

"Several children were born of the marriage, viz. four sons and three daughters. The defender, Colonel Alastair M'Innes M'Donald, is the eldest son, and the pursuer, John Alan M'Donald, is the second surviving son; the other two sons predeceased their parents. The three daughters are all alive. Sir John M'Donald died on 24th June 1866, and Lady M'Donald on 7th November 1872.

"Lady M'Donald's fortune, derived from her father's estate, amounted to upwards of £50,000, which was received by the marriage-contract trustees for the purposes of the trust. A few years after the marriage Sir John M'Donald purchased two estates, named Loch Garry and Kinloch Rannoch, adjoining Dalchosnie, at the price of £28,000, which, by expenditure on improvements, was increased to £30,000, for the purpose of paying which price he borrowed from the M'Innes trustees a portion of Lady M'Donald's fortune, amounting to £25,000, for which he gave them security in the form of a bond and disposition in security over the two estates so purchased. These securities were afterwards transferred to the marriage-contract trustees. The declared intention of Sir John in making the purchase was that these two estates, along with the family estate of Dalchosnie, should be permanently united as a family estate, and should descend, in the first instance, to the heirs-male of the marriage. This appears from the narrative of the deed of entail of the three estates, executed by Sir John M'Donald, on 18th July 1837, which begins by narrating the marriage-contract and the trust-conveyance therein of Lady M'Donald's fortune, and then proceeds as follows:—'And further, considering that the object of the said trust is to secure the liferent of the said funds to the said Adriana M'Innes or M'Donald during her life, in the event of her having children, and the succession to the fee of the same to the children, if any, of the said marriage, in such shares and in such manner as we, the said spouses, or the said Adriana M'Donald, if the survivor, may direct, and that the objects of the said trust may be fully accomplished by the purchase of lands to be entailed on the eldest son of the said marriage, and such provisions secured to the other children as I, the said John M'Donald, and the said Adriana M'Donald, may now or afterwards direct, and further, considering that I, the said John M'Donald, soon after the marriage, purchased the two estates of Loch Garry and Kinloch Rannoch, adjoining to Dalchosnie, and it being the desire of me, the said John M'Donald, and of the said Adriana M'Innes or M'Donald, to settle definitely, onerously, irrevocably, and mutually the said estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, belonging to me, the said John M'Donald, on ourselves and our family, and, failing our heirs-male, so far to alter the destination in the marriage-contract, with regard to Dalchosnie, as to settle it with the other lands, giving heirs-female of the present marriage a preference and priority over heirs-male of any subsequent marriage, and having, of even date herewith, executed a deed of appointment and division of the whole estate belonging to the said Adriana M'Innes or M'Donald, which deed and appointments therein contained are held as implement on her part of the mutual agreement between us for the settlement of our respective estates, Therefore, in implement on my part of the foresaid mutual agreement, I, the said John M'Donald, bind and oblige myself, my heirs and successors whomsoever, to entail and secure my whole lands and others particularly underwritten in

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lutely; and having elected to take and having taken the £25,000 absolutely, he is not entitled to any beneficial interest in these estates. (4) According to the intention of Sir John M'Donald, as declared in his settlements, it was a condition of the defender taking benefit thereby that he should not so act as to prevent Loch Garry and Kinloch Rannoch being disburdened of the debt for £25,000, and having acted otherwise, the defender has thereby forfeited all right to these estates, at least he is bound to make compensation to the pursuer for the loss and damage he has sustained by and through the election made by the defender. (5) The testator, Sir John M'Donald, having, in an onerous and irrevocable deed, agreed with his wife to entail his fee-simple lands of Loch Garry and Kinloch Rannoch upon the defender and his heirs-male, in consideration of £25,000 of her fortune being applied in discharge of so much of the purchase price of these lands, and the defender having defeated this purpose, and refused to give consent to that application of the money, the consideration stipulated for has not been given, and the disposition of these lands, in so far as the defender is concerned, therefore fails. (6) The pursuer being—1, the next heir in existence called to the succession by the said deed of entail immediately after the defender and the heirs-male of his body, and the defender having no male issue, never having been married, the pursuer is entitled to require the defender immediately to cede possession to him of the said estates of Loch Garry and Kinloch Rannoch; or, 2, the pursuer being the next heir-at-law of Sir John M'Donald after the defender, he is now entitled to the said lands; or, 3, in consequence of the election made by the defender, and the forfeiture of his right to the said lands, the rents thereof belong to the said heirs of entail, and ought, during the defender's lifetime, to be collected and applied for their behoof, so that each in his order may obtain benefit therefrom.

The defender pleaded;—(1) The averments of the pursuer are not relevant or sufficient to support the conclusions of the action. (2) The discharge of the said bond for £25,000 over the entailed estates of Kinloch Rannoch and others not being a condition of the deed of entail of 1837, the defender was not put to his election between discharging the said bond and forfeiting his rights under the entail. (3) *Separatim*, the defender was not put to such election, in respect that upon a sound construction of the various deeds executed by his parents, and in particular of the joint settlement and division and deed of entail of 1837, it was not the intention of the granters to put him to such election.

Upon 27th March 1876 the Lord Ordinary pronounced this interlocutor:—"Having heard the counsel for the parties, and considered the closed record and whole process, assolizies the defender from the whole conclusions of the action, and decerns: Finds the defender entitled to expenses," &c.*

* NOTE.—(After the narrative given above)—"The result of all this is, (1) That the defender, Alastair M'Iain M'Donald, has been for nearly forty years, and still is, infest as fiar in the estates of Dalchoanie, Loch Garry, and Kinloch Rannoch, under a title absolutely unqualified except by the liferent of his parents and the fetters of the entail: (2) That in 1872 his right to a share of the marriage-contract trust funds, to which he had, from the day of his birth, a *spes successionis* indefeasible except by his own death during the lifetime of the longest liver of his parents, became absolutely vested in him: (3) That by the deed of appointment and division which did not, and could not, take effect until the death of Lady M'Donald, the share of the fund to which the defender was thus absolutely entitled was fixed by his parents at the sum of £25,000 (4) That the deed which so fixed it was not a settlement by Sir John and Lady

The pursuer reclaimed.

Argued for the pursuer ;—The deed of division and deed of entail not

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M'Donald of any estate belonging to themselves, but was a mere appointment of a fund in which they themselves had a mere right of liferent, the fee being in the children : (5) That it has been settled by final judgment in a litigation in which the present pursuer, along with his sisters, appear to have keenly contested every point with the defender, that the defender is entitled to that £25,000 absolutely, and that the same is not to be applied in discharging the debt of £25,000 affecting the estates of Loch Garry and Kinloch Rannoch : And (6) that the defender has completed his title to the securities over Loch Garry and Kinloch Rannoch, on which the money is invested, and has received payment of the money in whole or in part.

"It is in these circumstances that the pursuer, John Alan M'Donald, as the heir called to the succession of the entailed estates immediately after his elder brother, the defender, and the heirs-male of his body, has raised the present action against his brother for the purpose of having it declared that, under and by virtue of the deed of division and the deed of entail above mentioned, the defender was 'bound to make his election as to whether he would take absolutely and unconditionally the sum of £25,000 sterling, allocated to him by the joint deed of division, or take the said entailed estates subject to the condition of the same being discharged and disencumbered of the said sum of £25,000 sterling, and that he has made his election, and has claimed and taken the said sum of £25,000 sterling absolutely, and that he has thereby defeated and frustrated the intention of his said father in respect of the settlement of the said estates of Loch Garry and Kinloch Rannoch under the said deed of entail, and has thereby in that respect reprobated the said joint settlement and deed of division and deed of entail, and that his right, title, and interest therein is now, and shall in all time coming, be void and extinct, and that the said lands and others, with the rents, maills, and duties of the same, have fallen, devolved, and accresced and do now belong to the pursuer as next heir appointed to succeed by the said deed of entail.'

"It will be observed that the summons relates only to Loch Garry and Kinloch Rannoch, and not to Dalchosnie, the defender's right to enjoy the latter estate being admittedly indefeasible under the marriage-contract, and incapable of being affected by anything which his parents may have done in the deed of division and appointment. And the result of the pursuer's success in this action will be, that the entailed estate which his parents intended to be a united family estate, held by the male representative of the family, will be dismembered, Dalchosnie remaining with the defender, the eldest son, while Loch Garry and Kinloch Rannoch are carried off by the pursuer, a younger son and remoter heir. Nothing but the clearest evidence, not only of the power, but of the intention of Sir John and Lady M'Donald, to put the defender to his election, could, in my opinion, warrant the present demand of the pursuer.

"The first question, therefore, to be answered plainly is, whether Sir John and Lady M'Donald had power to put the defender to his election between the entailed lands of Loch Garry and Kinloch Rannoch and the appointment of £25,000 of the marriage-contract free of all destinations or conditions? I confess that notwithstanding the very able arguments of Mr Trayner and Mr Fraser on behalf of the pursuer I have not much difficulty in answering that question in the negative. The pursuer rests his case, both on the record and in debate, on the ground that the deed of entail and the deed of division must be read together as forming the testamentary settlements of Sir John and Lady M'Donald. But I am of opinion that these deeds, which are said to raise this case of election, are neither of them testamentary in the proper acceptation of that term. The entail was in no sense testamentary. By it Sir John M'Donald voluntarily and during his lifetime, and nearly thirty years before his death, conferred upon his eldest son, the defender, the irrevocable and irredeemable right of fee in Loch Garry and Kinloch Rannoch, without any indication *ex facie* of the deed that by accepting the estate he was to become bound to apply towards the extinction

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only referred to one another, but each bore to be granted in consideration of the other. The deeds were, so to speak, dovetailed into one another.

of the debt affecting them any part of the marriage-contract trust funds, which were indefeasibly settled upon the children of the marriage, and to a share of which the defender, as one of these children, had at all events a protected *opere successionis*. On the other hand, the deed of division was not testamentary of the granters, because the funds which were thereby divided by Sir John and Lady M'Donald belonged, not to themselves, but to their children, subject only to a power of appointment by the parents. Two considerations, therefore, are to my mind conclusive against the power of the granters to put the defender to his election. These are—(1) That long before the alleged case of election emerged the defender had become by an *inter vivos* deed of entail the irredemable proprietor of the entailed estates, so that he had not to choose between taking these estates and taking the appointed share of the trust-funds; and (2) that the separate deed of division was not a testamentary settlement of the granters conferring benefits on the defender to which he was not otherwise entitled. But, further, and even if the entailed estates had been conveyed and the power of appointment had been exercised in one and the same deed, and both had been testamentary, the condition annexed to the appointment was illegal and void, and no case of election could arise. This point has been expressly decided in England by the Master of the Rolls (Lord Romilly) in the case of *Churchill v. Churchill*, 1867, L. R. 5 Eq., p. 44, in which all the previous decisions are fully considered and commented on. The rule of law which underlies that judgment, and indeed all the decisions as to election and approbate and reprobate, is, that although *res aliena scienter legata* in a testament bequeathing a legacy to the owner of the *res aliena*, may put him to his election between claiming the legacy and taking his own property, yet if the testator made his bequest erroneously believing that he had the power, while he had it not, the legatee will not be put to his election. The rule is illustrated in the case of *Douglas' Trustees v. Douglas*, 1862, 24 D. 1191. Now, in the present case it is clear from the language of the deed of appointment that Sir John and Lady M'Donald believed that they were dealing with a fund belonging to themselves, or over which they had the uncontrolled power of disposal, but that was an erroneous belief, and as their appointment of £25,000, in so far as it was restricted and qualified by conditions annexed, was illegally restricted, the presence of these conditions in the deed cannot put the defender to his election.

"The second question to be answered is whether, assuming that Sir John and Lady M'Donald had power to put the defender to his election, it was their intention to do so? No such intention is expressed, and I am very clearly of opinion that none is implied, either in the deed of entail or in the deed of appointment. The terms of the latter deed, however, are founded upon by the pursuer as implying such an intention on the part of the granters. And there cannot be any doubt as to the desire of Sir John and Lady M'Donald that the defender's £25,000 should be applied for the benefit of the heirs of entail. But was that their leading and ruling motive and intention? I think not. In the first place, the words they use are precatory words, and these are not sufficient to raise a case of election. See *Blacket v. Lamb*, 14 Beavan, p. 482, as commented on by Lord Romilly in the case of *Churchill* already referred to. But in the next place, it is clear that the ruling motive and fixed intention of Sir John and Lady M'Donald, in executing the deed of entail and deed of appointment, were that the three estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, should, burdened or unburdened, descend to and be enjoyed by the heirs male of the marriage in their order, as a united and important family estate. The language of the two deeds, whether read together or separately, is not, in my opinion, capable of any other construction. As I read these deeds it is not conceivable that the granters thereof intended or could have contemplated, as the possible result of the defender refusing to allow his share of the marriage-contract fund to be applied in extinguishing the debt affecting Loch Garry and Kinloch Rannoch, that the united family estate which they were so anxious to found

so as to form one plan of settlement. It was true that the condition which Sir John and Lady M'Donald had sought to impose upon the appointment of the sum of £25,000 to the defender was beyond their powers. They could not prevent him challenging that condition as he had done, and taking the money absolutely. But although they could not take away the defender's right to challenge the condition, they could take away his interest to exercise that right, by making its renunciation a condition of his obtaining something else, which they might give or withhold at their pleasure, *i.e.*, the entailed estates of Loch Garry and Kinloch Rannoch. The defender could not at the same time take the gift and refuse to comply with the condition. This principle, whatever name it received, "approbate and reprobate," "election," "implied condition," was based on the clearest principles of equity, and had been applied in a great variety of cases.¹ It was not necessary for Sir John and Lady M'Donald to use any words expressive of their intention that the defender should make his election. Every settlor intended his whole settlement to take effect. No one could read the deed of appointment and the entail without seeing that Sir John and Lady M'Donald's plain intention was that the lands of Loch Garry and Kinloch Rannoch should devolve on the series of heirs on which they were entailed disburdened of the bond for £25,000. This was expressly recognised in the opinions delivered in the House of Lords in the multiplepointing between the parties. The defender was bound to make his election whether he would take the entailed estates and the money with the condition of using the money to disburden the estates, or take the money without the condition

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should be dismembered, and that Loch Garry and Kinloch Rannoch should be taken away from the heir of the marriage, and enjoyed as a separate estate by a remote substitute, while Dalchosnie remained with the institute of the entail. I am therefore of opinion that it was not the intention of Sir John and Lady M'Donald to put the defender to his election.

"If I am right in these views there is an end of the case, and the pursuer having failed in maintaining his declaratory conclusions he is not entitled to prevail in his other conclusion for denuding and removing, or for compensation for the prospective loss or damage which he alleges he may sustain by the defender having claimed and obtained payment of the £25,000 absolutely for his own behoof. Indeed, even if a case of election had been made out, I could not have held that the defender had already made his election. He has already obtained possession both of the estate and of the £25,000, and if he was ever bound to make his election it is still open to do so.

"In conclusion, I have only to state that even if a clear case of election, such as that for which the pursuer contends, had been made out, I should have had great difficulty in sustaining any claim, either for denuding in favour of the pursuer or for 'equity of compensation,' seeing that the pursuer is at present only heir-presumptive under the entail; that he may never succeed to the entailed estate; that in any view the defender is, during his life, the only person interested in the rents of the estate and in the annual income of the £25,000; and that any claim of damage at the pursuer's instance is too remote and contingent to admit of being, *in hoc statu*, estimated or assessed, or provided for.

"On the whole, I am of opinion that the defender is entitled to decree of absolvitor, with expenses."

¹ Strathmore v. Clydesdale, Feb. 10, 1729, M. 6377; Cunningham v. Gainer, Jan. 17, 1758, M. 617; Breadalbane Trustees v. D. of Buckingham, March 5, 1840, 2 D. 731, 12 Scot. Jur. 400; Black v. Watson, Feb. 9, 1841, 3 D. 572, 13 Scot. Jur. 239; Earl of Glasgow's Trustees v. Earl of Glasgow, Dec. 13, 1872, 11 Macph. 218, 45 Scot. Jur. 145; Cooper v. Cooper, Nov. 14, 1870, L. R., 6 Chan. App. 19; Coutts v. Acworth, Jan. 15, 1870, L. R., 9 Eq. 519; Sugden on Powers, 8th ed., p. 582.

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and relinquish the estates. By taking the £25,000 without the condition the defender had, in fact, made his election, and he must give up the entailed estates. If, however, the Court were of opinion that the case was rather of implied condition than of approbate and reprobate, then the defender could only keep the entailed estate by fulfilling the condition.

The defender's argument sufficiently appears from the opinions of the Judges.¹

In the course of the debate the pursuer tendered a minute of amendment, by which he proposed to add a conclusion that "the defender is bound, as a condition of his retaining possession of the said estates of Loch Garry and Kinloch Rannoch, to free and relieve the said lands and estate of and from the burden of the debt of £25,000: . . . Or otherwise, that the defender, by having taken benefit under the said joint settlement and deed of division, and the said relative deed of entail, by his having obtained possession of the lands and estate of Dalchosnie immediately upon his father's death, and by his having taken possession of the said estate of Loch Garry and Kinloch Rannoch upon his mother's death, is under obligation and is bound to free and disburden the said estates of Loch Garry and Kinloch Rannoch of the said sum of £25,000 affecting the same."

At advising,—

LORD NEAVES.—This case appears at first sight to be more complicated than it really is. When divested of superfluous matter it seems to come to a comparatively simple question, and one which is affected by several plain principles of law.

Mr M'Donald of Dalchosnie, who afterwards became Sir John M'Donald was married to a daughter of Mr M'Inroy of Lude, and their antenuptial contract of marriage is one of the documents requiring here to be specially considered. The contract disposed mainly of two matters. Sir John M'Donald settled his paternal estate of Dalchosnie upon himself and his intended wife in conjuncture fee and liferent, but for her liferent use allenarly, in case she should survive him, "and to the heirs-male of this present marriage." On the other hand Mrs M'Inroy conveyed to trustees her whole interest in her father's estate, to be liferented in manner there mentioned; and after the death of the survivors of the spouses, then to be paid over to the child or children of the marriage in such proportions, and at such times, and under such conditions as the spouses should appoint by any joint deed, or as the lady should appoint if she survived her husband. The other provisions need not be here specified.

The marriage took place shortly after the date of the contract, which was 8th September 1826, and several children were born of the marriage, and, among others, the pursuer and defender in the present action. Several years thereafter two other deeds were executed, on which the case principally turns.

On 18th July 1837 the spouses executed a joint settlement and deed of division, which narrates the contract of marriage and the fact that Sir John M'Donald had purchased the estates of Loch Garry and Kinloch Rannoch, upon which, besides the price, he had expended a considerable amount in improve-

¹ *Defender's Authorities*.—Carver v. Bowles, Jan. 1831, 2 Russ. and Mylne, 304; Blacket v. Lamb, 1851, 14 Beavan, 482; Woolridge v. Woolridge, Feb. 21, 1859, Johnson's Rep. 63; Churchill v. Churchill, Dec. 1867, L. R., 3 Eq. 44; Wollaston v. King, April 23, 1869, L. R., 8 Eq. 165 (V. C. James, p. 174).

ments. It was also stated that in the purchase of these estates a sum of £25,000 had been advanced from Lady M'Donald's funds, for which an heritable bond had been granted to her trustees, and which bond had been assigned to the trustees under the marriage-contract. Upon this narrative, and the further narrative that it was their desire "to settle definitely, onerously, irrevocably, and mutually the whole of the said estates of Dalchoania, Loch Garry, and Kinloch Rannoch, belonging to him, the said John M'Donald, and also to divide, apportion, and settle the whole property, heritable and moveable, including the said sum of £25,000 secured over the lands of Loch Garry and Kinloch Rannoch belonging to her, the said Adriana M'Donald, on themselves and their family," the spouses proceeded to make the appointment contained in the deed by which the said sum of £25,000 was settled upon the defender, their eldest son, and other members of their family in succession, being heirs in possession of the entailed estate. It was explained that this sum was allotted "as the share of the eldest son, or, failing him, of the heir of entail succeeding to the said entailed estate;" to which allotment this addition was appended, "it being their desire and appointment that the said trustees . . . should, immediately on the death of the survivor of them, the said spouses, renounce and discharge the said heritable bond, and disburden the said lands and estates of Loch Garry and Kinloch Rannoch of the same." The remainder of Lady M'Donald's property was to be equally divided among the younger children, exclusive of the heir.

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Of the same date, 18th July 1837, there was also executed by Sir John M'Donald the deed of entail referred to in the record, to the nature of which I shall afterwards advert.

A great deal of the discussion which we have had relates to the question of election, or of approbate and reprobate. I think it doubtful whether those questions are properly raised in the present case.

It appears to me that the question referred to resolves always into this position of things, that some party who is in the position of donor makes to another an offer of two different things, upon the footing, express or implied, that the party favoured may either take or reject the two things offered. This state of things implies a choice with a power of rejection or acceptance, and the two things are linked together in such a way as to be inseparable.

I am unable to discover that this state of things occurs here. No doubt there are two matters dealt with, but they are not so dealt with as to give rise to any election. The parents of the two parties,—pursuer and defender,—executed a deed of appointment and division, but this was not made the subject of a proper offer for their acceptance. It was a positive and valid deed of appointment, by which there was given to the defender, the eldest son of the parents, the sum of £25,000, which the parents allotted and apportioned as his share. The deed contains other matters, and, in particular, declarations or statements as to the debt of that amount constituted over the heritable estates in question, and which debt it was the wish of the father and mother to wipe off by payment.

Now, the introduction of this matter into the deed of appointment might be looked at in one or other of two ways; it might be meant as an inherent and imperative condition of the appointment that the £25,000 allotted to the defender should be specifically applied to the extinction of the debt constituted over the estates to that amount, or it might be considered as something falling short of that qualification. In the process of multiplepoining previously

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brought to determine the rights of parties the pursuer and the other young children maintained that the appointment in favour of the defender was conditional and qualified, and consequently null, so that the whole divisible fund was to be divided equally among all the children. This Court sustained the plea, and set aside, accordingly, the whole appointment. But, upon an appeal to the House of Lords, that judgment was reversed, and it was decided that the appointment was good, that it was in itself an absolute appointment, and that what was said as to applying the £25,000 to the extinction of debt was merely the expression of a wish or desire that this should be done, but was not a condition of the appointment so as either to make it null or to make the desire expressed obligatory on the defender.

In so far, therefore, as regards the deed of appointment it was absolute and unqualified, and the defender was entitled to take the whole sum allotted to him without being under any obligation or restraint as to the application of the money.

But then the pursuer maintains that the deed of entail executed by the father on the same day imposed on the defender an obligation as to the use of the money allotted to him.

Now, it is true that the deed of entail thus executed by Sir John M'Donald was a voluntary deed, and that Sir John might have made it conditional if he had chosen. But the question is, whether he did so. He executed the deed as a *de presenti* deed, but he inserted in it no condition as to the use of the money he apportioned. The form of the entail was that he gave the entailed lands to himself and Lady M'Donald, and to the survivor, and to the heirs aftermentioned in fee. This was done upon the conditions, restrictions, and provisions after specified, but these were merely the usual conditions applicable to an entail. The deed then contains a procuratory and precept for infesting the defender and the other heirs of entail in the entailed lands, but there is no provision or condition either irritant or resolute in connection with the allotted money.

Upon this deed of entail infestment immediately followed in favour of the spouses in liferent, and the defender as the first heir of entail in fee. These infestments took place in the years 1837 and 1838, now nearly forty years ago.

It is in these circumstances that the pursuer brings the present action to have it found substantially that this entail binds the defender to apply the £25,000 allotted to him to the extinction of the debt forming a burden upon the lands in question.

It seems a complete answer to any plea of approbate and reprobate or of election that the defender was never put to any election by his parents. He took the allotment of £25,000, as the House of Lords found, absolutely and unconditionally, and was entitled to expend it or apply it as he pleased. It is said, however, that the entail executed in his favour was a conditional grant, which he could only accept upon the footing said to be indicated in it of applying his own £25,000 to the disburdening of the entailed lands to that extent. If there had been an offer by the father to put his son upon an election it might have been expected that the defender would elect to take or reject the entail as he pleased. But no such option was given. His father gave him the estate at once, the fee of the estate, taking only a liferent to himself, and he immediately infested the defender, then a mere boy, in the fee. The defender was thus left

option in the matter, and was not by the figure of the transaction placed under any necessity of election. No. 9.

Accordingly the House of Lords has found that the defender has an absolute and indefeasible right to the money. It was not pleaded, and at any rate it is not found, that he was barred from taking the money by any condition or uncertainty as to the entailed estate. It was further held that all that was meant by the language of the appointment was an expression of desire that the money should be applied in a certain way, but which did not amount to an imperative obligation.

If this was the meaning and effect of the language used in the deed of appointment it seems impossible to transfer that language to the deed of entail, and give it there a more stringent meaning. If it was truly meant to qualify the entail the place to do that was in the entail itself along with other conditions, and certainly to infest the defender in the entail was an absolute reinstating of him into full and absolute right to the entailed estate as the heir first called.

In these circumstances it seems to me impossible to hold that this statement which occurs in the deed of apportionment can be read as being more imperative and more of a resolute condition in the deed of entail where it is not to be found. There seems no room for thus fettering the defender under either of the deeds, or of putting him to an option of election that was plainly never intended, and for which there is nowhere to be found any clear or unequivocal words.

Upon these grounds I am for adhering to the Lord Ordinary's interlocutor. I may further state my doubts as to the pursuer's position for pursuing this action as a mere presumptive heir of entail, and also as to the propriety and suitability of the conclusions of the action, even in their most amended form, but I think it better to deal with the action on its proper merits so as to settle definitely the rights of the parties.

Neither of these deeds is testamentary.

LORD ORMDALE.—Although this case was debated at great length and very anxiously it does not appear to me to be attended with much difficulty.

The disputed question, as raised in the record and argued at the bar, is whether the defender has in the circumstances been so put to his election, or, in other words, has so acted that he must be held, on the principle of approbate and reprobate, to have lost all right to the entailed estates of Loch Garry and Kinloch Rannoch, and is bound to cede possession of them to the pursuer. Another question, suggested in the course of the discussion, from the bench, is whether, independently of the principle of election, or approbate and reprobate, a condition or obligation was, by the deed of entail and relative deed of division and appointment, imposed upon the defender to the effect that he must discharge the £25,000 debt with which the estates are encumbered, and can be compelled to do so.

It is unnecessary here to enter into a detail of the circumstances in which these questions have to be considered. They are set out in the record, and the Lord Ordinary has given a very distinct *resumé* of them in the note subjoined to his judgment, which is adverse to the pursuer.

It is essential, however, to bear in mind—(1) that the deed of entail under which the defender holds the estates in question, and which is not said to be in itself objectionable in any respect, was executed and duly recorded and infest-

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ment taken in virtue of it nearly forty years ago; (2) that it expressly bears that the object of the granters was to settle the estates on the defender and the heirs called in succession to him, "definitely, onerously, and irrevocably;" and (3) that since the death of his mother in 1872, his father having previously died, the defender has been in the full and—till the present action was raised in December 1875—unchallenged possession and enjoyment of the entailed estates.

And in regard to the sum of £25,000 which the defender derived from his mother in conformity with the marriage-contract between her and his father and relative deed of division and appointment, it is also very important to keep in view that he has been found entitled to payment of it, absolutely and unconditionally, by the Court of last resort, under an appeal from a judgment of this Court.

Notwithstanding these facts, about which there is no dispute, the pursuer who is the heir next to the defender and the heirs-male of his body entitled to succeed to the entailed estates of Loch Garry and Kinloch Rannoch, calls upon the defender now to denude of these estates in his favour on the ground that he is not entitled both to the £25,000 and the estates, and that having taken payment unconditionally of the money, he must give up the estates, in respect that having been put to his election either to take the estates or the money, but not both, and that having elected to take and having got payment of the money, he must surrender the estates to the pursuer. But why this should be the result, even supposing the defender had been put to his election, I do not very well see. He had got possession of the entailed estates prior to any question having been raised as to the money, and some years before he was found entitled to and received payment of the money. He must therefore on the pursuer's theory, supposing it to be maintainable at all, have been held to have made his election when he took possession of the entailed estates. So that the only course left for the pursuer was, on that ground, to have opposed the defender getting payment of the money. But no such ground of opposition to the defender getting payment of the money was taken by the pursuer or any one else, and the fact is undoubtedly, as has been already noticed, that he was found entitled by judgment of the House of Lords to payment of the money, absolutely and unconditionally. Again, supposing the pursuer's present grounds of action to be maintainable at all, it may well be asked why should he any more than the defender be found entitled to the entailed estates, free from the alleged obligation to discharge the £25,000 debt to which they are now subject. In no view can I see how any such result could be sustained, and yet were decree pronounced in favour of the pursuer in terms of the conclusions of his action such would be the result.

But it is unnecessary longer to dwell upon these considerations, as in every aspect of the pursuer's action it appears to me to be quite untenable, that is to say, the pursuer's assumption that the defender was put to his election between the entailed estates and the £25,000, or, to put it differently, his assumption that the defender must, by taking the money free from any obligation to free the entailed estates from the £25,000 debt, be held to have reprobated the deed of entail under which he took the estates, is ill-founded, whether the matter is examined and considered in connection with the deed of division and appointment, or the deed of entail, or both together.

In making the deed of division and appointment, the granters were not dealing with monies over which they had an absolute control, but with funds which they

were bound to divide among their children, although no doubt they had a discretionary power to make the division in such proportions as they might consider right. They did accordingly appoint £25,000 of the funds to be paid to the defender, who was one of the parties having right to a share. But they were not entitled to impose upon him, as the condition of his receiving payment of that sum that he should apply it in payment of the debt with which the entailed estates were encumbered. And in point of fact, as was found in the House of Lords, no such condition was imposed upon the defender, although in the deed of division a desire was expressed that he should with the money pay off the debt on the entailed estates. If, indeed, it had been made an express or positive condition of his getting the money the appointment would have been altogether bad; but just because there was no such condition the appointment was held to be good and unobjectionable, and the defender found entitled to payment of the £25,000 absolutely and unconditionally.

Thus standing the matter as regards the deed of division and appointment, it was next to be considered how far the question is affected by the deed of entail. It was assumed in the argument for the pursuer that it was made a condition in that deed, either express or implied, that the defender could not take the estates of Loch Garry and Kinloch Rannoch and also the £25,000 without applying that sum towards discharging the debt of that amount on the entailed estates, and that as he had done so, he had approbated and at the same time reprobated the deed of entail; or to put it differently, that he must be held to have elected to take the money, and having done so, must give up the estates to the pursuer. But, as has been already remarked, the defender having taken the estates before he got the money, must be held to have then made his election, if there was election in the case at all, and the objection, if there was any room for it, taken on the principle of election, ought to have been raised, and could only have been raised, as against the defender's claim for the money. Irrespective of that consideration, the pursuer's ground of action appears to me to be in itself ill-founded. The deed of entail does not in itself contain any condition or obligation such as the pursuer relies upon. It is true that in the deed of entail there is a reference to the deed of division, but it is *res judicata* that what the pursuer calls an obligation to apply the money towards discharging the debt on the entailed estates is not an obligation at all. The Lord Chancellor (Session Cases, vol. ii., 4th series, H. of L. p. 131), makes this, I think, very clear. After quoting the portion of the deed of division which is said to constitute the alleged obligation or condition, his Lordship observes—"It is simply an expression of desire which could only be carried into effect with the consent of the person who by the previous clauses was made, according to my opinion, the absolute owner of the £25,000. If he consented, the trustees might discharge the estate. If he did not consent, the estate had to remain burdened with this bond, and this expression of desire would not be held in any way of itself to take away from that ownership which was created by the former clause." And it is vain, I think, to contend that although the allusion to discharging the debt in the deed of division and nomination is not of the nature of an obligation to do so in that deed, it must be held to become an obligation in the deed of entail, in consequence merely of its being there referred to in the most general way possible. To hold that to be so would, in my opinion, be contrary to the judgment pronounced in *Carver v. Bowles*, 2 Russell and Mylne's Reports, p. 304; *Blacket v. Lamb*, 14 Beavan's Reports, p. 482; and *Woolridge*

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v. Woolridge, Johnson's Reports, p. 63. Thus, in *Woolridge v. Woolridge* was held by Vice-Chancellor Page Wood that where "there is an absolute appointment by will in favour of a proper object of power, and that appointment is followed by attempts to modify the interest so appointed in a manner which the law will not allow, the Court reads the will as if all the passages which such attempts are made were swept out of it for all purposes, i.e., only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election."

In regard, therefore, to election as between the entailed lands and £25,000, I have no difficulty in assuming that there is no sufficient ground holding that it arises in the present case.

And in regard to there being otherwise an obligation on the defender to charge the £25,000 debt, I cannot find it in the deed of entail any more than in the deed of division and appointment. There is certainly no such obligation expressly set out in the deed of entail. It is said, however, that it is in the deed of division and appointment, which, being referred to in the deed of entail, must therefore be read as part of it. But, as I have already explained, it has been decided by the House of Lords that what is said to be the obligation or condition in the deed of division and appointment is not an obligation or condition at all, a reference in the deed of entail to the deed of division and appointment cannot, in my apprehension, effect the pursuer's object. The desired obligation or condition would indeed require to appear in very explicit and unambiguous terms in the deed of entail, and a general reference to the deed of division and appointment, which is all there is, would not, I think, be sufficient in any view that can be taken of the matter. Besides, the pursuer did not maintain such a ground of action, and it is not reconcilable either with the argument or any of the conclusions of his summons.

I have only further to remark that were effect to be given to the pursuer's contention, on any of the grounds which have been adverted to, the great object of the makers of the entail would be entirely defeated, for the inevitable consequence would be a separation of the estates of Loch Garry and Kinloch Rannoch from the estate of Dalchosnie, a result which I can find nothing in this case warranting.

In my opinion, therefore, and for the reasons I have stated, there is no ground for disturbing the interlocutor of the Lord Ordinary, which, I think, ought to be adhered to, and the pursuer's reclaiming note refused.

LORD GIFFORD.—I am of opinion that the result reached by the Lord Ordinary in this case is right, and that the interlocutor under review should be adhered to, although I scarcely concur with the Lord Ordinary in some of the views upon which he proceeds, and which are fully explained in the observations appended to his interlocutor.

The object of the action is to have it found and declared that the defender, who is heir of entail in possession of the entailed estates of Loch Garry and Kinloch Rannoch, is bound to give up possession of the said estates, and hand them over to the pursuer, who is the defender's immediate young brother, and who happens to be the next heir of entail now in existence. The purpose of the action, its sole purpose, is to put the pursuer in possession of these two entailed estates in place of the defender, his elder brother.

and the pursuer claims the estates as next heir of entail unconditionally, and without offering to clear the same of the debts or heritable bonds affecting the lands.

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The ground of this demand is, that by the terms of his father's settlements, consisting of, first, the deed of entail of the said estates, and, second, a deed of apportionment and division of the same date, the defender was put to his election either to apply the sum of £25,000, allocated to him by the deed of division, in paying off the debt affecting the entailed estates, or, to renounce his interest in the said estates, and that having elected to take the £25,000 absolutely the defender is now bound to give up his interest and right as heir of entail. At the debate before your Lordships an additional conclusion was tendered, as an amendment of the summons, to the effect that if the defender was entitled even yet to retain the entailed estates he was bound, as a condition of so retaining them, to free and relieve the lands from the debt and burden of £25,000. I do not think, however, that this amendment makes any difference in the disposal of the case.

The question raised in the action is of great importance, and, in some of its aspects, is attended with a good deal of nicety and difficulty. The circumstances in which the question arises are very special, and involve the very minute consideration of Sir John and Lady M'Donald's antenuptial marriage-contract, and of the deed of division and apportionment following thereon, as well as of the deed of entail under which the estates now in question were finally settled.

In this consideration we are aided and must be regulated and guided, so far as the judgment goes, by the final and authoritative decision pronounced by the House of Lords in the previous litigation between the same parties, and which, of course, is binding on all concerned. This judgment was pronounced by the House of Lords on 17th June 1875, and it related to the validity and effect of the deed of division and apportionment by Sir John and Lady M'Donald.

In explaining shortly the view which I take of the present case I think it most convenient to begin with this judgment of the House of Lords, because it completely fixes and finally determines the rights of parties under one of the deeds in question,—I mean under the deed of apportionment and division, and determines conclusively the meaning and effect of that deed as between the present parties. This being finally established I do not find very much difficulty in determining the effect of the only other deed in question,—I mean the only other deed which is said to put the defender to his election, the deed of entail of 16th July 1837.

By the judgment of the House of Lords it is finally fixed that under the deed of division and apportionment the defender takes, and is entitled to take, the sum of £25,000 contained in the bond for that amount secured over the entailed estates of Loch Garry and Kinloch Rannoch as his own absolute and exclusive property, free from all conditions, obligations, or limitations of whatever kind. The money is his own, unfettered in any way, to dispose of and apply at his own pleasure. It was not in the power of Sir John and Lady M'Donald to impose upon the defender any binding condition whatever as to the mode in which the defender should employ or expend that £25,000. They could not require him to expend it in disencumbering the entailed estates or in any other way whatever. They could not make a conditional appointment, and, whatever was their desire or intention, they could in no way compel the defender to carry it out.

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It is no doubt quite plain from the terms of the deed of division and appointment what was the intention and desire of Sir John and Lady M'Donald. They wished the entailed estates of Loch Garry and Kinloch Rannoch to be freed and disburdened of this debt of £25,000, which formed so considerable a part of the whole value of the lands, and they wished the estates so disburdened to descend to the series of heirs called in the deed of entail. The Lord Chancellor and the other Judges in the House of Lords are agreed upon this point, and I do not think there is room for two opinions. The Lord Chancellor says,—"Now, there is not the least doubt upon the view which must be taken of the whole of the joint deed of division, coupled with the deed entailing these properties, that the spouses intended and desired that the estates of Loch Garry and Kinloch Rannoch, which had been mainly acquired by the £25,000 of trust property, should go in the course of the entail under which they were limited, and should go without the encumbrance on them of the heritable bond securing the £25,000 to the trustees of the trust-funds. And there is not the slightest doubt, at least not in my mind, that if Sir John and Lady M'Donald had been asked, is that what you desire? do you desire to execute an instrument which shall say that Loch Garry and Kinloch Rannoch shall go in the course of the entail under which they have been settled, discharged of the £25,000? they would have said, by all means, that is exactly what we want, let that be done in whatever way it can be done." But then the Lord Chancellor goes on to say that the question under the deed of appointment is, "How have they given effect to that general intention, and have they given effect to that general intention in a way which is open to objection upon the ground of its complete invalidity?"

The judgment of the Lord Chancellor, and the other noble Lords all concurring with him therein, was that while the apportionment of the £25,000 in favour of the defender was valid and effectual the expression of the wish and intention of Sir John and Lady M'Donald as to the application of that sum was altogether void and ineffectual as a condition, and the result of the judgment is that the appointment in favour of the defender of the sum of £25,000 is read as if it had been pure and simple, and as if the deed had contained no expression of wish or intention that it should be applied in disencumbering the entailed lands or in any other way. Everything which could be read as imposing a condition or obligation upon the defender to apply the £25,000 in any particular way is struck out of the deed and held *pro non scripto* as if the deed had contained no provision whatever excepting the appointment and apportionment of £25,000 to the eldest son.

The present case, therefore, starts with this, that the defender takes the £25,000 contained in the bond in question as his own absolute and unlimited property. It is as much his own as if it had been put into his pocket in coin or in bank notes, or as if he had earned it by his own industry. He takes it and he holds it free of all condition or obligation whatever, and this narrows the case to the inquiry as to the entailed estates. Does the defender take these estates as heir of entail free from any condition affecting his own property, and free from any other fetters or conditions than those usually attaching to an entailed succession?

Now, this, in my view, is the real question for decision in the present case: was the defender called unconditionally as the institute in the entail, or was it made a condition of the entail that he should not take or should not hold as

stitute or as first heir of entail at all unless he applied certain independent property and money of his own in a particular way,—that is, unless he took 25,000 out of his own pocket to clear off once and for ever the burdens affecting the entailed lands?

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To put the question otherwise—but it is really the same question—did the late Sir John M'Donald intend that if the defender, his eldest son, did not take his own money, to the extent of £25,000, and pay off the burdens affecting the entailed lands, then he, the eldest son, should not succeed as institute of entail at all, but that the entailed succession should thereupon devolve upon the pursuer, the entailer's second son, who most certainly would be under no obligation whatever to apply £25,000 of his, the pursuer's, own money, or any sum whatever, in clearing off the entailed debts?

Now, I am utterly unable to say that this or anything like this was the intention of the late Sir John M'Donald. On the contrary, I entirely agree with the Lord Ordinary that the intention of Sir John M'Donald, so far as we can gather it from his deeds, was that the whole estates should go to his eldest son in the first place, as the first heir of entail, disencumbered, if possible, of the £25,000 affecting the same, but that they should so go whether disencumbered or not. This appears evident from many considerations upon the face of the deeds. For example, it is clear that Loch Garry and Kinloch Rannoch were purchased because they adjoined the original family estate of Dalchosnie, and they were purchased in order that they might be united with Dalchosnie and might form one entire and undivided estate. It was never the intention of the entailer that Dalchosnie should go to one set of heirs, and Loch Garry and Kinloch Rannoch to another. But this separation would be the result if the pursuer's contention is well founded, for admittedly the defender, as the eldest son, is entitled to keep Dalchosnie, and the pursuer seeks to separate therefrom and appropriate to himself Loch Garry and Kinloch Rannoch, and thus utterly to defeat the indisputable intention of the testator.

Still, farther, the defender, as institute of entail, was actually infeft, that is, put in possession of Loch Garry and Kinloch Rannoch, by the maker of the entail, Sir John M'Donald, so long ago as 1837. This infeftment was expedited in the defender's favour by the orders of Sir John M'Donald himself, the defender, his eldest son being then in minority, and the beneficial possession was no doubt postponed until the expiry of the liferent. But the very fact of Sir John M'Donald having, forty years ago, executed an irrevocable deed of entail, and expedited an absolute and irrevocable infeftment in favour of his son, shews in the clearest manner that the entail was not intended to be conditional, or to be either suspensive or resolutive in its effect, or to depend in any way upon what his son might long afterwards choose to do with his own separate and absolute money and property.

Yet, again, not to dwell upon other indications, it would be absolutely futile and useless to impose such a condition on the first heir of entail, that is, on the eldest son, when it was not imposed upon any of the subsequent heirs of entail, that is, when it was not imposed on the issue of the eldest son, who undoubtedly would take, free from all such condition, or upon the pursuer, as the second son, or on his issue, or on any of the subsequent heirs of entail. No doubt Sir John M'Donald wished the estates disencumbered, but if this could not be done—if he had no power to do it by means of the deed of apportionment—then there is not the slightest ground for supposing that he wished the encumbered estates,

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that is, the estates charged with £25,000, to go so encumbered to his second son rather than to his eldest. But this is the effect of the pursuer's contention, and I think this contention is altogether unfounded. It would not better the condition of the estates or of the family or of the heir in possession that the estates should go, subject to all their burdens, to a younger son rather than to an elder,—to a remoter heir rather than to a nearer,—and if Sir John M'Donald had been told, as he might have been told, you cannot compel your eldest son to apply that £25,000 in disburdening the estate, is there the slightest probability that he would have said,—then I will not give my estates to my eldest son at all, but I will separate them from Dalchosnie and give them to my younger son as first heir of entail, although most certainly my younger son has neither the will nor the means to free them from the burden with which they are charged.

In truth, and on what I think a sound construction of these deeds, reading them all together, for I quite assent to this as the sound mode of reaching the testator's intention, I think that the deeds do not raise a question of election at all. It was not the intention of the late Sir John M'Donald to put his eldest son to the election which the pursuer now seeks to impose upon him. I think such an idea never crossed Sir John M'Donald's mind, and if it had been put to him he would at once have repudiated it. If he had been told that he could not impose the condition upon his eldest son as a binding condition, what he would certainly have said would have been,—Well then I shall simply give my wish and desire, and leave it there. My eldest son, who has the £25,000, and has thus the means of clearing the estate, will be far more likely to do so, and thus fulfil my wish, than my second son, who has no such money and no such means. To suppose any other intention in the testator, to suppose that he wished the burdened estates to be taken from his eldest son and handed over to his second, is, mildly, to guess at the testator's meaning, and to make a will for him which he has not chosen to make for himself.

For if the testator, Sir John M'Donald, had really intended that if his eldest son, the defender, refusing to apply the £25,000 towards clearing the estates, should thereupon forfeit his life interest in the estates, which should devolve upon the pursuer, nothing would have been easier for him than to have said so, and the proper place to have said so would have been in the deed of entail itself. It might have been made a proper condition of the entail, duly fenced with irritant and resolute clauses, and this is very generally done when such an effect is intended. Even without fetters or irritant and resolute clauses it might have been made a personal condition binding upon the institute taken under the entail. But nothing of the kind is done here. All that we have in the deed of entail is the narrative of the deed of appointment and division, and from this simple narrative is sought to be inferred and spelled out so serious a condition against the defender, the institute of entail, as the forfeiture of his whole life interest. I cannot imply such a condition.

We were told that estimated actuarially the defender's life interest in the entailed estates is of much less value than the £25,000 which the pursuer demands that he should pay, and this may very easily be so. The defender's life might conceivably at least be a very precarious one, his prospect of possession might be short and uncertain, and as the whole rental does not exceed or does not much exceed the mere interest of the £25,000 it would be the hardest possible condition to make the defender pay the full capital merely for a precarious life rent. I cannot find such a condition or requirement in the deeds.

It is very remarkable, and I recur to this as an element in the question of No. 9. tention, that the condition which the pursuer now maintains to be an essential Nov. 1, 1876. condition of the defender's taking under the entail, is not found in the deed of M'Donald v. M'Donald. entail itself, but only, if at all, in the deed of appointment, which I am quite willing to call, as the pursuer's counsel did, the relative or counterpart deed. It then it is somewhat serious for the pursuer's argument that the expressions in the deed of appointment have been finally held by the highest authority, by the Court of the last resort, in a question between the same parties, not to be proper conditions at all, but merely expressions of desire, and, where directed to the marriage-contract trustees, to be expressions of desire which could not be carried out without the consent of the defender,—a consent which he was not bound to give. It is very awkward and very difficult for the pursuer to maintain that what in the deed of appointment itself is a mere expression of desire shall be held in another deed which simply narrates the deed of appointment without incorporating it to be a proper and obligatory condition inferring forfeiture of the entailed estates. I do not say this is conclusive, for it is possible that a thing may be made a condition in a pure *beneficium* which cannot be made a condition annexed to what is really payment of a debt. But although not conclusive the obstacle is very formidable to the pursuer, and I do not think he can overcome it. I think he has neither words nor materials to enable him to do so. The strong presumption is, reading the deeds together, that the words must have the same meaning and effect in both.

Questions of election, such as this is said to be, always resolve into the will and intention of the testator. If the intention can be gathered that the party favoured shall take the benefit, even although he resist the testator's wishes in certain other respects, then he is not put to his election, and it seems to me that this is the fair result of the whole testamentary expressions of the late Sir John M'Donald. Still farther, election is always or almost always of the nature of compensation, and followed by compensatory effects. The legatee or beneficiary who will not comply with the testator's intention forfeits his legacy, and then the legacy is applied, so far as it will go, in carrying out the intention. The child who, repudiating his provisions in a universal settlement, claims legitim, must give up these conventional provisions, and the amount thereof goes to the other children or to the residuary legatee, who suffers by the claim of legitim. But here if election were held to apply it would be a very anomalous case of election, for there is no room for compensation. No sum is set free which might go so far at least to fulfil the testator's intention. The testator's intention is no more carried out under the one alternative than under the other. The only difference is according to the pursuer's contention that the estates which are not to be disencumbered, instead of going to the eldest son, who has the means, and may very likely fulfil his father's wish of sending them down free of debt, are to go to the second son, who, whatever his wish may be, has not the means of carrying out his father's desire. I do not think that this is an election either contemplated or implied by Sir John; and on this main ground, while concurring in other respects with Lords Neaves and Ormisdale, I am for adhering to the Lord Ordinary's judgment.

LORD JUSTICE-CLERK.—The parties to this action have changed, and indeed reversed, the positions which they held when they were last before us. In the former action of multiplepoinding the younger children of Sir John and Lady

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M'Donald endeavoured to frustrate the manifest intention of the settlements of their father and mother by challenging the validity of the deed of appointment, in so far as it apportioned £25,000 of Lady M'Donald's fortune to the present defender. They maintained that the directions of that deed were a fraud upon the power reserved in the contract of marriage, inasmuch as they carried the benefit of the appointment contingently to persons who were not objects of the power. In defence the defender pleaded that the appointment to him was absolute, and not conditional; and in argument he stated that he was quite willing that the directions expressed in the deed of appointment should be carried out. The plea of the younger children was sustained by this Court, but the judgment was reversed in the House of Lords, where it was found that the defender was entitled to the sum allotted to him, unconditionally.

The pursuer, who is the next heir of entail entitled to succeed to the estates of Loch Garry and Kinloch Rannoch, now brings this action, for the purpose of having it declared that the defender has forfeited his right to these entailed estates by taking this sum of £25,000, not having paid off the debts which affected these lands, as directed by the deed of division; and by an amendment of the summons, to which I shall afterwards refer, he has introduced a conclusion, modified in terms, but substantially coming to the same result.

The defender, on the other hand, now maintains that, having taken the £25,000 under the deed of division absolutely, he is entitled to keep up these debts against the entailed estate, notwithstanding the explicit intention expressed in the deed of division.

I had not much sympathy with the plea maintained by the younger children in the former action, which I thought, as it was ultimately found to be, unsound, because they were endeavouring to frustrate the manifest intention of the maker of this settlement. I have as little for the plea of the defender in this action, for he is as plainly endeavouring to obtain a benefit which no one can read these deeds without seeing that he never was intended to have. I am, however, greatly hampered in giving effect to my views as to the justice of the case and the legal rights of the parties, from the shape in which the pursuer, for very plain reasons, has chosen to make and maintain his claim.

After what has fallen from your Lordships I shall not detain the Court by any analysis of the two instruments on which this case turns. It is enough to premise that the joint settlement and deed of division, and the deed of entail, of the fee-simple lands of Kinloch Rannoch and Loch Garry, executed on the same day, by Sir John and Lady M'Donald, form one settlement of the estate belonging to them. Each deed is the counterpart of the other, and bears to be granted in consideration of the other. The deed of division bears to proceed on the narrative that the deed of entail executed on the same day "was granted by me," that is, Sir John M'Donald, "in consideration of the declarations and appointment hereinafter made in regard to the property of the said Adriana M'Donald my wife;" and the deed proceeds,—“Therefore we, the said John M'Donald and Adriana M'Donald, in consideration of the said deed of entail,” &c. “declare and appoint as follows.” And the deed of entail, on the other hand, proceeds upon the narrative by the entailer, Sir John M'Donald, “and having of even date herewith executed a deed of appointment and division of the whole estate belonging to the said Adriana M'Donald or M'Donald, which deed and appointments then contained are held as implement on her part of the mutual agreement between us for the settlement of our respective estates, therefore, in implement on t.

part of the foresaid mutual agreement, I, the said John M'Donald," &c. As far
 herefore as the deed of division and appointment contains provisions relative
 o the fee-simple lands which were thus gratuitously entailed, they relate to pro-
 erty over which the granters had full power, and which they might have dis-
 posed of as they pleased, and the combined effect of the two deeds constitutes
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Nor can there be the slightest doubt as to the substance, or rather the object,
 if that combined settlement. The parents intended that their eldest son should
 succeed to these lands (which Sir John M'Donald held in fee-simple), under
 the fetters of an entail, unencumbered. That was the result of the provisions
 which the spouses made, if they had been carried out in terms, and that of
 course was the object which they intended to accomplish. By appointing
 £25,000 out of the wife's fortune to the eldest son they enabled him to cancel
 these debts with which the estates were charged.

The defender, the eldest son, has, since the date of the judgment of the
 House of Lords, obtained an order from this Court on the trustees to transfer
 these bonds to him, and he has apparently assigned them, in part at least, for
 value to third parties; and he now maintains that he is entitled to keep them
 up against the entailed estate. The pursuer, accordingly, the next heir of
 entail, has raised the present action, the conclusions of which are the following :
 That it should be found and declared that, under and by virtue of the joint
 settlement and deed of division executed by the said Sir John M'Donald and
 Adriana M'Donald, and the relative deed of entail executed by the said Sir
 John M'Donald, "the defender was bound to make his election as to whether
 he would take absolutely and unconditionally the sum of £25,000 allocated to
 him by the said joint deed of division, or to take the said entailed estates sub-
 ject to the condition of the same being discharged and disencumbered of the
 said sum of £25,000, and that he has made his election, and has claimed and
 taken the said sum of £25,000 absolutely, and that he has thereby defeated and
 frustrated the intention of his said father in respect of the settlement of the said
 estates of Loch Garry and Kinloch Rannoch under the said deed of entail, and
 has thereby in that respect reprobated the said joint settlement and deed of
 division, and deed of entail, and that his right, title, and interest therein is now
 void and shall in all time coming be void and extinct," &c.

I am very clearly of opinion that, in so far as the pursuer demands that the
 right of the defender to the entailed estates shall be declared to be forfeited, his
 action is entirely untenable, not because the defender is not or may not be still
 bound to clear the estate of these debts, but because that obligation, if it exists,
 must be fulfilled according to its terms, and enforced by the ordinary compul-
 sions of the law.

The pursuer maintains his case on the footing that by accepting the appoint-
 ment of £25,000 without clearing off the debt, the defender had reprobated the
 deed of the entailor, and therefore had forfeited his right under the entail. But
 this is a misapprehension of the defender's right, as sustained by the House of
 Lords. There are three separate provisions contained in this deed of appoint-
 ment, all of which are very clearly dealt with by the Lord Chancellor. The
 first is the declaration of the will of the granters that this sum of £25,000
 should descend to the heirs of entail, a declaration which the Lord Chancellor
 holds to be equivalent to a gift of the fee to the defender. Then, secondly,
 there are the words of absolute appointment, which the Lord Chancellor held

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to be unconditional ; and, thirdly, there is the direction and appointment on the trustees to cancel these bonds, which was held not to be the expression of a condition, but only of a wish or desire that the money should be so employed. As regards this last direction, all the noble and learned Lords were clear, not only that it could not receive effect, but that it never was intended to receive effect, without the consent of the eldest son. Thus, in taking the £25,000 as his absolute right, the defender acted entirely in conformity with the deed of division. He took the money without conditions, because it was given without conditions, and no question of election, or as we term it, approbate and reprobate, can possibly arise by the defender acting on the deed of appointment according to its terms.

This consideration might be held sufficient to dispose of the original conclusions of this action ; and although the amendment of the summons does contain a conclusion that it should be declared that the defender is bound to discharge these debts, this is only for the purpose of leading up to the conclusion that the forfeiture of the estate is the penalty to be incurred by the failure to fulfil the obligation. Apparently, and not unnaturally, the pursuer cares little whether these debts are cleared or not, if he is not to have access to the estate, for the payment would not confer any immediate benefit on the pursuer, and might never do so. And therefore he has been driven to maintain that by accepting this unconditional provision the defender, in some way which is not intelligible to me, has reprobated the deed under the terms of which he has implicitly acted.

But while I am very clear that by taking the £25,000 absolutely the defender has raised no question whatever of election, there remains the other and to my mind the only point involved in the conclusions of the summons which the case presents, whether, apart from election, he can take these estates which were entailed on him by Sir John M'Donald and yet keep up these debts against the entailed estate. I mean to express my opinion on this point as your Lordships have, but I have doubts how far, even if my views are sound, they can receive effect in this action. This point does not depend on any of the defender's actings in regard to the apportioned fund, but entirely on the injunctions or obligations laid upon him by the granters of the settlement, either directly or by clear implication. It is maintained by the pursuer that the deed of division, while it attaches no condition to the appointment, does yet clearly indicate the will and the intention of Sir John and Lady M'Donald that the defender should pay off these debts, and that Sir John M'Donald, as the fee simple proprietor of these lands, was entitled to attach this obligation to the settlement by any probative writing expressive of that intention.

On this subject I am of opinion—1st, That Sir John M'Donald may effectually impose this condition on his eldest son, by words expressive of the intention, in the deed of division. It can be of no moment that the obligation did not enter the investiture or the formal conveyance. Any purposes, conditions, or alterations may be effectually adjoined to a formal conveyance by any probative writing, contemporaneous or posterior, expressive of the grantor's intention. The destination itself may be so altered, and much more may conditions be so annexed to the gift. I should consider it a matter of law not admitting of dispute that if Sir John M'Donald had distinctly said in the deed of division that his eldest son should pay off these debts the direction might have received effect, and that it would not signify that the clause did not

the conveyance. In the second place, I do not think that any light is thrown on this question by the series of English cases, commencing with that of *Carver v. Bowles*.¹ It was argued that in conformity with these cases the words in the deed of division which indicate the intention of the parties that the defender should pay off these debts, however clear, cannot be read, but must be blotted out of the deed. I have carefully studied these cases, and I am very clearly of opinion that the argument founded on them proceeds on a misapprehension of their true import. They decide no more than this, that where in the exercise of a power of appointment an attempt is made ineffectually to attach limitations to the appointment, the appointee may both take the fund absolutely, and other gifts contained in the same deed, without thereby giving force or vitality to the inoperative directions, on the principle of election. That seems to be the inevitable result of holding that these superadded directions were not conditions of the appointment, and so I am inclined to hold in this case. Such was the case of *Carver v. Bowles*. Lord Hatherley, in the recent case of *Woolridge*,² makes the observations which Lord Ormisdale has quoted. He says that the words must be blotted out of the deed, not only to the effect of denying them operation in limiting the appointment, but also of excluding any question of election. It was to these effects only that Lord Hatherley held that the words were to be considered as blotted out of the deed. Holding as I do that no question of election can be raised in this case under the judgment of the House of Lords, the decisions in question seem to be entirely in conformity with my opinion. If a testator leaves a legacy out of his own proper estate, and at the same time appoints to a fund under a power, and superadds words of limitation applicable to both, these may fail as regards the sum appointed, but they must receive effect as regards the legacy.

The question, therefore, is, whether the defender is bound to clear off these debts, or is entitled to keep them up; and that depends entirely on whether Sir John M'Donald, who was absolute proprietor of these lands, has validly expressed his intention that the defender in accepting this gift of the lands should take them under the burden of this obligation.

This intention can only be gathered by reading these two instruments in combination; and so reading them, while I am strongly impressed with the difficulties suggested by your Lordships, I cannot persuade myself that there is any doubt at all of what Sir John M'Donald intended. He, beyond all question, meant that his heir should pay off these debts, and should not keep them up against the estate. It is, I think, of no moment that the special manner in which payment was to be made, neither was, nor was intended to be, imperative, nor that in order to enable his heir to pay these debts he and his wife allotted to the heir an equivalent from his mother's estate. He was quite entitled both to impose the obligation and to give the means of discharging it; and in construing this *mortis causa* gift effect must be given to the avowed intention of the granters, even although the words in which it is expressed are the same as those which failed to limit the appointment. It is here, no doubt, that the apparent difficulty arises. The words which express the intention are used with reference to a special mode of giving it effect, which the granters could not enforce. But this does not touch the substance of the settlement, which did not limit this

No. 9.

Nov. 1, 1876.
M'Donald v.
M'Donald.

¹ Jan. 1831, 2 Russell and Mylne, p. 304.

² *Woolridge v. Woolridge*, Feb. 21, 1859, Johnson's Reports, p. 63.

No. 9.

Nov. 1, 1876.
M'Donald v.
M'Donald.

obligation to the use of the special fund. No doubt the obligation was only laid on the eldest son, because he only had funds out of which he could fulfil it. But the intention that he should clear off these debts and not keep them up, when he took £25,000 under the appointment, is plain enough.

The conclusion at which I should have been inclined to arrive, had the summons been framed for that purpose, would have been to have found that the defender is bound to pay off these debts, not in respect of his taking the £25,000 under the appointment, but in terms of the manifest intention of the granters of the entail. The conclusions for irritating the right of the defender are in any view untenable, and from these the defender ought to be assoilzied.

THIS interlocutor was pronounced:—"Allow the amendments of the summons proposed by the pursuer: . . . Adhere to the interlocutor complained of: Find the defender entitled to additional expenses," &c.

DEWAR & DEAS, W.S.—A. P. PURVES, W.S.—Agents.

No. 10.

Nov. 2, 1876.
Rocca v.
Catto's
Trustees.

MRS JESSIE BURD OR BIRD OR ROCCA AND HUSBAND, Pursuer.—

Campbell Smith.

THE TRUSTEES OF THE LATE GEORGE CATTO AND ANOTHER, Defenders—
Balfour—Darling.

Vicennial Prescription of Retours—Stat. 1617, c. 13—Fraud.—An action of reduction of a retoured decree of service was brought after the lapse of five and six years, upon the allegation that the person served was not the true heir. The summons also contained vague allegations to the effect that the service had been obtained by fraud, perjury, and subornation of perjury. The defenders called were singular successors in the property taken up by the service. Including minorities, the full period of the long prescription had not elapsed. Held that the action was barred by the vicennial prescription of retours.

Observations on the vicennial prescription of retours.

2D DIVISION.
Lord Young.
R.

IN May 1819 Patrick or Peter Burd obtained a decree of general service as nearest and lawful heir of his deceased brother, Thomas Burd, before the bailies of Aberdeen, which decree was duly retoured to Chancery.

Thomas Burd was vested with a personal right to a share of heritable subjects in Peterhead, under a charter granted by the superiors of the subjects.

By disposition and assignation, dated October 1820, Patrick Burd sold and disposed the subjects which had belonged to his brother to one Kilgour, and assigned to him the charter above mentioned, with the precept of sasine therein contained, which was then unexecuted, and also the general service in his favour, in virtue of which Kilgour was infeft, conform to instrument of sasine also dated and recorded the same month of October 1820.

From Kilgour the property passed by various transmissions, some of them being by public sale, to the defenders of the present action, which was raised in December 1875 by Mrs Jessie Burd or Rocca, who alleged herself to be the granddaughter and heir of Thomas Burd before mentioned. The summons concluded for reduction of the decree of service in favour of Patrick Burd, and the disposition and sasine in favour of Kilgour. The defenders were called upon to make over the subjects to the pursuer.

The pursuer averred that Patrick Burd was not the nearest heir of his

rother Thomas, who, on the contrary, had left lawful issue, his eldest son, also called Thomas, being Mrs Rocca's father; that Patrick Burd knew quite well that his brother had left issue, and that the service in his favour was obtained by fraud, perjury, and subornation of perjury; that Kilgour when he purchased the subjects knew that the seller had no good title, and that it was a matter of notoriety that the pursuer's father was a nearer heir than Patrick Burd. The pursuer stated that her father was born in 1802, and she herself was born in 1851, and was his only surviving child. No. 10.
Nov. 2, 1876.
Rocca v.
Catto's
Trustees.

The pursuer pleaded;—(1) The pursuer, being the nearest lawful heir of one or more of the parties favoured by the last settlement of John Burd, is entitled to decree as concluded for, with expenses, in the event of expense being caused. (2) The defenders having no right to the share of the properties libelled, which is claimed by the pursuer, ought to be decreed to cede possession in her favour. (3) The defenders' pleas of prescription are inapplicable, because of the minorities of the pursuer and her father falling to be deducted from the forty years. (4) The pretended service and retour of 1819 being wholly null or invalid, cannot be set up by any prescription.

The defenders pleaded, *inter alia*;—(2) The action is excluded in respect of both the positive and negative prescription, or one or other of them. (3) The action is barred by the Act 1617, c. 13, establishing the vicennial prescriptions of retours.

On 8th March 1876 the Lord Ordinary pronounced this interlocutor:—“Sustains the third plea in law for the defenders: Assoilzies the defenders from the conclusions of the summons: Finds the defenders entitled to expenses,” &c.

The pursuer reclaimed.

Argued for the pursuer;—(1) The vicennial prescription was a plea personal to the person served.¹ (2) A decree of service procured by perjury was no better than a forged decree of service. It was a nullity which no lapse of time could validate.

Argued for the defenders;—(1) In the case of heritable property purchased *bona fide* on the faith of the records the fraud of the author could not injure his successor.² (2) It was now settled law that the vicennial prescription could be pleaded by a successor of the person served.³ (3) The action was excluded by *mora* and taciturnity. (4) In any view the allegations of fraud were far too vague to be admitted to probation.*

¹ Fullarton v. Hamilton (Bargany case), June 20, 1825, 1 W. and S. App. 410 (see pp. 428 and 496); Sir George Mackenzie's Observations on the Statute 1617, c. 13 (see Additions and Supplement at the end of the Treatise); Erskine, iii. 7, 19.

² Erskine, iii. 5, 10; Wilson v. Elliott, May 2, 1828, 3 W. and S. App. 60; Williamson v. Shairp, Dec. 3, 1851, 14 D. 127, 24 Scot. Jur. 54; Baird v. Neill, June 12, 1835, 13 S. 927, 7 Scot. Jur. 413.

³ Neilson v. Cochrane, March 19, 1840, 1 Rob. App. 82; Campbell v. Campbell, Jan. 26, 1848, 10 D. 461, 20 Scot. Jur. 137.

* In the course of the debate the pursuer tendered a minute of amendment with the view of making her averments more specific, in which it was stated that the only witness examined in support of Patrick Burd's claim of service was a woman of abandoned character, selected solely because she was ready and willing to commit perjury, who swore that Thomas Burd died unmarried, which was false, and known by her to be false; that she was suborned by Patrick Burd to commit perjury, and did commit perjury. Particulars in regard to Thomas Burd's marriage were given, and an extract of the proclamation of banns produced. It was further stated that Patrick Burd had seen the pursuer's father

No. 10. At advising,—

Nov. 2, 1876.
 Rocca v.
 Catto's
 Trustees.

LORD JUSTICE-CLERK.—The facts of this case, so far as it is necessary to resume them for the purpose of this advising, are these : On 22d May 1819 a person of the name of Patrick Burd was served nearest and lawful heir of Thomas Burd, the grandfather of the pursuer. The service took place before the bailies of Aberdeen. The ancestor had right to certain heritable subjects in the town of Peterhead. The right to these subjects appears to have stood upon an unexecuted precept of sasine in the person of the ancestor. In 1820 Patrick Burd sold the subjects to one Kilgour, and assigned to him the unexecuted precept of sasine. Kilgour made up titles to the subjects, and they have come down by several transmissions to the defenders in this case.

The object of this action is to reduce and set aside the defenders' title, on the ground that, although fifty-six years have expired since the service was expedited by Patrick Burd that person was not the true heir of Thomas Burd. One of the pleas stated in defence is the vicennial prescription of retour, established by the Act 1617, c. 13. The Lord Ordinary has sustained that plea. For my own part I should not have required the aid of that statute in arriving at the conclusion that this action cannot be maintained. Looking to the nature of the challenge, and the facts as they appear upon the record, I think that it is not the question for the pursuer to raise any such issue as she now attempts to do. The plea of *mora* and taciturnity is a perfectly good plea against a claim of this kind, unless circumstances are specifically stated, accounting for and ~~excusing~~ the silence and delay. In this case the father of the pursuer lived for thirty years after the date of the service, in the full knowledge, if the pursuer's statement be true, that the lands, which ought to have been his, were in possession of another. It is not said that he was out of the country. Moreover it is averred by the pursuer that it was a matter of notoriety that her father was nearer heir than Patrick Burd. If so, the pursuer's father must have known the true state of matters. The taciturnity of that man and of the pursuer, who now claims through him, is quite a sufficient answer to her challenge of the truth of what was found by the inquest on the service. Still less can allegations of perjury and subornation of perjury be entertained, where for upwards of fifty years no charge has been made either against the witness or the man by whom the witness is said to have been suborned.

I think that the considerations which I have stated are sufficient for the decision of the case. The Lord Ordinary has, however, sustained the plea of the vicennial prescription, and I am prepared to affirm that judgment. The facts of the present case give great strength to the plea. If the vicennial prescription was intended to protect singular successors purchasing on the faith of the records one can scarcely imagine a case to which that prescription would be more applicable than the present. I admit that, notwithstanding the two cases

in his brother Thomas' house, and had been told that he was his son, and that "at the time of the service it was perfectly well known in Peterhead that Thomas Burd did not die unmarried, and that Peter Burd was not his heir. That was perfectly well known to Patrick Kilgour, the purchaser of the property, and to every subsequent purchaser of the property, or at least such purchasers and their agents knew that Peter's title to part of the property was disputed. They had all due notice of the pursuer's claim, or of her father's claim. In consequence of the doubtful character of the title the property nevertheless sold at its true value."

uries and a-half which have elapsed since the date of the statute, the subject of No. 10. he vicennial prescription is still in a somewhat misty state. If it were not for the authority of the cases of Neilson v. Cochrane¹ and Campbell v. Campbell,¹ Nov. 2, 1876. I should say that the operation and limits of the vicennial prescription are by no means clear. Sir George Mackenzie, who lived comparatively near the date of the Act, says, in his Observations on the Act 1617, c. 13, that it was intended in favour of singular successors. But in a *notandum* he retracts this statement, and remarks that what he said in general concerning singular successors was only meant of singular successors acquiring rights before that Act. But what raises the greatest difficulty on the subject are the *dicta* of the Judges in the Bargany case, who are all but unanimous in saying that the privilege conferred by the Act 1617, c. 13, is personal to the heir served. The point was not directly decided, because the retour in that case bore on the face of it that the person served was not the true heir. Then, however, came the subsequent case of Neilson v. Cochrane, in which very little seems to have been said on the opinions in the Bargany case,¹ and very little on the fact that in the case of Neilson the heir served was dead at the date of the challenge. Still the case of Neilson v. Cochrane is a direct authority for holding that the vicennial prescription can be pleaded by a singular successor of the heir served, and the point seems to have been assumed by the Court as a matter of course in the subsequent case of Campbell v. Campbell. Looking to these authorities, I am prepared to hold in the present case that a singular successor may plead the vicennial prescription after the death of his author.

It is said, however, that the service was radically bad, in respect that it was obtained by fraud. Questions of considerable subtlety might have arisen if there had been a relevant and sufficient allegation of fraud. For I am not sure whether in that case the defenders could say that their title as singular successors excludes the action. A general service establishes propinquity, and although part of the property which belonged to the ancestor has been transferred to a singular successor, that will not prevent the true heir from reducing the service of the false heir. In that case it might be contended that the title of the singular successor is annulled, not on the ground of fraud, but because it flows *a non domino*. But I do not think that these questions arise in the present case, because the allegations of fraud and subornation of perjury are far too vague to be admitted to probation.

I think, therefore, that this action cannot be maintained, and that we should adhere to the interlocutor of the Lord Ordinary.

LORD NEAVES, LORD ORMDALE, and LORD GIFFORD concurred.

THE COURT pronounced this interlocutor:—"The Lords having considered the amendment for the pursuer, No. 71 of process, allow the same to be received, and also the certificates from the Register of Marriages and Births, Nos. 72 and 73 of process, and having heard counsel on the reclaiming note for Mrs Jessie Rocca and husband against Lord Young's interlocutor of 8th March 1876, refuse said note, and adhere to the interlocutor complained of, with additional expenses," &c.

M'CASKIE & BROWN, S.S.C.—ALEX. MORISON, S.S.C.—Agents.

No. 11.

SARAH TURNBULL or MUIR, Petitioner and Appellant.—*Millie.*Nov. 3, 1876.
Muir.

Executor—Confirmation of Mother—Next of Kin—Moveable Succession Act, 1855, 18 Vict. c. 23.—Held that the interest conferred by the Moveable Succession Act, 1855, upon a mother in the succession of her deceased child entitled her to be confirmed executrix *qua* mother in the absence of others having a preferable title.

Executor—Joint appointment.—There is no incompetency in the confirmation of two persons as joint executors though claiming the office in different characters.

1ST DIVISION.
Commissary of
Renfrew.
M.

IN this case the petitioner, Mrs Sarah Turnbull or Muir, applied to the Commissary of Renfrew to be decerned "executrix-dative *qua* next of kin" to her deceased son, Alexander Muir.

In respect that another petition had been presented by Mrs Jessie Reid or Muir, widow of the deceased, for confirmation *qua* relict, the Commissary appointed intimation to her of the mother's petition.

A minute was thereafter lodged by the widow and mother agreeing to an appointment as joint executrices.

The Commissary-depute (Cowan), on 27th April 1876, in Mrs Sarah Turnbull or Muir's petition, found in law that "a mother is not one of the next of kin of her children, and that the petitioner is therefore not entitled to be decerned executrix-dative *qua* one of the next of kin, as craved," and therefore dismissed the petition.

The petitioner appealed to the Commissary (Fraser), who, on 10th May 1876, dismissed the appeal.*

The petitioner appealed to the Court of Session, and argued—Under the Moveable Succession Act, 18 Vict. c. 23, the mother, failing the next of kin, who in this case did not seek confirmation, was entitled to be decerned executrix. If her character was misdescribed in the petition that was not sufficient ground for dismissing it,¹ but an amendment should have been allowed. There was no valid objection to a joint appointment.

At advising,—

LORD PRESIDENT.—The Commissary-depute has found in law "that a mother is not one of the next of kin of her children, and that the petitioner is therefore not entitled to be decerned executrix-dative *qua* one of the next of kin, as craved," and he therefore dismissed the petition. The Commissary on appeal adhered to the interlocutor, and on the same grounds.

I am not disposed to differ from the Commissaries in holding that a mother is not one of the next of kin of her children in a certain sense of the term. In the law of moveable succession next of kin is a technical term expressing a certain degree of relationship, and in that sense certainly a mother is not one of the next of kin of her children.

But I think that the Commissaries have dealt too strictly in dismissing this

* "NOTE.—A mother is clearly not one of the next of kin, and it is a misapprehension of the Act 18 Vict. cap. 23, to suppose that it made any change upon the common law in this respect. It provided certain remedies for admitted grievances, by giving a right to the succession in personal estate to persons who by the common law would have had no such right; but this privilege did not import them into the class of next of kin. The objects and scope of the Act are well explained in the case of *Turner v. Cooper*, 27th Nov. 1869, 8 Macph. p. 222."

¹ *Dowie v. Barclay*, March 18, 1871, 9 Macph. 726, 43 Scot. Jur. 364.

tion. If the petitioner was entitled to be confirmed *qua* mother they might have allowed the petition to be amended, and have then confirmed her as executrix *qua* mother. It has been stated to us that the next of kin do not desire to be confirmed, and the only other party in the field is the relict. A minute was signed by the petitioner and the relict craving a joint appointment. But the commissary-depute seems to have doubted the competency even of a joint appointment in different characters.

Now, I am of opinion (1) that the mother of a deceased may in the absence of the next of kin be confirmed executrix-dative *qua* mother in consequence of the interest conferred upon her by the Moveable Succession Act, 1855; and (2) that it is conformable to well recognised practice that two parties, each of whom might be confirmed separately, should be confirmed jointly, though in different characters. The reason is that interest in the succession is the general ground of confirmation. No doubt the element of relationship enters into the question also, and other parties having a better title will exclude such a claim as that of a mother. But there is no reason why the principle, that, in the absence of the next of kin, a party having a beneficial interest in the succession may be confirmed should not apply to the case of a mother as well as to that of a widow or a creditor. An interest in the succession has been created in the mother by the Moveable Succession Act. It differs from other interests in the succession in that it is of a more restricted nature. But it is sufficient to entitle her to be confirmed in the absence of any one having a preferable right.

I think therefore that the course we should adopt is to send this petition back to the Sheriff, with a direction to him to allow the petition to be amended, and to proceed therein as shall be just.

LORD DEAR.—It is said in the sacred writings that the parent provides for the children, and not the children for the parent. How far this text may have influenced the law of Scotland in preferring collaterals to parents it is unnecessary to inquire. Other passages, however, in the sacred volume recognise, in general terms, the duties between parents and children as reciprocal. I am disposed to think that the recent amendments of the law, making the right of succession in personal estate to some extent reciprocal, are more in accordance with the law of nature than the law as it stood before the Act. Be this as it may, however, the fact that the law as it formerly stood excluded the father and mother from all interest in the succession was probably the reason why the nearest collateral relations were commonly called the next of kin, although they really are not in any proper sense nearer of kin than the father and mother. At all events the exclusion of the father and mother from all interest in the personal succession appears to me to have been the reason why they could not be confirmed, for I agree with your Lordship that interest in the succession is a material thing to look to in such a question. The appointment of executors-dative is within the ordinary commissary jurisdiction, to be exercised according to circumstances, although with due regard to practice. The present practice seems to have originated in the instructions given in 1666 by the archbishops and bishops to the Commissaries, and the officers of the Commissary Court.¹ Among “the orders to be observed in confirmation of all testaments” there is the following:—“If there be no nomination or testament made by the defunct,

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¹ See Acts of Sederunt, vol. 1553 to 1790, p. 95.

² *Ibid.* p. 99.

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or if the testament-testamentar shall not be desired to be confirmed, ye shall confirm the nearest of kin desiring to be confirmed; and if the nearest of kin shall not desire to be confirmed, ye shall confirm such of the creditors as desire to be confirmed as creditors, they instructing their debts; and if neither nearest of kin, executor, or creditor, shall desire to be confirmed, ye shall confirm the legators such of them as desire to be confirmed, and instruct that they are legators. And if no person having interest foresaid shall confirm, ye shall confirm your procurator-fiscal, datives always being duly given thereto before; and if after the said datives (but before confirmation) any person having interest shall desire to be surrogat in place of the procurator-fiscal, ye shall confirm them as executors surrogate in place of the procurator-fiscal." In giving these directions the archbishops and bishops were rather supposed to be encroaching on the province of the Court, and accordingly to give the directions undoubted authority, and at same time to preserve the judicial power intact, the injunctions were ordered to be recorded in the Books of Council and Session, "under protestation always that the recording of the said injunctions should be no ways prejudicial to the privileges of the Lords of Session, or derogate in any sort from their jurisdiction in civil causes."¹ These instructions, which were acted upon, seem obviously to recognise that under certain circumstances any person having an interest in the succession may be confirmed.

The only distinction made was that if there were various applicants they should be confirmed in a certain order. There was no distinction or difference in the validity of the decerniture and confirmation if actually made. From the terms of the instructions it was at one time contended that none but those specially mentioned were to be confirmed. But this was settled to the contrary in the authoritative case of Crawford, June 10, 1755, M. 3818, where the general disponees came forward and claimed the office, and in a competition between them and the next of kin the Court preferred the general disponees.

Thus the only reason why the father and mother were not confirmed under the former practice obviously was the want of interest in the succession, and this anomaly having been removed by the Act of 1855, no reason remains for any longer excluding them from the office.

It is apparent on the face of this petition that the petitioner is the mother. The only room for doubt therefore was whether she was entitled to be confirmed as one of the nearest of kin. If this had been done I think it would not have invalidated the appointment. It is no great stretch to say that a mother is one of the next of kin of her children. But all question would have been avoided by allowing an amendment of the prayer of the inferior Court petition, and simply confirming her executrix *qua* mother, and I see no objection whatever to this still being done.

I think it right to add that I can see no sufficient objection to the confirmation of two persons either in the same character or in different characters. Inconvenience may sometimes result in the management of the executry estate, but there is no incompetency in the appointment.

It is right also to add that the appointment of an executor-creditor is hardly a proper analogy, as that rests directly on the statute 1695, c. 41, and the appointment of a judicial factor is regulated by Act of Sederunt. But these analogies are not necessary to justify the result.

¹ Acts of Sederunt, vol. 1553 to 1790, p. 94.

LORD MURE concurred.

No. 11.

THIS interlocutor was pronounced :—" Recall the interlocutors of the Nov. 3, 1876. Commissary-depute and the Commissary, dated respectively the Muir. 27th April and 10th May 1876, and remit to the Sheriff of Renfrewshire, as coming in place of the Commissary under the authority of the 35th section of the 39th and 40th Victoria, cap. 70, to allow the appellant to amend the prayer of the petition, and thereafter to proceed as shall be just, and decern."

J. & A. HASTIE, S.S.C., Agents.

ALEXANDER NOBLE, Complainer.—*Kinnear*.
ANN NOBLE OR CAMPBELL, &c., Respondents.—*Adam*.

No. 12.

Nov. 4, 1876.

Bankruptcy—Agent—Sale.—An agent employed by the trustee in a sequestration became the purchaser of a decree for payment belonging to the bankrupt estate, which he assigned to a third party. The assignee having charged upon the decree, the debtor presented a note of suspension, on the ground that the sale by the trustee was null, the purchaser being the agent employed in the sequestration. *Suspension refused*.

Noble v. Campbell.

THIS was a suspension of a charge served by Ann Noble or Campbell and others on Alexander Noble, shipmaster, Fraserburgh, for the sum of £19, 14s 9½d, decerned for in an action instituted by Charles L. Forrest, trustee on the sequestrated estate of William Y. Gray. The suspender alleged that Forrest assigned without value the debt and diligence in question to Robert Anderson, writer in Fraserburgh, who transferred it to John Proctor, who transferred it to the respondents.

Bill-Chamber.
1st Division.
Lord Gifford.
M.

The Lord Ordinary refused the note.

The complainer reclaimed, and at the bar was allowed to add to his statement with reference to the assignation to Anderson being without value the allegation that Anderson was then the agent in Gray's sequestration.

The complainer argued ;—The assignation by Forrest to Anderson was invalid, because it was a purchase by the law-agent in the sequestration of property belonging to the sequestrated estate. The sale was *ultra vires* of the trustee, and was null. Anderson therefore could not give any right to his assignee.¹

The respondents argued ;—If the sale was illegal, it could only be rescinded by the creditors of the bankrupt estate. Until it was challenged by the creditors it was a valid sale.

LORD PRESIDENT.—The grounds of suspension maintained before the Lord Ordinary have not been argued to us, and the only objection now amounts to this that the chargers have no title, because the sale by Gray's trustee to Anderson was a nullity, and no right could be thereby transmitted to any one, and none therefore to the chargers. I think that contention is supported entirely upon the argument that Anderson was disqualified from purchasing because he was the agent in the sequestration. Now, there is no statutory nullity which so disentitles him. Indeed, an agent is not an officer in bankruptcy proceedings, and is not so recognised. An "agent in a sequestration" is a misnomer. The party so termed is nothing more or less than the law-agent of the trustee, and there is nothing beyond a common law relationship between them. Therefore,

¹ 2 Bell's Com. 5th ed. 376, 377; Crichton v. Bell, June 25, 1833, 11 S. 781, 5 Scot. Jur. 468; Robertson v. Adam, Feb. 20, 1857, 19 D. 502.

No. 12. if an agent is disqualified from purchasing at a sale by a trustee on a bankrupt estate it must be at common law.
 Nov. 4, 1876.
 Noble v. Campbell.

I assume that this sale might be reducible at the instance of creditors; but it is just as clear that if not so reduced it is perfectly good, not only by express confirmation, but by silence signifying acquiescence. There is no ground here for suggesting that any one connected with the estate offers any objection. That being so, I think the title of the chargers good, and that we must refuse the note.

LORD DEAS and LORD MURE concurred.

THE COURT adhered.

J. WATSON JOHNS, L.A.—PEARSON, ROBERTSON, & FINLAY, W.S.—Agents.

No. 13.
 Nov. 4, 1876.
 Cook v. Cook.

ARCHIBALD COOK, Pursuer.—*Rhind*.
 MARGARET LESLIE OR COOK, Defender.

Proof—Witness—Divorce—Criminating Question—Statute 37 and 38 V. c. 64 (Evidence Further Amendment (Scotland) Act, 1874), sec. 2.—Section 2 of the Evidence Further Amendment Act, 1874, enacts that “no witness shall be liable to be asked or bound to answer any question tending to shew that he or she has been guilty of adultery.” Held that it is the duty of the Judge to prevent such questions being put to the witness, so as to save him from the necessity of declining to answer, unless he volunteers to answer or make a statement; and when such a question has been put, and the witness has declined to answer, neither the question nor the declinature of the witness can be recorded in the notes of evidence.

1ST DIVISION.
 Ld. Craighill.

IN the course of a proof in an undefended action of divorce by Archibald Cook, miner, Thornton, against his wife, Margaret Leslie or Cook, on the ground of adultery, the following point arose under section 2* of the Evidence Further Amendment (Scotland) Act, 1874, and was verbally reported to the First Division by the Lord Ordinary. His Lordship stated that the defender had been examined, and admitted that she was married to the pursuer in 1872, and five months after the marriage had separated from him, and had never seen him again until the day of the proof, and that she gave birth to a child on 30th May 1876. In the pursuer's condescendence it was stated that John Mackie was the father of the child, and on being examined as a witness he admitted that he was on intimate terms with the defender. The pursuer's counsel proposed to ask him whether he had carnal intercourse with the defender in July 1875, at a place which was specified in the condescendence. The question had not been recorded, and the witness being asked by the Lord Ordinary whether he objected to answer, replied that he did. The counsel for the pursuer thereupon asked the Lord Ordinary to record the question and the declinature of the witness to answer in the notes of evidence, and referred to the case of Kirkwood v. Kirkwood, Dec. 9, 1875, ante, vol. iii. p. 235.

The Lord Ordinary reported the case.

LORD PRESIDENT.—The Court are of opinion that the object of the statute plainly is that a witness shall not be put in the position of refusing to answer, and therefore it enacts that he shall not be liable to be asked such a question as that which has been put. In these circumstances, if the question is put it is the duty of the Judge to object, and to allow nothing to be taken down

* Section 2 enacts that “no witness shall be liable to be asked or bound to answer any question tending to shew that he or she has been guilty of adultery.”

If the witness volunteers to answer the question or to make a statement he must of course be allowed to do so, and what he says may be recorded. The protection afforded by the statute extends this length, that it is not to be allowed that a witness shall be obliged even to decline to answer such a question as that about which we have been consulted by the Lord Ordinary.

No. 13.
Nov. 4, 1876.
Cook v. Cook.

LORD DEAS and LORD MURE concurred.

C. B. Hogg, L.A., Agent.

THE AYR HARBOUR TRUSTEES, Pursuers.—*Lord-Adv. Watson—Blair* No. 14.
—*Asher.*

ALEXANDER WEIR, Defender.—*Trayner—Balfour—Guthrie.*

Nov. 7, 1876.
Ayr Harbour
Trustees v.
Weir.

Harbour—Right of Harbour Trustees to Maintain a continuous Quay Wall.
—Circumstances in which, in virtue of possession upon an ancient grant of harbour, and upon the terms of local Acts, statutory harbour trustees were held entitled to construct and maintain a continuous line of quay wall along a harbour, and to prevent the proprietor of an adjoining shipbuilding yard from having a launching slip or opening through the quay wall into the harbour.

Observations (per Lord Ormisdale and Lord Gifford) on the rights conveyed by a grant of harbour.

ALEXANDER WEIR was the owner of a shipbuilding yard upon the north side of the river Ayr, at some distance below the bridge of Ayr.

2D DIVISION.
Lord Shand.
R.

Two openings communicated with the river by which vessels could be admitted to a dry dock and a patent slip on Weir's premises. The openings were respectively thirty-six and thirty-five feet broad, with a tongue of land nineteen feet in breadth between them. This frontage to the river, extending to ninety feet, was in the centre of operations which the Ayr Harbour Trustees were executing for the benefit of the harbour, and there being a deficiency of berthage accommodation in the harbour a question arose between them and Weir as to his right to maintain these openings.

The present action was raised in April 1875 by the Ayr Harbour Trustees against Weir, to have it declared that they had "right to construct and maintain a continuous river or quay wall along the north side of the harbour of Ayr, and also to make and maintain a quay or roadway by or along the top of said river or quay wall sufficient and suitable for all uses and purposes connected with the said harbour," and that the defender had "no right or title to form or maintain a dock or launching slip or other opening in or through the said river or quay wall along the north side of the harbour of Ayr, or otherwise to interfere with the said wall, or with the quay or roadway by or along the top of said wall." The summons also concluded for interdict against the defender "using the said dock, launching slip, or other opening in the said wall, except with the consent or under the authority of the pursuers." There were other conclusions which were not insisted in.

The defender's title to the property belonging to him was a disposition by James Scott in his favour, dated 31st May 1871. Scott obtained his title to the subjects by a feu-disposition, dated three days before, from the magistrates of Newton-upon-Ayr. The property conveyed was specially described and stated to be bounded by "the public road running along the north quay," but at the end of the special description these words were added,—“Together with the buildings and other erections thereon, pertinents thereof, and whole rights and privileges thereto belonging, in-

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cluding any right of property, servitude, or other right which may belong to us and to the said community of freemen in and to the ground, buildings, and erections situated between the harbour of Ayr and the patent slip and dry dock shewn on said plan."

The defender maintained that the ground to which these words referred belonged to the burgh of Newton, and now to him, unburdened by any right in favour of the pursuers.

The Lord Ordinary allowed a proof, of which the result was shortly as follows:—The burghs of Ayr and Newton-upon-Ayr were created by crown-charters of very ancient date, the lands granted to Ayr being on the south side of the river, and those granted to Newton being on the north side of the river. In 1400 King Robert III. granted the burgh of Ayr (which was originally created by William the Lion) a charter "cum portu burgi supra dicti," and the grant of "free port" or "port and harberie," was renewed by subsequent royal charters.

No right of port or harbour was ever given to the burgh of Newton-upon-Ayr.

By an Act of Parliament passed in 1772 the administration of the harbour, which down to that date had been under the management of the town-council of Ayr, was placed in trustees, who represented the burgh of Newton as well as that of Ayr. The trustees were empowered "to raise, repair, and make sufficient, or cause to be raised, repaired, and made sufficient, the dykes, piers, quays, and other works, at present belonging to the said harbour of Ayr; and to alter and extend the same, or any part thereof." The Act, however, did not transfer to the trustees any right of property in the harbour buildings and works.

Acts were passed from time to time for the improvement of the harbour, and alterations made in the constitution of the trust.

By the Ayr Harbour Act, 1835, sec. 13, the property in all the lands, heritages, piers, quays, walks, and ways built or established under the previous Acts or otherwise was declared to be vested in the trustees.

Another Act was obtained in 1855 to continue and amend the Act of 1835, which expired in twenty-one years, and the Act of 1855 contained a similar vesting clause.

The 40th section of the Act of 1855, which substantially repeated a similar clause (sec. 17) in the Act of 1835, was as follows:—"That it shall be lawful for the trustees, and they are hereby authorised to deepen, cleanse, scour, and preserve the said harbour of Ayr, and to heighten, repair, and make sufficient the quays and other works at present appertaining to the said harbour, and to alter and extend the same, or any part thereof, as they shall judge to be necessary for the more effectual improvement of the said harbour, and for scouring and cleansing the bed and channel of the river of Ayr, in, through, and from the said harbour of the bay of Ayr, and also to make, widen, and maintain roads and passages on both sides of the said harbour for the use thereof."

It was proved that from an early date to the present time the harbour of Ayr extended throughout the river so far as navigable, including the north as well as the south side. A series of minutes of the town-council of Ayr from 1596 to 1771 was produced, in which frequent reference was made to the north side of the river as forming part of the harbour, and to the existence of a dyke along the north side of the river, which was repaired from time to time by the burgh of Ayr as part of the harbour works.

The shipbuilding yard now belonging to the defender was formed on ground belonging to the burgh of Newton in the early part of the 17th century. In 1814 permission was given by the harbour trustees to the

nants of the yard to make a temporary opening for launching, and the
 emission was repeated from time to time. The present openings had
 existed in a permanent form from about the year 1840, but the minutes of
 the harbour trust and the correspondence engrossed therein shewed that
 the trustees claimed the right to shut the openings when they should
 sink fit, and that this right was recognised by the tenants of the yard.
 From the beginning of this century at least a road had existed running
 along the north quay, and which was carried over the openings in question
 by bridges.

The Lord Ordinary pronounced this interlocutor:—"Finds, decerns,
 and declares in terms of the declaratory conclusions of the summons, and
 grants interdict against the defender as concluded for: *Quoad ultra*
*seco*lizes the defender from the conclusions of the action, and decerns;
 but finds him liable to the pursuers in expenses since the date of the
 interlocutor of 6th January last, by which a proof was allowed."*

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* Note.—(After a narrative of the facts, of which an abstract has been
 given)—"In this state of the facts, and as there has been no hostile or counter
 possession on the part of the defender's predecessors in the property, I am of
 opinion that the pursuers have established their alleged right of property in the
 ground in dispute, including the harbour roadway, which I think forms the
 north boundary of the defender's property. This being so, the pursuers are, in
 my opinion, entitled to make and maintain the continuous quay wall proposed,
 and the defender has no right to have the openings which he desires left for
 fishing purposes.

"I am farther of opinion that even if the defender's right in the quay wall
 and harbour ways along the north bank of the river were not a right of property
 in the ground itself, they would still be entitled to succeed in this action, for
 the reason that they are entitled to make and maintain the quay walls that are
 necessary for the harbour traffic on the north as well as on the south side of the
 river. In the case of a port or harbour of large extent, including, it may be,
 several miles in the course of a river of considerable breadth, it would be diffi-
 cult for the proprietor of the harbour to maintain that he was entitled to put up
 quays for the landing and shipment of goods at any part of the properties ad-
 joining the river he might think fit. But in the present case the whole extent
 of the river which is navigable is small, the traffic is and has always been of im-
 mense to both burghs situated on its banks, and the banks on both sides have
 been used and possessed for harbour purposes as a necessary adjunct or pertinent
 to the harbour for time immemorial. Holding that the north bank fronting
 the defender's property is within the limits of the harbour, and keeping in view
 the entire absence of any possession on which the defender could found as an
 exercise either of a right asserted by his predecessors or acknowledged by the
 harbour trustees, to make or maintain openings in the river bank for launching
 purposes, I am of opinion that in any view the defender holds his property
 subject to the burden of submitting to the erection of such quays and walls as
 may be necessary for harbour purposes; and I think the harbour trustees, in the
 exercise of their powers, are the judges of what is necessary for that
 purpose.—Craig, i. 15, 15, and opinion of the Lord Justice-Clerk in *Magistrates*
St Monance v. Mackie, March 5, 1845, 7 D. 586. The right of harbour,
 which imposes duties and obligations on the proprietor, must, I think, in such a
 case as this, carry with it the right to use the banks for the loading and ship-
 ment of goods, and, if necessary, the right to erect walls, not only as a protection
 to the harbour, but as quays for the accommodation of the traffic. The erection
 of walls may be absolutely necessary for the protection of the harbour, from the
 river, and the grant of harbour implies a power to erect such works at least within
 the limits of the port. It is only a reasonable extension of the same principle,
 that the power of making the banks available for loading and unloading pur-
 poses should be held as included in the grant."

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Argued for the defender;—A grant of port or harbour was an incorporeal right. It gave a monopoly for levying dues; and it also gave a right of using the shore for the purpose of loading and unloading goods, provided always that the part of the shore so used was accessible from the land without going through enclosed private property. If the grantees of the harbour required ground for the extension of the harbour or for the erection of quays or docks, he must purchase it. An incorporeal right like that of harbour could not be converted by possession into a right of feudal property. Possession might be of use to explain the grant, but if a grant of harbour never carried any land, possession of land upon a mere grant of harbour was possession *sine titulo*, and could not prescribe a right of property.¹ The charters in favour of the burgh of Ayr were bounding charters, all the lands conveyed being on the south of the river, so that the burgh could not acquire by prescription lands to the north of the river. Further, any possession which the harbour authorities had in this case could be ascribed to their right of user, and it was a well established principle that if the possession could be ascribed to some lower right than that of property such possession would not prescribe a right of property.² The possession alleged by the pursuers consisted in the repair of a rough wall on part of the north side of the river the purpose of which was evidently to keep the river in its course. It was built on ground belonging to the burgh of Newton, and therefore belonged to that burgh as proprietors of the ground. The acts of possession chiefly relied on by the pursuers were moreover on the part of the statutory trustees, who were not vested with the rights conveyed in the charters,³ and whose possession therefore could not interpret the charters. There never was a time when the slips in question were required in launching that they were not so used. The possession of the ground hitherto had by the harbour authorities had been consistent with the use of the premises for the purpose of building and launching ships. Because the owner of the shipbuilding yard had submitted to an unessential interference it did not follow that he was bound to submit to an interference which would render his property useless for the purpose to which it was put. The permission asked by some of the tenants could not affect the rights of the proprietors, the burgh of Newton, or their successor, the defender.

The pursuers founded on immemorial possession by themselves and their predecessors following upon the ancient charters in favour of the burgh, and fortified by the Ayr Harbour Acts, and upon the absence of any counter possession, except by express license.

¹ *Authorities as to the nature of a grant of a port or harbour.*—Stair, ii., 5; Bankton, i., 3, 4; Bell's Prin. 654-658; Christie v. Landale, May 16, 1825 S. 813; Magistrates of Campbeltown v. Galbreath, Dec. 14, 1844, 7 D. 2317 Scot. Jur. 107 (see opinion of the Lord Justice-Clerk); Dundee Harbour Trustees v. Dougall, July 18, 1849, 11 D. 1464, 21 Scot. Jur. 551; Magistrates of Renfrew v. Hoby, Jan. 18, 1854, 16 D. 348, 26 Scot. Jur. 165; Officers of State v. Christie, 1854, 16 D. 454, 26 Scot. Jur. 206.

² Cameron v. Ainalie, Jan. 21, 1848, 10 D. 446, 20 Scot. Jur. 130; Hovell v. McCann, Dec. 10, 1858, 21 D. 96, 31 Scot. Jur. 63; M'Callum v. Patrick, Nov. 21, 1868, 7 Macph. 163, 41 Scot. Jur. 89.

³ Scrabster Harbour Trustees v. Sinclair, March 19, 1864, 2 Macph. 884, 3 Scot. Jur. 442; Milne Home v. Eyemouth Harbour Trustees, Jan. 8, 1868, 7 Macph. 189, 40 Scot. Jur. 109.

At advising,—

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LORD JUSTICE-CLERK.—The able argument which we have heard in this case has diverged into many important general questions both of law and of antiquarian history. But that on which the decision, in my opinion, turns is entirely free of the more difficult topics which have been raised, and the question will be found to be solved substantially by the terms of the statutes under which the Ayr Harbour Trustees act. Nov. 7, 1876.
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The only question in controversy is raised in the first two declaratory conclusions of the summons. The first of these is, that the harbour trustees have under their statutes right to maintain a quay wall along the Newton or north side of the river of Ayr, and that the defender has no right to cut through this quay wall by his slip. The second is, that the pursuers are entitled to maintain a roadway on and along the quay wall.

In support of their contention the pursuers have thought it necessary to found upon the ancient charter of the burgh and port of Ayr, and to contend, as the Lord Ordinary has found, that in virtue of this grant they were entitled to occupy land for harbour purposes on each side of the river without any farther title. The question thus raised is a very large one, and attended, in my opinion, with great difficulty, but I think it wholly unnecessary to determine it in deciding this case.

It is an entire fallacy to suppose that this case arises between the grantees of the port of Ayr and the burgh of Newton. It is true that the pursuers have all the rights of the grantees of the port, but they have also all the rights of the burgh of Newton, and represent the communities on both sides of the river, excepting in so far as private individual rights, or adverse prescriptive possession can be instructed. Now, these harbour trustees by a series of statutes extending for nearly a hundred years have express right given them by the Legislature to perform the very operations the right to construct and maintain which is the subject of this declarator. In particular, by the Act of 1835, section 17, they are expressly authorised to construct and maintain quays and roads on both sides of the river; and in the more recent Act of 1855 this power is given still more in detail in the following words, sec. 40:—"To lighten, repair, and make sufficient the quays and other works at present appertaining to the said harbour, and to alter and extend the same, or any part thereof, as they shall judge to be necessary for the more effectual improvement of the said harbour, &c.; and also to make, widen, and maintain roads and passages on both sides of the said harbour for the use thereof." For the purpose therefore of establishing their right to maintain quays and roads on both sides of the river Ayr the historical inquiry and the legal argument founded upon it are quite unnecessary, and do nothing to strengthen the express statutory right, which, looking to the ground assumed by the defender, is, to my mind, perfectly conclusive.

No doubt, although the title of the trustees to occupy and maintain these works for the public interest is conclusively given by the statutes, I can conceive a difficult question arising had there been contrary prescriptive possession on the part of the defender. But, in the first place, he has no title on which he could prescribe, for his own feu is admittedly outside the disputed ground. He says that he has all right which the burgh of Newton possessed in the river bank. But these rights, so far as available for harbour purposes, are truly transferred to

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and held by the harbour trustees, acting for or representing the burgh of Newton as well as the port of Ayr. But, in the second place, there has been no prescriptive possession. This ground has been used from time immemorial as a quay wall, and the acts of the defender and his predecessors proceeded on an express license from the pursuers, which they were entitled at any time to recall.

On these simple grounds I am prepared to adhere to the Lord Ordinary's interlocutor.

LORD NEAVES concurred.

LORD ORMDALE.—I have arrived at the same conclusion, although not disposed to give the same effect to the Acts of Parliament as I understand your Lordships are of opinion they are entitled to. I do not think that independently of right duly and legally established by prescriptive possession under habile titles the statutory enactments would by themselves have been sufficient to support the pursuers' claims in the present action. To illustrate my meaning, let it be supposed that there had been an encroachment by the harbour authorities on private property the year before they obtained their Act of 1835, I can see nothing in that Act or any of the others which would give them a right to retain property so acquired. But it is unnecessary to go into that question because it appears to me that there is ample evidence of legal possession and title, independently of the Acts of Parliament to support the pursuers in what they now claim, although certainly the statutes are important as clearing up and confirming what might otherwise be attended with some doubt and obscurity.

In the first place, there is a grant of harbour conferred by the pursuers' ancient charters. What precisely was meant, especially as regards limits and extent, to be given by the grant of harbour in these charters is not very precisely defined. But clearly such a grant must be held to include a right to land for the purpose of loading and unloading vessels at some place or places within the bounds of the harbour, which, again, may be defined or limited by possession. The next question, therefore, is, what has been the state of possession in the present instance? I can have no doubt upon the evidence (which I have gone over and considered with great attention) that the old dyke extending along the north side of this harbour has been in the possession of the harbour authorities for centuries, or, at any rate, time immemorial; and farther, that that old dyke, if not in all respects identical with the present quay, occupied the same line of ground or nearly so. This of itself goes far, if not completely, to establish the pursuers' right, especially where it is kept in view that there has never been any grant of harbour in favour of the burgh of barony of Newton. It is said, however, that that burgh had certain property of which the south boundary was the sea or river Ayr, just where the disputed quay exists. I am unable, however, to find any express reference to any such sea or river boundary in the defender's titles. But supposing that the burgh of Newton had originally such a boundary they must, I think, be held on the proof to have lost it by the counter possession of the harbour authorities. It does not appear to me to be doubtful that the harbour authorities could acquire by immemorial possession, and as pertinent or accessories to their right of harbour, a quay, and road along the quay, there being no counter possession, for I cannot hold the nominal and precarious possession, which some of the Newton feuars or tenants had by the tolerance of the harbour authorities and on the undertaking to surrender it whenever required.

any available possession at all in the present dispute. Irrespective, therefore, of the statutes I think there are good grounds, on the evidence, of possession under a habile title, for holding that the pursuers have established their case in terms of the Lord Ordinary's interlocutor.

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I may add that at first I had some difficulty as to the terms of the first declaratory conclusion of the summons, no precise limit to the right claimed being here stated, but I understand that what is really claimed is a frontage of ninety feet in length of the old quay wall, so that in this view I have now no difficulty in giving effect to the pursuers' claim to the quay and roadway in question, "sufficient,"—and this is a very important qualification,—“and suitable for all uses and purposes connected with the said harbour.” And, if I am right in this, the pursuers are entitled to have effect given to the subordinate conclusions of their summons as a matter of course.

LORD GIFFORD.—I am of the same opinion.

The first question which arises in this case is, whether the town of Ayr, as grantee of the right of harbour in the river of Ayr, had and has a good and sufficient title to prescribe a right of quay and roadway on the north side of the river Ayr? I think they had. The right given to the town of Ayr, and now vested in the harbour commissioners, was not a right of harbour extending, as such rights sometimes do, over a large extent of sea adjoining an estate or barony, and with an extensive and often somewhat vague coast line, and entitling the grantee to levy dues on all ships coming within the limits specified. On the contrary it was a specific grant of the port and harbour of Ayr, being the mouth of the river Ayr, limited on north and south by the natural banks or shores of that river, and probably originally both banks of the river at its mouth were simply parts of the natural foreshore, the river being for some way up a tidal river. Now, I am of opinion that a grant of this kind forms a good and sufficient title on which to prescribe a right to construct wharfs or quays and roadways on both sides of the river constituting the harbour proper. It is implied in a grant of harbour that the grantee shall be entitled to fence the harbour by proper fences, such as walls or quays, at least such a grant is a good title on which to prescribe such a right. Indeed, I think it evident that the old wall on the north side of the harbour (for there is no question about the walls and quays on the south side) was at first erected on the proper foreshore. In the old minutes of the town-council occur such expressions, relating to the old north wall, as “the dyke is not sufficient to keep the water in its course.” To confine a tidal river within limits it is necessary to build on the foreshore, for if the building were above high-water mark it could never in the proper sense of the words be said to confine the water at all, and although there is no direct evidence as to how far the foreshores extended at the date of the grant, I think there are sufficient grounds for presuming (especially after such long possession) that the quays and roadways on both sides of the harbour were really built on the *solum* of the foreshore if not in the very *alveus* itself. I do not doubt that a grant of harbour is sufficient to give the grantees a right to build on such a *solum*. But further, this quay wall was built before the memory of man, and is shewn to have been possessed from time immemorial, as far as susceptible of possession, as a pertinent of the harbour, and the question is, to whom does it belong? I think the answer must be, to the town of Ayr. They built it. It never belonged to Newton-on-Ayr. Further, the town of Ayr were in possession of a stripe of

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ground behind the quay, on which ballast was laid down, so that, as was quite natural if not absolutely necessary, the town of Ayr, as proprietors of the harbour, had a stripe of ground on either side thereof. Then come the statutes which give the harbour trustees all the rights originally vested in the town of Ayr. Accordingly, I think that the property of the dyke was in the town of Ayr, and is now in the harbour trustees.

The next question is, how broad a space are the trustees entitled to? That too must be determined by possession, and I am of opinion that possession on the town of Ayr, and of the harbour trustees as their successors, has been proved for the full breadth of the quay and roadway in dispute. The very fact that the properties to the south are fenced off from and bounded by the south side of the roadway affords strong presumptive proof that the roadway is their northern boundary, and there is no contrary evidence whatever.

So much for the right of property in the *solum* of the north quay and roadway. The next question is an extremely important one. It is this, have proprietors or persons holding property behind or to the south of the quay and roadway a right to cut through the quay wall so as to give them access to the harbour and river by means of launching slips or otherwise? Now, this may be a question of circumstances. A vague right of harbour and port extending over many miles of coast may not entitle the harbour trustees to prevent anyone with property adjoining or bounded by the sea or sea-shore, from having access to the sea, and from launching ships therein, or from landing or embarking at pleasure, and reaching the sea. But this is not a mere grant of free access embracing a great extent of coast and including the foreshores of, it may be, many proprietors along many miles of coast where it could never have been intended to exclude the proprietors having a sea boundary from the sea. The present case is that of a grant of a harbour proper, where ships are to lie, and around which permanent quays and costly structural works are to be erected, and in such a case I do not think that a back proprietor can cut through quays and harbour walls and claim a right to launch ships directly into what is strictly and properly a harbour. I do not say that if any such proprietor adjoining the harbour had done so for the prescriptive period, he might not have prescribed a right to do it. But here everything done by the proprietors of this shipbuilding yard was by express leave and license of the harbour trustees or of their predecessors. There has therefore been no possession adverse to that of the harbour trustees. I think, therefore, that in the special circumstances of this case, as instructed by the evidence, and considering the very limited character of this harbour, the possession had by the trustees and their predecessors, and the absence of any adverse possession by the defender, we should adhere to the interlocutor of the Lord Ordinary.

LORD JUSTICE-CLERK.—I think it right to observe that this is not a declaration of property in any proper sense. The pursuers ask us to find and declare—(reads declaratory conclusions of summons). Beyond that the pursuers do not ask us to declare that any right of property is vested in them.

THE COURT adhered.

HUNTER, BLAIR, & COWAN, W.S.—FYFE, MILLER, FYFE, & IRELAND, S.S.C.—Agents.

THOMAS MILLAR, Appellant.—*Trayner—Mackay.*
 ALEXANDER BIRRELL (Martin's Trustee), Respondent.—*D.-F. Watson—*
Adam—Strachan.

No. 15.

Nov. 8, 1876.
 Millar v.
 Birrell.

Husband and Wife—Mutual Settlement—Jus Mariti—Legitim—Testing-Clause—Executor—Personal and Transmissible.—A and his wife caused a mutual settlement to be prepared disposing of their whole estates after their deaths. The deed was duly signed by A before witnesses; but although his wife signed it, she did not do so, nor acknowledge her signature, before witnesses. The deed contained a declaration that the provision for their daughter B was to be exclusive of the *jus mariti* and right of administration of her husband. After the death of A, his widow and three children, including B (whose husband had deserted her), entered into a minute of agreement, whereby, on the narrative that the testing-clause of the settlement had not been filled up, they agreed to hold that the estate was intestate succession, and proceeded to divide it among themselves. The husband of B was no party to this agreement, nor, though he afterwards returned and lived with his wife for a short time, did he either approve of or challenge it. After the death of the mother and of B's husband A's executor became bankrupt. B's son, as executor to his father, claimed in the sequestration one-third of his grandfather's estate, as the share *ab intestato* due to his mother, which had passed *juri mariti* into the estate of his father. In an appeal against the rulings of the trustee and Sheriff-substitute, who rejected the claim, the Court allowed the trustee to complete the testing-clause of the mutual settlement, and thereafter held (1) (*diss.* Lord Ormisdale) that the mutual settlement, as completed, was valid and effectual as a testamentary settlement of the means and estate of the father; (2) that by the terms of the settlement the *jus mariti* and right of administration of B's husband had been effectually excluded; and (3) (*diss.* Lord Ormisdale) that when B's right to legitim emerged on the death of her father the same did not vest in her husband *ipso jure*, and that whether he could have claimed it effectually or not his executor was not entitled to claim it.

Husband and Wife—Right of Administration—Executor—Legitim.—Opinions, in conformity with *Stevenson v. Hamilton*, Dec. 7, 1838, that in the above circumstances the husband would not have been entitled to claim his wife's legitim.

Writ—Testing-Clause—Deed produced in Judgment.—Where a deed with an incomplete testing-clause was produced in a process by one of the parties who did not found upon it, held that the opposite party was entitled to have the testing-clause completed and effect given to the deed in the process.

Succession—Mutual Settlement.—A deed bearing to be a mutual settlement by a husband and wife contained a conveyance by the husband of his whole estate in favour of his wife in liferent and his children in fee, and a corresponding conveyance by the wife of her estate in favour of her husband and children. The deed was signed by the husband before witnesses, and by the wife, but not before witnesses. Held (*diss.* Lord Ormisdale) that it was effectual as a testamentary settlement of the husband's estate.

THE late William Martin senior, farmer, Kirkshotts, Fife, died there on 2^d DIVISION.
 5th February 1869, survived by his widow, Janet Greig or Martin, and Sheriff of
 three children, Thomas, William, and Janet. Some time before his death Fifeshire.
 he and his wife caused a mutual settlement to be prepared, which bore—
 "For the love, favour, and affection we bear to each other and to our
 children after named have mutually agreed to grant these presents in
 manner underwritten, Therefore I, the said William Martin, do hereby
 give, grant, assign, and dispoise to and in favour of the said Janet Greig
 or Martin in liferent, for her liferent use only, and after her death to and
 in favour of" his three children, "equally among them in fee," his whole
 means and estate: "And for the causes foresaid, I, the said Janet Greig

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or Martin, do hereby give, grant, assign, and dispose to and in favour of the said William Martin in life, for his life, for his life only, and after his death to and in favour of" their children "equally amongst them in fee," her whole means and estate: "But declaring that these presents, so far as in favour of the said Janet Martin or Millar, are granted exclusive of the *jus mariti* of the said James Millar, her husband, and that the property and effects, heritable and moveable, shall not be affected by his debts or deeds, legal or voluntary, nor by the diligence of his creditors, and that the same shall belong to and be used by her and payable to her without the intervention of her said husband in any way whatsoever."

Mr Martin signed this settlement before witnesses in the office of his agent; but although Mrs Martin signed it also, she did not do so before witnesses, nor did she ever acknowledge her signature before witnesses.

After Mr Martin's death, his widow and three children, Thomas, William, and Janet (whose husband had left her without making any provision for her, and was then resident in Australia), entered on 9th February 1869 into an agreement whereby, upon the narrative that the settlement above referred to, "although executed, not having the testing-clause filled up, the parties hereto have agreed to disregard the same, and to act as if the said deceased William Martin had died intestate," they agreed to divide the estate left by the deceased in certain proportions among themselves.

William Martin junior was confirmed executor-dative to his deceased father, and proceeded to administer the estate in accordance with the provisions of the agreement of 9th February 1869.

James Millar, the husband of Janet Martin, about the year 1872, returned to Scotland, and resided with his wife for some weeks, and then again left her. He lived for about three years in his native country, but did not contribute to his wife's support, and eventually died on 11th February 1875, survived by his widow and five children. He was ignorant of the existence of the agreement above referred to, but he took no steps in connection therewith. His son, Thomas Millar, was duly deemed executor-dative to him.

Mrs Martin, the widow of William Martin, died in 1874, and in 1876 William Martin junior became bankrupt, and Alexander Birrell was appointed trustee on his sequestrated estates.

Thomas Millar, as executor-dative of his father, James Millar, lodged a claim in William Martin junior's sequestration, in which he claimed to be ranked as a creditor for the sum of £193, 4s. 10d. as the share of the moveable estate of William Martin senior which fell to his mother, Mrs Millar, as intestate succession, and as such passed under the *jus mariti* of his deceased father, James Millar, to whom he was confirmed as executor-dative.

The trustee, Mr Birrell, rejected this claim on these two grounds—(1) that the agreement of 9th February 1869 was a binding agreement, and was acted on in good faith by all parties; and (2) that under the 16th section of the Conjugal Rights Act, 1861,¹ as Mrs Millar was, at the time she executed the agreement, living apart from her husband, who was not contributing to her maintenance, she was entitled to enter into the arrangement without her husband's consent.

Millar appealed, and a record was made up, in which the appellant pleaded;—(1) The sum claimed to be ranked having fallen under the *jus mariti* of the said deceased James Millar, and never having been paid or compensated, the appellant, who is now in right of the same as executor-

dative foresaid, is entitled to have his appeal sustained, and said sum ranked as claimed, with expenses. (2) The foresaid agreement not having been entered into by the said deceased James Millar, or by any one legally representing him, is no bar to the appellant's claim. (3) The foresaid agreement having been entered into by Mrs Janet Martin or Millar at the time she was a married woman, without consent of her husband, and dealing as it does with funds which did not belong to her, but to her husband, in virtue of his *jus mariti*, the same is null and void, and no bar to the appellant's claim. No. 15.
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The trustee pleaded ;—(1) Assuming that the deceased William Martin died intestate, and that the family agreement produced had not existed, or that it does not bar the appellant's claim, still the claim is erroneous, inasmuch as it contains no deduction for payments made by the executor out of the deceased's executry. (2) Assuming, again, as in preceding plea, the claim is erroneous—1, inasmuch as it contains no averment that the said James Millar had ever exercised his *jus mariti* in reference to the fund claimed by the appellant, and, in terms of the Conjugal Rights (Scotland) Act, 1861, made a reasonable provision therefrom for Mrs Millar's support and maintenance, and contains no deduction in respect of such a provision, which did not fall within the executry of James Millar; and, 2, inasmuch as, upon the death of the said James Millar, Mrs Millar would, out of the fund claimed by the appellant, be entitled to a *jus relitæ*, and no corresponding deduction is made in the claim,—(3) The family agreement produced was validly and legally entered into by the said Mrs Millar, she and her husband living as they were at the time separately; and her position as a party thereto is fortified by the 16th section of the Conjugal Rights (Scotland) Act, 1861, especially inasmuch as the said James Millar never made provision for her support from any fund to which she succeeded by the death of her father. (4) The deceased James Millar never repudiated the said agreement to which his wife was a party; and that being so, it must be held to have been homologated or acquiesced in by him. (5) The said James Millar never put forward any claim of the nature of the one made by the appellant; and that being so, he must be presumed to have passed from it. (6) The family agreement produced excludes the appellant's claim, the more especially so, inasmuch as it was duly implemented by the bankrupt, and Mrs Millar, upon the death of her mother, received her quota under it.

The Sheriff-substitute (Beatson Bell) allowed parties a proof of their averments, in the course of which the facts, as stated above, were established. Upon the call of the trustee, the appellant, Millar, by the hands of his agent, produced the settlement by Mr Martin senior and his wife, but in an incomplete state, the testing-clause not having been filled up. In his evidence Millar deposed that he had got the settlement from his grandfather, William Martin, who, he said, "distinctly said he did not wish it completed."

On 20th June 1876 this interlocutor was pronounced :—"The Sheriff-substitute having heard parties' procurators on the appeal, minutes held as a closed record, and proof led, Finds in point of fact (1) that the appellant is executor-dative of his father, James Millar, formerly farmer, who died at Annfield, Auchterderran, on 11th February 1875, survived by his widow, Janet Martin or Millar, sister of the bankrupt William Martin, who was the son of William Martin senior, formerly farmer, Kirkcubotts, who died there on 5th February 1869; (2) that at the date of the death of the said William Martin senior the said James Millar, the appellant's father, was absent from this country, being in Australia or elsewhere abroad, where he resided for many years apart from his wife (who

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had remained in this country), and never remitted any funds for her maintenance; (3) that after the death of the said William Martin senior the mutual disposition and settlement, No. 35 of process, was found, but the same not having been completed by the filling up of the testing-clause, an agreement, No. 8 of process, was entered into by his widow and children, including the bankrupt and Mrs Millar, by which they agreed to deal with his estate as intestate, and regulated the manner in which it should be divided by the bankrupt, who undertook to get himself appointed executor, but to this deed the appellant's father was not a consenting party; (4) that the bankrupt accordingly got himself decerned and confirmed executor to his father, and intromitted with and managed the estate, and although some questions arose as to whether the agreement was being duly carried out, no challenge of the agreement was ever made by any of the parties thereto on the ground that the appellant's father was not a consenter thereto; (5) that about three years before his death the appellant's father returned to this country, and for some time resided with his wife, and was aware of the existence of the agreement, but never took any steps to vindicate his right to the share of the deceased William Martin's estate which had vested in his wife as one of the next of kin and beneficiaries *ab intestato* of the deceased, and which would have fallen under his *jus mariti*: Finds in point of law (1) that the succession of the late William Martin senior was rightly dealt with as intestate; but (2) that the appellant's father having lived for three years or thereby after returning to this country, and having become aware of the existence of the agreement, and having taken no steps to vindicate his *jus mariti* in the share of the estate which would have fallen to his wife *ab intestato*, his son and executor, the appellant, is now barred from insisting in his father's *jus mariti* over said share: Therefore sustains the decision of the trustee appealed from, refuses the appeal, and decerns: Finds the appellant liable in expenses," &c.*

* "NOTE.—As to the first question debated, whether William Martin senior died testate or intestate, I am of opinion that the mutual settlement, No. 35, not having any testing-clause, cannot be held as a testamentary deed, and having been produced in Court cannot now be completed—(Hill v. Arthur, 6th December 1870, 9 Macph. 223). The effect of this intestacy, then, was to vest a share of the estate of the defunct in Mrs Millar, his daughter. The appellant contends that this fell under his father's *jus mariti*, and that he, as his executor-de-facto, is now entitled to rank for it against the estate of the bankrupt, the executor of the defunct, his father, William Martin senior. But for the circumstances which occurred after the death of William Martin senior this would have been so; but I am humbly of opinion that these circumstances were such as to bar the appellant from insisting in his claim. The agreement, No. 8 of process, no doubt required the consent of Mr Millar to its validity as regards him, and had he died without coming to the knowledge of his wife's succession to a share of her father's estate his son and executor might probably have succeeded in vindicating his father's rights. But he came home three years before his death; he lived for a time with his wife, and he had business conversations with his son, the appellant. No doubt the appellant says he did not inform him of the nature of the agreement, but he also says that within a week of his return he informed his father that such an agreement was made, and that it was not worth the paper it was written on. Of course, from want of his consent, that was a distinct incitement to the father, who does not appear to have been in such circumstances as readily to give up his rights to assert his claims, and he lived a time amply sufficient for the purpose of such assertion, but he took no steps. His wife also says she thinks he was aware of the agreement, but never called it in question in any way. Some speculation as to the reasons for his silence was addressed to me during the debate. The incomplete mutual deed excluded

Millar appealed to the Second Division of the Court of Session.

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At the hearing on 15th July 1876 counsel for the trustee moved the Court for leave to fill up and complete the testing-clause of the mutual settlement by William Martin and his wife. The following interlocutor was pronounced :—" On the motion of the respondent, and before answer, allow him to borrow from the process the mutual settlement, No. 32 of process, in order that he may, if so advised, complete or fill in the testing-clause thereof, reserving all questions as to the competency of so doing, and all questions as to the effect thereof or of the said mutual settlement."

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When the case was again called on 20th July counsel for the trustee stated that the testing-clause had been filled up as regarded William Martin senior's signature, but as the deceased Mrs Martin had neither signed in the presence of, nor acknowledged her signature before witnesses, it was impossible to fill it up with reference to her signature.

Argued for the appellant, Millar ;—(1) The mutual settlement of William Martin senior and his wife was wholly invalid owing to its not having been properly executed. It was a mutual settlement only formally executed by one of the parties, and was therefore not binding upon either. It was moreover, at the date of Mr Martin's death, an undelivered deed. In the case of Macmillan,¹ where a deed in a somewhat similar position had been sustained, the deed had been holograph of the party whose succession it was held to rule. The succession of William Martin was therefore intestate succession. (2) That being so, Mrs Millar had no right during the lifetime of her husband to enter into the agreement disposing of her father's succession without her husband's consent. No married woman could waive her legal rights without her husband's consent. Mr Martin having died intestate his daughter's claim for legitime passed under the *jus mariti* of her husband, and on his death transmitted to the appellant, his executor-dative. Taciturnity or delay in making a claim for legal rights of this sort did not operate against the claim.² Apparent acquiescence did not affect it.³ The Conjugal Rights Act, sec. 16, which was relied on by the trustee and the Sheriff-substitute, had no bearing on this question as between the executor of the husband and the debtor.

Argued for the trustee, Birrell ;—The Sheriff-substitute was clearly wrong in supposing that the mutual settlement had been produced "in

his *jus mariti*, and had he challenged the agreement it might still have been completed, as it had not then been produced in judgment. Again, under sec. 16 of the Conjugal Rights Act he would have been bound to make a provision for his wife's maintenance from the sum to which she had succeeded, and the whole to which she so succeeded would have been insufficient for her maintenance. He, soon after returning, again separated from his wife, and made her no allowance, apparently not being in a position to do so. The reason which really actuated him must be matter of speculation only, but his failure to act during all these years is a fact which, I think, under the circumstances, amounts to homologation of the agreement on his part. It is unnecessary to consider whether he himself might at the close of life have attempted a challenge ; but I am clear that, having died without doing so, the right to such challenge did not pass to his executor-dative, but that he is barred by the fact of his father having died after three years' acquiescence in the state of things he found in existence on his return to this country."

¹ Macmillan v. Macmillan, Nov. 28, 1850, 13 D. 187, 23 Scot. Jur. 66.

² Gourlay v. Wright, June 23, 1864, 2 Macph. 1284, 36 Scot. Jur. 642 ; Mackenzie v. Beith, June 12, 1873, 11 Macph. 681, 45 Scot. Jur. 433.

³ Cowan v. Lord Kinnaid, Dec. 15, 1865, 4 Macph. 236, Lord Justice-Clerk, p. 241, 38 Scot. Jur. 131.

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judgment in the sense of the decision of the Court in *Hill v. Arthur*.¹ It was moreover quite competent to fill up a deed after the death of the granter.² (2) The mutual settlement must therefore be held to be operative to a certain extent, that is, so far as regarded Mr Martin's provisions to his children.³ (3) Mrs Millar's right to anything from her father's estate was exclusive of the *jus mariti* of her husband, and the appellant's claim as executor of the husband was excluded. (4) Apart from that, a husband or his representative were not entitled to exercise the wife's choice as to claiming legal rights. Wherever the claim would be against the wife's interests he could not interfere.⁴

At advising,—

LORD GIFFORD.—This case is now in a somewhat different position from that in which it stood when the interlocutor of the Sheriff-substitute appealed against was pronounced. The testing-clause of the deed or settlement, No. 35 of process, has now been filled up under the authority of the interlocutor of this Court dated 15th July last, and the deed is now *ex facie* a completed deed so far as regards the late William Martin. All questions regarding the competency or effect of filling up the testing-clause and all questions as to the deed itself, and, in particular, all questions arising from the signature of Mrs Martin not being attested, are left open under the said interlocutor of 15th July, and these questions are now to be determined so far as necessary for the disposal of the present appeal.

The appeal arises in reference to the sequestration of the estates of William Martin, the son and executor-dative of the said deceased William Martin, the granter of the settlement which I have just referred to, and the appellant's claim in the sequestration, the validity of which claim is now in question, is a claim by the appellant as executor of his father, the late James Millar, who was husband of Mrs Janet Martin or Millar, the daughter of the said deceased William Martin. His demand is for a share of the moveable succession of the said deceased William Martin, who died in February 1869, as the appellant maintains, intestate. The appellant claims the share of the intestate succession which he says devolved upon his mother, and through her *jure mariti* upon the appellant's father.

Now, the first point which arises is, as the case now stands, Did the appellant's grandfather, the late William Martin, die intestate or not? Is the deed, No. 35 of process, the testing-clause of which has now been filled up, a valid and effectual testament by the said deceased William Martin? The Sheriff-substitute held that the late William Martin did die intestate, the deed No. 35 being without a testing-clause when it was before the Sheriff-substitute. His Lordship also held that the deed thus imperfect having been produced in the Sheriff Court process, that is, in the appeal against the trustee's deliverance in the sequestration, the testing-clause could not thereafter be filled up.

Now, I am clearly of opinion that the production of the deed in the Sheriff Court appeal formed no bar to the testing-clause being thereafter filled up in common form, and that the general rule applies that a testing-clause which is always or almost always filled up after execution, may be filled up at any time

¹ Dec. 6, 1870, 9 Macph. 223, 43 Scot. Jur. 171.

² Vesey v. Malcolm, June 2, 1875, *ante*, vol. ii., 748.

³ Macmillan v. Macmillan, Nov. 28, 1850, 13 D. 187, 23 Scot. Jur. 66.

⁴ Stevenson v. Hamilton, Dec. 7, 1838, 1 D. 181 (*McIntosh's Trs.*), 11 Scot. Jur. 153.

efore the deed is founded on in judgment. I do not think that in the present No. 15.
 as the deed in question was, in the true sense of the expression, founded on in
 adgment by being produced in this process. The deed was not produced by Nov. 8, 1876.
 he trustee or by any party founding or claiming thereon, or having an interest *Millar v.*
 o claim thereon as a completed deed. It was not produced by any beneficiary *Birrell.*
 nder the deed, or by any legatee or party favoured thereby. It was produced
 n 7th June 1876 by the appellant himself, or, rather, by the agent to whom
 he appellant had handed it for the purpose the night before, and it then stood
 without a testing-clause. The appellant says that he found it in his safe in an
 envelope, unopened, and he states elsewhere that he got it from his grandfather,
 the late William Martin, the granter of the deed. No doubt he also says that
 his grandfather said he did not wish the deed completed, but I cannot take that
 off the appellant's hands. It is his mere unsupported verbal statement, and
 would enable the appellant to set up the deed or not just as he pleased by his
 unsupported parole. If a testator does not wish his written settlement to stand
 he should say so in writing, or actually cancel the deed with his own hands. I
 take the deed, therefore, just as if it had been found in the repositories of the
 deceased William Martin, and I take it to be perfectly clear that it was not in
 the power of the appellant, Thomas Millar, by incidentally producing the deed
 in the Sheriff Court appeal long after the deliverance of the trustee, to prevent
 the testing-clause being filled up by any party who had an interest to get this
 done. Even if the deed had been produced incomplete by a legatee or benefi-
 ciary, who actually founded upon it, this would not prevent other legatees or
 other beneficiaries who had not founded upon it from insisting that it be duly
 and regularly completed in common form. But the appellant had an interest to
 destroy the deed or to render it invalid, for he was maintaining that his grand-
 father had died intestate, and it would be monstrous to hold that by producing
 the deed without the testing-clause being filled up, or by keeping the deed back,
 or in any other way he could at his own hand render it inoperative. I need
 not go into the cases on this point; it is too clear for argument. I am of opinion,
 therefore, that it was competent to fill up the testing-clause, and that this has
 now been well and competently done.

The next question is this,—Is the deed, No. 35 of process, as it now stands,
 a valid and effectual settlement of the late William Martin? I am of opinion
 that it is. No doubt it was originally intended as a mutual settlement between
 the late William Martin and his spouse, Mrs Janet Greig or Martin. It is in
 point of form such a mutual settlement, and, in point of fact, it bears to be
 signed by both the spouses, although, unfortunately, Mrs Martin does not
 appear to have signed in presence of witnesses, and so her subscription is not
 duly attested. At the same time it is worth noticing that in the deed of agree-
 ment to which the wife is a party it is stated that the deed was executed,
 although the parties had agreed to disregard it. Now, if this had been a
 question between the spouses, or between the husband or his representatives, as
 against the wife or her representatives, the objection might have been fatal.
 The deed as a mutual deed is certainly not complete. But the deed or mutual
 settlement is more than a mutual settlement. It is besides a separate settle-
 ment by each of the spouses *mortis causa* of their respective estates, to take
 effect after the death of both of them, and, as such, I think it must receive
 effect, as William Martin's *mortis causa* settlement, because it is quite complete
 as to him, although in reference to Mrs Martin it is incomplete, her signature

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not being attested. By the deed the late William Martin first makes a *liferent* provision in favour of his wife, should she survive him, and then, "after her death," he gives the whole of his estate to his three children, Thomas Martin, Janet Martin or Millar, and William Martin, equally among them. In this manner Mrs Martin gives her husband the *liferent* of all her estate, and then, after her husband's death, and by way of *mortis causa* provision only, she gives the fee of her estate to the same three children equally. Now, this is a complex deed. It is, first, of the nature of a mutual settlement, or it may be a mutual contract between husband and wife, and so far it may be inoperative because it was never duly completed by both parties; but then it also embodies a separate testament by the husband to take effect after his wife's death, and with which she has nothing to do; and the deed being fully and regularly completed by William Martin, I do not see any reason why his regular separate testament should not receive effect. Both spouses are now dead, and I think equity clearly requires that the written and expressed will of the late William Martin to take effect after his wife's death should now be carried out. I think this is not only in accordance with equity, but also with authority. In *Macmillan v. Macmillan*, 28th November 1850, 13 D. 187, it was expressly held that a mutual will, holograph of the husband but not attested, and not holograph of the wife, was valid as the husband's will, though it would be totally ineffectual as to the wife's succession. On the whole, I have not much difficulty in holding that the deed, No. 35 of process, though probably invalid as a mutual settlement as between the late William Martin and his wife, if she had disputed it, and if any such question had arisen, is perfectly valid, and must receive effect read as a mere *mortis causa* settlement of the late William Martin to take effect after the death, both of himself and of his spouse.

Now, what does this *mortis causa* settlement of the late William Martin really do? No doubt it gives one-third of his estate to his daughter, Mrs Janet Martin or Millar, the appellant's mother, and this third, in the ordinary case, and if there had been no specialty, would have passed *jure mariti* so far as moveable, to her husband, the late James Millar, the appellant's father. But then William Martin's settlement contains this very important clause,—“*Expressly declaring that these presents, so far as in favour of the said Janet Martin or Millar, are granted exclusive of the *jus mariti* of the said James Millar, her husband, and that the property and effects, heritable and moveable, shall not be affected by his debts or deeds, legal or voluntary, nor by the diligence of his creditors, and that the same shall belong to and be used by her and payable to her without the intervention of her said husband in any way whatsoever.*” Now, this effectually excludes the appellant's father, James Millar, from any interest whatever in William Martin's succession. His *jus mariti* and right of administration as husband of Janet Martin or Millar are effectually excluded. The property bequeathed is left to Mrs Millar by herself alone, and her husband could not interfere with it in any way. If so, neither can the appellant, as executor of his father, the late James Millar, make any claim to any share of William Martin's succession. He has nothing to do with it. It belongs to her mother, who is still alive, and who is a witness in the present proof, and it belongs to her alone in her own right.

It follows, therefore, that the appellant's claim in the sequestration was rightly rejected by the trustee in the sequestration, and that the trustee's deliverance was rightly affirmed by the Sheriff-substitute, although I reach this

result on different grounds from those on which the trustee and the Sheriff-
substitute proceeded. No. 15.

For, in the view which I take of the case, it is not necessary to consider the
validity or effect of the deed of agreement entered into by the members of
William Martin's family for the distribution of his estate. I would have had
difficulty in holding that that agreement was binding upon the appellant or
upon the appellant's father, who was no party thereto, and who is not shewn to
have been ever fully cognisant of its terms. I would also have had a difficulty
in founding anything on the Conjugal Rights Act, as protecting the rights of the
appellant's mother, Mrs Millar, who is not a party to the present process or a
claimant in the sequestration at all. But I think all these questions are quite
superseded by the view of the case based upon the validity of William Martin's
settlement; and if I am right in holding that this deed utterly excludes the
appellant and destroys his title to claim in the sequestration, that is, destroys
the only title upon which he founds in his affidavit, it follows that his claim
must be rejected and disallowed.

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If I am right in holding that the appellant, and his father, in whose right he
now claims, are entirely excluded from all share of the late William Martin's
succession by the terms of Mr Martin's will, which, although intended to be a
mutual will between him and his wife, is nevertheless effectual as regulating his
own succession, the only other possible plea open to the appellant is that, re-
pudiating the will and the conventional provisions therein made in favour of
Mrs Millar, he can, as representing his father, claim her legitim free from the
exclusion of the *jus mariti* and right of administration.

Now, in the first place, I greatly doubt whether such claim of legitim could
be insisted in under the present affidavit. The affidavit makes no mention of
legitim. It is simply a claim for share of succession *ab intestato* by one of the
next of kin. Even if it were a summons, I doubt whether the one claim could
be converted into the other, for the claims rest upon wholly different grounds
and different principles, and they give rise to different defences and objections,
such as collation *inter liberos*, and similar pleas. The case is not bettered by its
being an affidavit in a sequestration, where, without an amending affidavit, the
trustee can deal with nothing but what is sworn to.

But, even if the claim for legitim were open in the present appeal, I think it
is excluded. A husband has no absolute right to repudiate his wife's conven-
tional provisions, and claim her legitim. It is always a question of circum-
stances, and where a wife's father has made large provisions for his daughter,
but excluded her husband's *jus mariti*, the husband has no absolute right to
renounce or to compel his wife to renounce these large provisions in order that
he may claim and get into his own pocket for himself or for his creditors a
comparatively small, or at least a much smaller amount of legitim. This was
quite fixed in the case of *Stevenson v. Hamilton*, Dec. 7, 1838, 1 D. 181.

In the present case, even if the appellant's father were alive, and was claim-
ing legitim in right of his wife, I do not think he would be allowed to do so.
Such a claim would reduce the wife's provisions to one-third of what they would
otherwise be, for Mrs Millar's legitim would only be one-ninth of her father's
executry, whereas her share under his will is one-third. I do not think her
husband could compel her to take the smaller amount merely to get quit of the
exclusion of the *jus mariti*. This would be plainly inadmissible. Still farther,
it is in evidence that the appellant's father was abroad, and had left his wife un-

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provided for for at least three years. I think the wife, Mrs Millar, was entitled, without her husband's consent, to take up her father's succession, and to deal with it as she did in the deed of agreement, and I think that deed of agreement did not require her absent husband's consent. And yet again the appellant's father, the late Mr Millar, never himself claimed legitim in right of his wife. He returned to this country, and survived for some years, without making any such claim. The appellant now is in a very unfavourable position for making such a claim as in his place; and on these grounds, even if the claim for legitim were now open, I think it should be disallowed.

For these reasons I come to the same conclusion as the Sheriff-substitute, although, in consequence of the emergence of new circumstances, the grounds of judgment are quite different.

LORD NEAVES.—This is a case of some peculiarity, and requiring considerable attention. I concur in the opinion now delivered, and on the same grounds, with some, it may be, unimportant modifications, which, however, may strengthen the judgment.

The mutual deed in process was a deed in all respects complete except for the omission of the wife in not signing before witnesses, and the not filling up of the testing-clause. That the wife did sign the deed is apparent both from her signature being appended to the deed, and from the fact that the agreement, which she certainly signed before witnesses, bears that she had executed the mutual deed.

It was erroneously held in the Sheriff Court that because the deed was produced in judgment the testing-clause could not be afterwards filled up. There certainly is a rule that if a deed is produced in judgment it cannot afterwards be filled up, but that raises the question, what is production in judgment? Suppose an incomplete deed produced in a multiplepoinding, not to be founded on but for some collateral purpose, can that be said to be production in judgment? It may have been for *comparatio litterarum* to prove handwriting, or it may have been recovered under a diligence. If that is not production in judgment to the effect of preventing an incomplete deed from being filled up, still less can it be so where a party, who has an interest to set aside such a deed, produces it in a process possibly with the view of preventing its completion. I cannot, therefore, think that this deed was produced in judgment when it was produced as it was—no one founding upon it. If the law were otherwise it would just come to this that if a person to whom an uncompleted deed was adverse wished to nullify that deed he would only require to get hold of it and produce it in a process in order completely to avoid its effect.

This deed as it is now completed is undoubtedly a probative tested deed as regards Mr Martin senior, and as such must regulate the succession to his estate. That being so, the question comes to be, what is the effect of this deed as now filled up. It was originally a mutual deed, and I am not prepared to say that a mutual deed requires to be authenticated by both parties. The signature of one may be enough—especially in such a case as this when one signed before witnesses and the other signed also but unfortunately not before witnesses. I rather take it a mutual deed between landlord and tenant does not need the signature of both parties, provided there be an acknowledgment of its execution as there is here.

This, then, being a probative writ as regards Mr Martin senior, the result is

that his daughter is to get a certain share of his estate, but only exclusive of the *jus mariti* of her husband. We have the authority of the case of *Stevenson v. Hamilton* for the proposition that the right to legitim, where there is in the impudicated deed a provision excluding the husband's *jus mariti*, does not vest in the husband *ipso jure*. The bequest of an option to a married woman, where one alternative would give the estate to herself and the other let it pass to her husband, was there held not to vest *ipso jure*. At all events the opinion of the Court must be taken about it. And the Court might refuse the husband any interest in the succession, at all, or at least qualify his interest in such a way as not to leave the wife at the mercy of a spendthrift husband. That, as I have said, was the principle established in the case of *Stevenson v. Hamilton*. Take the case here of the husband who had deserted his wife, who might have appeared after an interval and overturned all that had been done in his absence. The idea of his so doing is out of the question. But even if he had had the power when he died, who was to exercise it? Certainly not his executor. When he was alive whatever right he had was as his wife's curator—his son and executor can never be that. He cannot come and take *ex bonis* of his father what that father never claimed. This appellant, then, has no right to this fund at all. His father never exercised the option, if any, which is said to have belonged to him. The appellant, then, has no *status* and no title now to make that option, which it is doubtful whether he might have made but did not. That I take to be the equity of the case also, and so I concur with the opinion of Lord Gifford, and adhere to the proposed judgment.

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Nov. 8, 1876.
Millar v. Birrell.

LORD ORMDALE.—I have been anxious to hear the views of some of my learned brothers, whose opinions I understood to be different from my own, before definitively adhering to the opinion I had myself, after much consideration, previously formed. I regret, however, that I am unable to concur in the opinions which have been delivered.

The dispute in this case relates to that portion of the estate or succession of William Martin senior, who died in February 1869, which fell to his daughter Janet, who was then the wife of James Millar, since deceased.

The appellant, as executor-dative of James Millar, claims right to the estate & funds so arising, in respect, as maintained by him, that it vested *jure mariti* in Janet Martin's husband, the said James Millar, and consequently now belongs to the appellant, as Millar's executor-dative. This claim is resisted by the respondent, the trustee on the sequestrated estate of William Martin junior, as executor-dative decerned to his father, William Martin senior, to whom he says the fund in dispute belongs in virtue of the alleged agreement, No. 8 of process, entered into by the children of William Martin senior, including his daughter Janet, after the death of her father,—her husband having deserted her and being then absent from the country. To this the appellant replies that no effect can be given to the alleged agreement, in respect that the daughter Janet could not by any act or deed of hers deal with a fund which on the death of her father had vested in her husband *jure mariti*, and now belongs to the appellant as his executor-dative. The appellant accordingly claimed to be ranked as a creditor for the fund on the sequestrated estate of William Martin junior.

The respondent, as trustee on the sequestrated estate of William Martin junior, pronounced a deliverance repelling the appellant's claim, and on an appeal to the Sheriff-substitute his deliverance was affirmed, "in respect that the appel-

No. 15. lant's father having lived for three years or thereby after returning to this country, and having become aware of the existence of the agreement, and having taken no steps to vindicate his *jus mariti* in the share of the estate which would have fallen to him *ab intestato*, his son and executor, the appellant, is now barred from insisting in his father's *jus mariti* over said share." And from the explanatory note to his judgment it appears that the Sheriff-substitute has proceeded on the assumption that the appellant's father had died intestate, and that the agreement on which the respondent relies had been so homologated and acquiesced in by the appellant's father as to bar him and the appellant, as now in his right from disregarding it.

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But the case presents itself in a somewhat different aspect now from what it did when before the Sheriff-substitute. It is now said that William Martin senior did not die intestate, in respect the testing-clause of the deed, No. 35 in process, *quoad* his signature, has been filled up, and that, accordingly, the succession of William Martin senior must now be regarded as a testate and not an intestate one. In opposition, however, to this view it was argued that the deed having been produced in judgment in an improbativè condition, the filling up of its testing-clause thereafter could have no effect. The rule or principle of law on which this argument was founded is no doubt a sound one in itself when the facts admit of its operation, but I am quite clear they do not in this case. The deed was not produced in judgment, in any correct sense of that expression, by the respondent, who now founds upon it, before the testing-clause was filled up, and therefore I concur in holding that the testing-clause might, if there were materials for it, be still filled up.

But that is not sufficient to dispose of the case, for the question still remains whether the agreement by Janet and the other children of William Martin senior, excluding as it does the *jus mariti* and right of administration of Janet's husband, is good and effectual against the appellant, and this depends upon whether the Sheriff-substitute is right in holding that the appellant's father had barred himself by homologation or acquiescence from challenging it. The first question, therefore, which presents itself for the consideration and determination of the Court is, whether this ground of judgment of the Sheriff-substitute is sound or not? Now, I am quite unable to go along with the Sheriff-substitute in holding, on the proof, that the appellant's father acquiesced in or homologated the agreement. No act whatever of homologation is established; and neither can I discover any evidence of acquiescence. On the contrary, the proof clearly shews that the appellant's father never even saw the agreement, or knew what was its nature or effect. And neither is there any evidence of its having been represented to him as a good and binding deed, and that he ever adopted any such view of it. On the contrary, it would rather appear that it had been represented to and held by him as a worthless and unavailing deed. And if I am right in this, it is difficult to understand on what ground it can be held that the appellant's father, or the appellant himself, as now in right of his father, is barred from maintaining that the agreement is not effectual against him.

If, then, the alleged agreement is to be held, as I think it must, to be an ineffectual and inoperative deed against the appellant, the judgment of the Sheriff-substitute appealed against, as well as the preceding deliverance of the trustee, must be set aside. And if so, there must, I rather think, be an end to the present litigation.

But it was argued that, independently of the Sheriff-substitute's judgment.

the ground upon which it is founded, the case of the appellant is untenable, in respect that both the mutual settlement and the agreement, Nos. 8 and 35 of process, are valid and effectual deeds. With reference to the mutual settlement, the case of *Macmillan v. Macmillan* (28th November 1850, 13 D. 187) was cited in support of it; and on the strength of that case it was contended that the deed was sufficient, as it now stands, to carry at least the whole means and estate of the husband, William Martin. I would have been very willing to hold it to be so if I could, but I am not satisfied that I can. In *Macmillan's* case the ground of judgment was that the deed there was of the nature, not of contract at all, but simply of wills by husband and wife, just as if they had been separate and unconnected with each other. Here, however, we have a mutual disposition and settlement partaking so largely, as it appears to me, of the nature of contract, as to make it impossible to hold that one part of it, viz., that relating to the husband's estate, can be held to be operative and effectual independently of the other part, which relates to the wife's estate. In this view, and seeing that there are no witnesses to what is said to be the wife's signature, and that the testing-clause is not filled up, and admittedly cannot now be filled up in so far as the wife is concerned, I am not satisfied that the mutual settlement can be given any effect to at all. And this was plainly the view on which the parties appeared to have acted in entering into the agreement, which is the other deed founded on, for in that deed they expressly state that Martin senior had died intestate. And it is certainly to be regretted before coming to the conclusion that the mutual disposition and settlement is effectual, even as regards the husband's succession, an investigation had not been gone into of all the circumstances in which the deed had been left uncompleted not only during the husband's own life but for about seven years after his death.

Supposing, however, the settlement, No. 35 of process, is to be held as a good and effectual deed *quoad* Martin senior's own estate, I am unable to see how it can effect the legitim which fell to Janet Martin or Millar on the death of her father. Neither the father or mother, nor both together, could by any post-nuptial or testamentary settlement defeat a claim for legitim. This neither was nor could be disputed. But it was maintained on the authority of the case of *Stevenson v. Hamilton* (1 D. 181) that the legitim accruing to Janet Martin or Millar on the death of her father did not fall to and become vested in her husband. That case, however, does not appear to me to be in point. There it was merely held by a narrow majority of the Court that an insolvent husband and his creditors were not, in the special circumstances which there occurred, entitled to enforce his wife's legal claims to the effect of repudiating her father's settlement, which she had expressly ratified,—the repudiation being in the highest degree injurious to her and her children. But here, 1st, there was no settlement by the wife's father at all, supposing I am right in holding, on the grounds I have stated, that the settlement, No. 35 of process, is invalid; and at any rate, 2dly,—and this is the important point—there has been no ratification by the wife of her father's settlement, supposing the deed, No. 35 of process, to be an effectual one. On the contrary, the alleged agreement, No. 8 of process, which was executed by the wife, proceeds expressly on the narrative that the settlement, No. 35 of process, was not a valid or effectual deed, and, therefore, that her father must be held to have died intestate. It seems impossible, therefore, to hold that the principle of election which influenced so much the majority of the Judges in the case of *Stevenson v. Hamilton* has any place in the present case. That

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specialty therefore, as well as others, being wanting here, it appears to me that the present case cannot be treated as an exceptional one at all, as *Stevenson v. Hamilton* was, but must be held to be governed by the general rule which, as stated by Lord Jeffrey and acknowledged by all the Judges in that case, is undoubted law, that all moveable rights vested in a wife at the time of her marriage, or accruing to her during its subsistence, and as to which the *jus mariti* had not been effectually excluded, are necessarily carried to the husband by the assignment implied in marriage.

I regret, therefore, that in the circumstances, and for the reasons I have now stated, I feel myself obliged to hold that the Court ought to recall the Sheriff's substitute's judgment appealed against, and also the deliverance of the trustee and to remit to the trustee in the sequestration to reconsider the appellant's claim and to sustain the same in so far as he may find it to be sufficiently established. To the extent to which there was legitim fund or estate accruing to Janet Martin or Millar on the death of her father I am at present unable to see any sufficient answer to the appellant's claim.

LORD JUSTICE-CLERK.—I have found this case attended with great difficulty and have not come to a conclusion without giving weight to the observations of Lord Ormidale. I concur, however, with Lord Gifford and Lord Neave with regard to the question of legitim the case is ruled by that of *Stevenson v. Hamilton*.

With regard to the deed, the matter is somewhat peculiar. The father of the appellant's mother signed it before witnesses, and has since died. His wife acknowledges in the subsequent deed of agreement that she also signed the mutual deed, and the objections there taken to the deed is that the testing-clause was not filled up. But the wife's signature really was appended to the mutual deed to the knowledge of her husband, and he was entitled to rely upon the signature, whether written before witnesses or not, as she could have afterwards acknowledged it before witnesses.

On the whole matter I concur with the majority of your Lordships that the mutual deed is an operative one.

THE COURT pronounced this interlocutor:—"Find (1) that the deed No. of process, the testing-clause of which has now been filled up, is valid and effectual as a settlement of the personal means and estate of the deceased William Martin; (2) that by the terms of said deed the *jus mariti* and right of administration of Janet Millar, the husband of Janet Martin or Millar, is effectually excluded; and (3) that the present appellant is not entitled, as the right of his deceased father, either to claim legitim, as due to her mother, or to claim any share whatever of the succession of the said deceased William Martin: Find the respondent entitled to one-half of the taxed expenses in the Sheriff Court; and, with these variations, affirm the judgment appealed from, dismiss the appeal, and decern: Find the respondent entitled to expenses in this Court, except those relating to the first day's discussion, and remit," &c.

NENION ELLIOT, S.S.C.—DAVID HUNTER, S.S.C.—Agents.

JAMES DON AND OTHERS (James Webster's Trustees), First Parties.—
J. A. Crichton.

No. 16.

ANN WEBSTER, Second Party.—*Mackay.*

Nov. 8, 1876.
 Webster's
 Trustees v.
 Webster.

Succession—General Disposition—Special Destination.—A testator left a trust-disposition and settlement, by which he conveyed to trustees his whole estate, heritable and moveable, which should belong to him at the time of his death. Subsequent to the date of his settlement he purchased certain heritable subjects, and took the disposition in favour of himself and his assignees and disponees, whom failing, to his sister and her heirs and assignees whomsoever. Held that the subjects belonged to the sister as heir of provision, and were not carried to the trustees by the general disposition in their favour.

MR JAMES WEBSTER died in January 1875, possessed of considerable personal property, but his only heritable estate consisted of two subjects, which he had acquired in 1874, as after-mentioned. 2ND DIVISION.
R.

He left a trust-disposition and settlement dated 11th June 1864, and relative codicils, the last being dated April 1867, by which he conveyed to trustees All and Sundry lands and other heritable and real estate of every description, and wherever situated, as also the whole moveable estate which should belong to him at the time of his death. The trustees were directed at his death to pay £150 to each of his six brothers and sisters, including his sister Ann who lived with him; to pay over to his said sister the free income of the residue, and to allow her the use of his household furniture, plate, linen, &c., so long as she should remain unmarried; and in the event of her marriage, to pay her a further sum of £500 in addition to the £150 payable at his death, and her equal share of the residue; and upon her death or marriage, to convert the whole trust-estate into money, and pay over the proceeds equally among the testator's brothers and sisters, including Ann if she was alive.

In 1874 Mr Webster acquired the villa at Trinity village, Brechin, where he and his sister lived, for the sum of £500. By the disposition in his favour the sellers, "at the special request of the said James Webster, as evinced by his subscription to these presents," sold and disposed the subjects "to the said James Webster and his assignees and disponees, whom failing, to Ann Webster, also residing at Trinity village, sister of the said James Webster, and her heirs and assignees whomsoever in fee."

Mr Webster also about the same time bought a small adjoining pendicle of land for £10, and took a disposition in similar terms.

One of the testator's brothers died in 1872. His other brothers and sisters survived him. His sister Ann was born in 1813, and had lived with him for thirty years prior to his death.

Miss Ann Webster claimed the heritable subjects as heir of provision to her brother under the dispositions in his favour.

His trustees, on the other hand, maintained that the heritable subjects were conveyed to them by virtue of the general conveyance contained in the trust-disposition and settlement.

The trustees and Miss Ann Webster presented a special case, in which the questions submitted to the Court were:—"1. Whether, in virtue of the general conveyance by the said James Webster in his trust-disposition and settlement, the subjects contained in the dispositions, . . . belong to the parties of the first part in trust, for the purposes mentioned in the said trust-disposition and settlement and codicils? or 2. Whether the said subjects contained in the two dispositions before-mentioned now belong to

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the said Miss Ann Webster, as heir of provision of the said James Webster, in virtue of the destinations therein contained?"

Argued for the trustees;—The destination of the heritable subjects was to "James Webster and his assignees and disponees," whom failing, &c. The assignees and disponees must be looked for in the trust-deed of 1864, otherwise this clause would be meaningless. The contention for the other side would involve this result, that if his sister Ann had predeceased him, the subjects would have been carried to her heirs (who might not have been his heirs) in preference to his own heirs. The substitution in favour of Miss Webster was perhaps inserted to meet the contingency of Mr Webster cancelling his trust-settlement and executing no other.

Argued for Miss Webster;—The case of Glendonwyn shewed that the *onus* of proving that the terms of a general disposition derogated from a prior special destination is upon the party supporting the general disposition.¹ In cases of this kind the difficulty generally arose from the conflict of the two maxims, "special derogates from general," and "posterior derogates from prior," but here the two principles concurred in favour of Miss Webster. The expression "assignees and disponees" could be satisfactorily explained as meaning assignees and disponees of the particular subjects. The construction adopted by the trustees rendered the substitution in favour of Miss Webster nugatory.

At advising,—

LORD JUSTICE-CLERK.—The question arises between a general *mortis causa* conveyance by Mr Webster of his whole estate to trustees for certain purposes and a special destination of a subject purchased by him long afterwards contained in the disposition which he took from the seller. The question is, in the first place, which of these deeds is to rule, and, in the second place, whether there are any words in the special conveyance which indicate the intention of the testator that the subject should fall under the antecedent trust-disposition and settlement.

There are two legal presumptions which may arise in such cases, first, that a special conveyance derogates from a general conveyance, and, second, that a later deed derogates from a prior deed. In most of the cases upon this subject, such as those of Glendonwyn and Thoms,² the general conveyance was later than the special conveyance, and accordingly these two presumptions came into conflict. But here the two presumptions concur, for the special conveyance is the later, and therefore, *prima facie*, the later destination must rule.

But then it is said that as the special title is taken to "James Webster and his assignees and disponees," these terms must apply to his assignees and disponees under his general settlement. There is, however, another meaning which can be attached to the words which I have quoted, *i.e.*, to James Webster and any one to whom he may convey the particular subject by subsequent assignment or disposition. The words will bear either construction. But there was no reason for taking the title, failing his assignees and disponees, to James Webster, if he intended it to fall under his general disposition, for a simple conveyance to himself would have had this effect. It has been suggested that

¹ Glendonwyn v. Gordon, May 19, 1873, L. R. 2 Sc. App. 317, 11 Macph. H. L. 33, 45 Scot. Jur. 183; Farquharson v. Farquharson, 1756, M. 224; Campbell v. Campbell, 1740, 1 Paton App. 343; Fleming v. Fleming, 1740, 3, 1800, M. "Implied Will," App. No. 1.

² Thoms v. Thoms, March 30, 1868, 6 Macph. 704, 40 Scot. Jur. 361.

is destination was to take effect in case he destroyed his prior settlement. No. 16.
 ut we cannot presume anything so unreasonable as that he should have made
 is special destination merely on the chance of his destroying his former Webster's
 ttlement, and failing to make another. The special terms of the conveyance, Nov. 8, 1876.
 and Mr Webster's signature to it, indicate that he had a specific object in view ;
 and I am satisfied that both the express words and the disclosed intention
 occur in shewing that the subject was not intended to fall under the general
 settlement, but was to go to his sister, failing any subsequent assignation or
 disposition of it by himself. Trustees v. Webster.

LORD NEAVES and LORD ORMIDALE concurred.

LORD GIFFORD.—This is entirely a question as to the intention of the late James Webster. What did the late Mr Webster mean by the terms of his trust-deed and codicils of 1864 and 1865, and by the terms and destination in which he expressly took the two special dispositions of 1874, which special dispositions in testimony of his will and wish are subscribed by himself ?

Even although Mr Webster had not subscribed these two special deeds the question would not have been materially altered, because a purchaser who takes the disposition to himself in special terms, and with substitutions or destinations over, is held by acceptance of the deed to make it his own settlement of the subjects purchased.

In such cases the mode in which the question generally arises is, whether a substitution or special destination in the settlement of a particular subject is evacuated, destroyed, or altered by a subsequent general disposition and settlement of the testator's whole estate. In the present case the question arises differently and in a somewhat unusual form, for it is whether Mr Webster's general trust-deed and settlement of 1864 is innovated upon, or whether an exception thereto is created by the special conveyances which he took in 1874. In both cases, however, and indeed in all such cases, the true question is, *Quid sit voluntas testatoris ?*

Looking to the whole circumstances of the present case as disclosed in the deeds and in the special case for the parties, I am of opinion that the subjects contained in the two dispositions of 1874 belong to Miss Ann Webster and not to the trustees under the general settlement, and I think the questions put should be answered—the first in the negative, and the second in the affirmative.

In getting at the intention of the late Mr Webster, from the deeds and circumstances before us, I begin by supposing, contrary to the fact, that the two special dispositions had been taken by Mr Webster first, and that then some years afterwards, at a greater or at a lesser interval, he had executed his general trust-disposition and settlement and codicils in the terms which are now before us. If this had been the case, would the general trust-disposition and settlement have evacuated the destinations in the special deeds and carried the subjects to Mr Webster's testamentary trustees for the general purposes of his settlement ?

Now, I think this would not be the effect of such a general settlement. I think the special settlement and destination effected by the dispositions to the villa at Trinity village and small piece of ground adjoining would not have been held to be superseded and destroyed by the mere general words in Mr

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Webster's universal settlement. General words in such a deed are always open to construction, if the intention of the testator can be gleaned, and I think the general rule is, that a special subject, precisely and definitely settled in a particular way, or in favour of a particular heir or substitute, is not affected by mere general words used by a testator in settling his whole means and estate. The subject specially settled is held not to have been in the testator's view unless the contrary can be shewn, and in general a special provision should be specially revoked. There are very numerous instances of the application of this rule, the latest and most authoritative of which, trenching to some extent upon cases which preceded it, is the case of *Glendonwyn v. Gordon*, as decided in the House of Lords 19th May 1873, Law Reps. 2 Scotch Appeals, 320. I do not think there is anything in the present case which, supposing the general trust-deed to have been last in date, would have indicated the testator's intention thereby of cutting down the previous special destinations.

Now, I think the case actually before us is more favourable for Miss Webster the special donee or substitute, than it would have been had the general disposition been latest in date. *Posteriora derogant prioribus* applies emphatically in such cases as the present—the latest expression of the testator's will receives effect even though it be contrary to preceding indications; and the latest will in the present case is expressed in the special dispositions.

Mr Webster made his general settlement in 1864, containing various provisions in favour of his sister, Miss Ann Webster, who was the only one of his sisters who resided with him. In 1874, having occasion to buy the villa a question for the occupation of himself and sister, he took the titles both of the villa and of the adjoining ground to himself and his assignees and donees, whom failing, to his sister, Ann Webster, in the terms of the deeds before us, both of which he specially subscribes in token of the destination being the expression of his will. Now, I cannot help holding that by these deeds Mr Webster intended to give his sister, Miss Ann Webster, an additional benefit in his succession. He surely meant something by inserting her name as the donee or substitute, and although undoubtedly he reserved full power of himself disposing of the subjects, I think he intended that, failing any subsequent disposal thereof by himself, it should go to his sister.

The contention for the trustees makes the special insertion of Miss Webster's name in the dispositions of 1874 absolutely meaningless unless the testator be supposed to have intended to destroy his general settlement and die intestate, and this seems to me to be a most unlikely supposition. Miss Webster is only to take, the trustees say, failing them, the general testamentary trustees. I cannot think that this was Mr Webster's intention. I feel certain that had he so intended he would have expressed himself very differently. No doubt a difficulty arises from the expression in the special deeds after Mr Webster's own name, "and his assignees and donees," for undoubtedly in one sense his testamentary trustees are his assignees and donees, but I think this is not the true meaning of the words. His "assignees and donees" mean, I think, special assignees or special donees in the special subject conveyed by the deed, and not mere general assignees in his general settlement. The intention was that, notwithstanding the destination of the villa to his sister, Mr Webster might sell or convey it to whom he pleased, but that failing such special sale or conveyance Miss Webster should inherit it. Mr Webster never altered the special destination, and he never sold or disposed of the villa and ground, and

I think we should now give effect to his will and purpose by finding that Miss Webster is entitled to the villa and pertinents in addition to her provisions under the general settlements. No. 16.

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THE COURT answered the first question in the negative, and the second question in the affirmative.

DUNCAN & BLACK, W.S.—G. & H. CAIRNS, W.S.—Agents.

ANDREW DOUGLAS, Pursuer and Respondent.—*Lord-Adv. Watson—M'Laren.*

No. 17.

JAMES EARL DOUGLAS, Defender and Appellant.—*Fraser—Thoms.*

Nov. 8, 1876.
Douglas v.
Douglas.

Parent and Child—Legitim—Collatio inter liberos.—Large cash advances made by a father to a son in business, and entered in the father's books as "By gifts payable to my son James as he requires it:" "By allotted for his business, free gift:" and "By given over as free gift,"—*held* to be advances to account of legitim.

THIS was an action for payment of legitim raised in the Sheriff Court of Forfarshire by Andrew Douglas against his brother, James Earl Douglas, the sole executor and universal disponee under the settlement of their father, Thomas Douglas. 2D DIVISION. Sheriff of Forfarshire. I.

The father was twice married, the pursuer and defender respectively being the only issue of the first and second marriages. He died on 13th March 1875, predeceased by both his wives, leaving a *mortis causa* disposition and settlement, dated 4th August 1869, by which, upon the narrative of his affection for his son James, and of having already made provision for his other son Andrew, he disposed and conveyed to his son James his whole means and estate, and appointed him his sole executor. This deed contained a clause revoking all prior *mortis causa* settlements; but a prior settlement, executed on 9th July 1860, was to the same effect, save that a trust was constituted until his son James should attain majority, which he had done before the date of the second deed. The trust-settlement of 1860 also contained a statement in the inductive clause that the testator had already made provision for his other son Andrew.

In point of fact, Mr Thomas Douglas had in a postnuptial contract between him and his first wife (there having been no antenuptial contract of marriage between them) provided a sum of £800 to his son Andrew, and by a subsequent mutual settlement by himself and his second wife he provided a further sum of £600 to Andrew, which sums were declared to be in full of all claims of executry, legitim, or other legal claims whatsoever competent to him by and through the decease of his mother, or through Mr Douglas' death.

Mr Douglas left personal property to the extent, as ascertained in this action, of £6740, besides some heritable subjects.

During his lifetime he had handed over three sums, amounting together to £6000, to the defender. These sums were entered in a ledger kept in the handwriting of the deceased thus:—

Say three thousand pounds				
1865. Dec. 25.	By Gift to him (my son James) payable as he requires it,	£3000	0	0
		T. D.		

[At another part of the same book headed JAMES E. DOUGLAS.]

1866. Dec. 31.	By allotted for his business, free gift,	1000	0	0
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1868. Dec. 31.	By given over as free gift,	2000	0	0
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The defender maintained that these sums were intended by his father as gifts over and above legitim, that he was not bound to collate them, and that the legitim fund, being one-half of the free executry, fell to be divided equally between himself and the pursuer.

The Sheriff-substitute (Cheyne), after a remit to an accountant, pronounced this interlocutor:—"Finds that the true nett value of the deceased Thomas Douglas' personal estate, including interest to 13th September 1875 (being six months from Thomas Douglas' death), may be held to have amounted to £6740, whereof one-half or £3370 is, in the circumstances of the case as stated on record, the legitim: Finds that there is evidence in process to establish that the defender received from his father, the deceased, during his lifetime, sums of money exceeding in amount the whole legitim fund, which sums he is, in a question with the pursuer, the deceased's only other child, bound to collate or impute towards legitim: Finds therefore that his claim to legitim must be held to have been satisfied, and that the pursuer is entitled to the whole legitim funds; and, having regard to these findings, decerns against the defender as executor of his deceased father for payment to the pursuer of the sum of £3370, with interest thereon at the rate of five per cent from 13th September 1875 until paid."*

The Sheriff (Maitland Heriot) adhered.†

* "NOTE.— . . . As to these (the cash advances), the question comes to be whether the mode in which they are entered in the deceased Mr Douglas' ledger (for the defender offers no evidence upon the point except his own oath, which it need hardly be said is inadmissible) is sufficient to establish that it was the deceased's intention that they, or any of them, should be in addition to legitim, and so exempt from collation. Now, I think it might, with some plausibility, be argued that the way in which the advance second in date (viz. the £1000 credited to defender under date 31st December 1866) appears in the ledger suggests, that so far from the deceased intending it as a *præcipuum* over and above legitim, he intended it to be an advance towards the defender's portion or share of legitim, for he describes it as a sum 'allotted for his (i.e. defender's) business;' but be that as it may, it seems to me that no higher inference can be drawn from the fact that the deceased speaks of one of the advances as a 'gift,' and of the other two as 'free gifts,' than that he did not intend them to be treated as loans of which repayment could be demanded; and accordingly I hold that there is nothing to take any of the three advances out of the general rule, according to which advances made by a father to a son in his lifetime are, in a question of legitim, subject to collation."

(The Sheriff-substitute then proceeded to negative a contention for the pursuer; which was not maintained in the Court of Session, that the defender was bound to replace into the legitim fund the whole sums which he had received from his father in his lifetime, and that the pursuer was entitled to one-half of the fund so formed.)

† "NOTE.— . . . As to the moveable estate left by the deceased, it falls in this case to be divided into two parts, (1) the dead's part, and (2) the legitim. As to the first of these—the dead's part—there seems to be no room for any dispute. The defender is entitled to the whole of it, in respect of the testament (No. 17 of process) executed by his father. As to the second of these—the legitim—it is now admitted that the pursuer is entitled to a share of the legitim fund, notwithstanding the terms of the testament, No. 17. The question now arises, whether the defender be entitled to a share of this legitim fund. It admits that he got from his father during his life three sums at least, viz. £3000, £1000, and £2000, making together the sum of £6000. In such circumstances the Sheriff considers that, looking to the amount of the legitim fund in this case, the defender is excluded in respect of such gifts from claiming any share of the fund, and that the pursuer is entitled to the whole of it."

The defender appealed to the Court of Session.

No. 17.

Argued for the defender;—If the judgment appealed against were
 mud, every sum given by a father to a son would require to be collated. Nov. 8, 1876.
Douglas v. Douglas.
 he intention of the father in this case to favour his younger son was
 shewn conclusively by the testamentary deeds which he executed, and
 which shewed that he was strongly impressed with the resolution that
 his elder son should get no more, having been already provided for. The
 very days on which the gifts were made, Christmas-day and the last day
 of the year, shewed their true character. There was no case in which ad-
 vances stated by the father to be “gifts” or “free gifts” to the son
 had been held subject to collation.¹

The pursuer supported the judgment of the Sheriff.²

At advising,—

LORD JUSTICE-CLERK.—I am of opinion that this case has been very properly
 disposed of in the Court below, on grounds which are satisfactorily and clearly
 explained by the Sheriff and Sheriff-substitute. (His Lordship stated the facts).
 I have no doubt that these sums were intended as gifts and not as debts; and
 the learned Sheriffs have come to the same conclusion. The entries made by
 the father in his books shew this very clearly; nor does it signify whether the
 gift was made by the father paying the money down or allowing his son to draw
 on him as occasion required. These sums are carried to the credit of the son's
 account in the father's ledger, and there is no reason to think that they were
 ever considered as debts he was bound to repay.

But the question remains, was this “free gift” a *præcipuum* over and above
 the legitim, or must the appellant collate it before he can claim a share of the
 legitim fund?

This question belongs to a class which has been the subject of much discus-
 sion among all jurists who follow the civil law, whence we have derived the
 doctrine. I think it is well settled with us that a donation by a father to his
 son during his life, to set him up in the world (as these advances certainly were)
 is subject to collation, unless the father has, either expressly or by some clear im-
 plication, declared his intention to the contrary. The law is so stated by Mr
 Bell in his Principles, and is entirely borne out by the authorities quoted by him
 —from the case of Skinner, in 1775, to the recent case of Nisbet, in 1865.
 Domat's Treatise on the Civil Law was referred to by the appellant; but unless
 I misread what that author says (l. iii. t. 3, sec. 3), he entirely confirms the view
 I have stated.

No doubt it is contended that the father has sufficiently indicated his inten-
 tion that this should be a *præcipuum*, and that the intention of the father to
 this effect may be gathered from any clear indications of intention, although it
 be not directly expressed. Now, first, as regards the express words—the words
 “as a free gift,” although certainly material, are at the best ambiguous. They
 might be satisfied by being referred to a gift as distinguished from a debt, al-
 though they may also bear the interpretation that the advance was not only a

¹ Stair, iii. 8, 26; Domat, ii. 4, 3; Keith's Trustees v. Keith, July 17, 1857,
 19 D. 1066, 29 Scot. Jur. 497; Webster v. Rattie, June 4, 1859, 21 D. 915,
 31 Scot. Jur. 504 (see note of Lord Neaves, Ordinary).

² Skinner v. Skinner, Dec. 20, 1775, M. 8172; Johnston v. Cochran, Jan.
 13, 1829, 7 S. 226, 1 Scot. Jur. 6; Nisbet's Trustees v. Nisbet, March 10, 1868,
 5 Marph. 567, 40 Scot. Jur. 293.

No. 17.

Nov. 8, 1876.
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Douglas.

gift, but was also free of any other legal result or liability. Between these constructions I think the balance must be cast by the circumstances. If the sum had been inconsiderable compared to the father's means these words would have given great weight to the appellant's contention. But when I see that they amounted to two-thirds of the father's estate I think we must look for some more direct and unambiguous evidence of intention before we can assume that the father meant to effect so great an inequality between his sons.

There is a passage in Voet's Commentaries on the Pandects which seems apposite. The author leans to the opinion that pure gifts are not subject to collation except in two specified cases. But he says (37, 6, 14)—“*Diversum est si quid non simpliciter ad donationem, sed ad instructionem tabernæ, vel officii, vel generalius ad mercaturam exercendam, aliasque similes causas, liberè a parente datum esset; id enim collationi subesse placuit.*”

LORD NEAVES concurred.

LORD ORMDALE.—I concur with your Lordships in thinking that the Sheriff has decided rightly in this case.

The advances which form the subject of dispute were not, and could not be said to be in any correct sense such as a father is always understood to make for or for his children, irrespective altogether of any question of legitim. They were certainly not made for the purposes of education or aliment; and were of a small or inconsiderable amount. On the contrary, they were advances large in amount, and made to a younger son, who was forisfamiated and engaged in business on his own account, for the purpose of assisting him in his business. In ordinary circumstances such allowances would clearly fall to be taken into computation in adjusting the division of legitim, or, to put it differently, would require to be collated as in a question with the other children. It is true, however, that the father might, if he pleased, have made the advances on the footing, either express or implied, that they were not to be so dealt with, but to be held as a *præcipuum*. There is certainly nothing expressed to that effect in this case, and, in my opinion, there is nothing in the circumstances sufficient to imply it. The expression “free gifts” must, I think, be held as intended merely to denote that the advances were not debts, payment of which could be enforced by the father from his son.

LORD GIFFORD concurred.

THE COURT pronounced this interlocutor:—“Refuse the appeal, and affirm the judgment appealed against, and decern: Find the respondent entitled to expenses,” &c.

WILLIAM ARCHIBALD, S.S.C.—LINDSAY, PATERSON, & Co., W.S.—Agents.

No. 18.

Nov. 10, 1876.
Glass v.
Laughlin.

JAMES GLASS, Complainer.—*Asher—Lang.*
JOSEPH LAUGHLIN, Respondent.—*Macdonald—McKechnie.*

Process—Suspension—Competency—Expenses—Remit to Sheriff—Court of Justiciary.—In disposing of an appeal under the Small Debt Act to the Circuit Court of Justiciary the presiding Judge remitted to the Sheriff to proceed “as may be just,” found the appellant entitled to expenses, remitted the account of expenses to the Sheriff Court Auditor, and granted power to the Sheriff to

decern for the expenses, which he accordingly did. The appellant lodged a note of suspension in the Court of Session of a threatened charge for the taxed expenses, on the ground that the remit to the Sheriff to decern for expenses was *ultra vires* of the Circuit Judge. *Held* that the remit to the Sheriff was competent, and the suspension refused.

No. 18.

Nov. 10, 1876.

Glass v. Laughlin.

Question, whether the suspension was competent.

In January 1875 James Glass raised an action in the Small Debt Bill-Chamber. Court of Lanarkshire against Joseph Laughlin for the sum of £15, restricted to £12. On 10th February the Sheriff-substitute (Galbraith) gave decree for the sum sued for, with expenses. Laughlin appealed to the next Circuit Court of Justiciary at Glasgow, under the provisions of the Small Debt Act 1 Vict. cap. 41, sec. 31. On 23d April 1875 Lord Deas, as presiding Judge at the Spring Circuit at Glasgow, heard the cause, and remitted to the Sheriff of Lanarkshire to inquire into the facts and to report. Parties were again heard on 16th September 1875 before Lord Neaves, as Circuit Judge, when a fresh remit to the Sheriff of Lanarkshire was made. The appeal was next heard, of consent, by Lord Young on 23d December 1875, during the Christmas Circuit at Glasgow, when his Lordship pronounced this interlocutor:—"Having of consent heard parties' procurators on the report of the Sheriff under the remit made to him by interlocutor of the Circuit Court of Justiciary of 16th September last, sustains the appeal; recalls the decree complained of; remits the cause to the Sheriff to proceed therein as may be just: Finds the appellant entitled to expenses, remits the account thereof when lodged to the Auditor of the Sheriff Court at Glasgow to tax and report to the said Sheriff, and grants power to the said Sheriff to decern for the same."

2D DIVISION.
Lord Young.
I.

The Sheriff of Lanarkshire, in virtue of the above remit, resumed consideration of the cause, and on 29th February 1876 pronounced an interlocutor assoilzieing Laughlin, and decerning against Glass for £54, 5s. 4d. of expenses.

Glass then presented a note of suspension of a threatened charge under this last interlocutor. In his statement of facts he set forth the above proceedings, and added—"The Court of Justiciary possesses no power either by statute or at common law to delegate any part of its functions, and that part of Lord Young's judgment which granted power to the Sheriff of Lanarkshire to decern for the expenses incurred under the appeal is *ultra vires* and inept. In like manner the decree of the Sheriff of Lanarkshire following upon said judgment is *ultra vires* and inept. Diligence having, however, been threatened on the said decree, the present suspension has been rendered necessary."

The pleas in law were to the same effect.

The respondent pleaded (1) that the suspension was incompetent, and (2) that the whole procedure was regular and legal.

On 16th June 1876 the Lord Ordinary repelled the reasons of suspension, with expenses.*

* "NOTE.—The complainer asks suspension of a decree of the Sheriff of Lanarkshire, pronounced under a remit to him by the Circuit Court of Justiciary at Glasgow, in an appeal to that Court under the Small Debt Act. The ground of suspension is that the Circuit Court exceeded its jurisdiction in making the remit, and that therefore the decree of the Sheriff acting under it is inept.

"The respondent maintains (1st) that the suspension is incompetent; and (2) that it is groundless, the Circuit Court not having exceeded its jurisdiction.

"With respect to the question of competency, the complainer, while conceding that this Court cannot directly review a judgment of the Circuit Court, con-

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Argued for Glass;—The Circuit Court of Justiciary had no power to extend the jurisdiction of the Sheriff to the extent of entitling him to decern for expenses incurred in the Circuit Court. The civil jurisdiction of that Court was the creature of statute,¹ and did not arise from common law like that of the Court of Session. All statutory jurisdiction must be

tended that a decree pronounced by a Sheriff under a remit from that Court was reviewable on the ground of want of jurisdiction, and that if a remit from the Circuit Court appeared to be the only foundation of his jurisdiction, this Court might consider and determine whether that was sufficient. I do not know that it was exactly so put in argument, but as this seems to me the strongest way in which it can be put I so state it.

"I am of opinion that this Court must assume that the Circuit Court, being a superior if not Supreme Court, acted within its jurisdiction, and according to the law and practice of that Court, in any judgment which it pronounced; and that as this Court cannot under any form of review directly set aside or stay the execution of any such judgment, it cannot or ought not to do so indirectly by reviewing a Sheriff's decree, pronounced under and according to the terms and directions of such judgment, on the ground that the Circuit Court had exceeded its jurisdiction in pronouncing it. But although I state this as a general proposition, I desire to explain that I do so with the qualification which necessarily accompany most general propositions, viz., that it is not meant to exclude the possibility of an exception from it under circumstances sufficiently exceptional to warrant it. Whether or not such circumstances may conceivably ~~very~~ need not be determined. It is enough to have a general rule, and no good reason for departing from it in the particular case. That there is no such reason here is, I think, very clear. The expenses of the appeal which the Circuit Court awarded to the appellant were exceptionally heavy, from the circumstance of two remits having been made to the Sheriff to investigate and report on matters of fact, and were chiefly incurred before the Sheriff in the execution of these remits. As I was myself the Circuit Judge who saw fit to award the expenses I am able to state (what I could otherwise only have taken as a reasonable supposition) that I remitted to the Sheriff to ascertain and decern for the amount, if not with the express consent of both parties, certainly without the slightest objection by either, as the most expedient course in the circumstances, and preferable to the alternative of a taxation and report to the next Circuit for decern. It was the third Circuit at which the appeal had come up, and, being the Christmas Circuit, I only consented to hear and decide it then at the urgent request and of consent of both parties, who greatly desired then to have an end of the matter. Therefore, whether or not it may be possible to conceive circumstances in which this Court might competently review directly, or indirectly, the judgment of a Circuit Court of Justiciary, I am of opinion that here are no such circumstances, and that the general, if not universal, rule against the competency of such review must prevail.

"If the suspension were assumed to be competent I should have to express my own opinion that it is unfounded, for I think the Circuit Court of Justiciary has jurisdiction to remit to an inferior Judge to tax and decern for the expenses of an appeal awarded by that Court. I have in my own practice known of remits to the inferior Judge of the whole cause, with certain instructions (the competency of which is, I suppose, not doubtful), but with power to dispose of the expenses of the appeal on the termination of the cause.

"I cannot avoid remarking, in conclusion, that the present suspension seems one regarding mere form of procedure, by which the complainer cannot possibly take any substantial benefit. Pay the expenses awarded against him by the Circuit Court he must, and if the Sheriff cannot competently decern therefor, a remit the only result is that the Circuit Court must on application at his expense pronounce such decree. There is here no question of a peremptory decree which has fallen."

¹ 1 Vict. cap. 41, sec. 31.

strictly construed. The Heritable Jurisdiction Act,¹ which introduced No. 18.
civil appeals to the Circuit Court, provided that the decree for costs "shall
be final." No other Court was entitled to pronounce such a decree with
regard to the expenses in that Court.

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Counsel for the respondent was not called upon.

LORD JUSTICE-CLERK.—It may be doubted whether we have jurisdiction to entertain this suspension. That might be a point of difficulty were it necessary to decide it; but I do not put the judgment on that ground.

This is a suspension of an interlocutor of the Sheriff of Lanarkshire in the Small Debt Court decerning for a sum of expenses in an action before that Court. The judgment on the merits had been appealed to the Circuit Court of Justiciary, and the decree complained of was pronounced in terms of a remit from the Circuit Court. The ground of suspension is that the Sheriff had no jurisdiction to pronounce the interlocutor, his authority for doing so being an interlocutor of Lord Young, sitting in the Circuit Court of Justiciary at Glasgow Winter Circuit. It is maintained that Lord Young had no power to make the remit.

It is not disputed that Lord Young rightly entertained the case in which the remit was made, and that he did so at the request of both parties, but it is said that he went beyond his powers in remitting to the Sheriff to decern for expenses.

It is perfectly clear on the merits, if merits there be, that there is no ground for this suspension. The parties came before Lord Young at the Winter Circuit at Glasgow, and there being some doubts felt as to whether the Circuit Court held at Glasgow during the Christmas recess had power, under the special statute, to entertain appeals, they thought fit to consent to waive all objection on that ground. Lord Young accordingly decided the case, and remitted it *simpliciter* back to the Sheriff, finding the appellant entitled to expenses, which expenses he granted power to the Sheriff to decern for. This is the step upon the part of the Circuit Judge which is now objected to as *ultra vires*. But I have no doubt that if he had power to decide the case he had undoubted power to authorise the Sheriff, from whom the appeal was taken, to decern for the expenses as found due. The contention is that whenever a party has been found entitled to expenses in the Circuit Court these expenses must either be modified at the time, or else no decree for them can be obtained till the next Circuit, in consequence of the delay entailed by the taxation of the account. That is a proposition which I should be very sorry to affirm.

Upon these grounds, then, I think that we should adhere to the Lord Ordinary's interlocutor, and refuse the note.

LORD NEAVES and LORD ORMDALE concurred.

LORD GIFFORD.—I am of the same opinion. I have great doubts of the competency of this suspension, but still I am prepared to put my judgment upon the merits. On referring to the "Heritable Jurisdiction Act" it will be seen that there is there given to the Circuit Court of Justiciary, in all cases in which appeal is made competent to that Court, power to cognosce and determine such appeals in civil cases in the same way as the Court of Session may

¹ 20 Geo. II. cap. 43, sec. 34.

No. 18. now cognosce and determine in suspensions of inferior Court judgments. think this necessarily implies a power to remit to the Sheriff in order to extricate the jurisdiction, or apply the decree of the Circuit Court.

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The review which is conferred on the Circuit Court is a limited one, but still within its limits it falls under the rule of common law procedure, and I am clear of opinion that at common law every Court of review has power to remit to the inferior Court to carry out its decrees, and to dispose of all questions of expenses. The expenses incurred in a Court of review must very often unavoidably fall to be sent back to the inferior Court to ascertain the true amount thereof and to be decreed for and payment thereof enforced, especially when, as in the case of the Circuit Courts, they only sit for a day or two at a time, and at considerable intervals. This mode of procedure is not excluded by the words of the statute conferring the jurisdiction, and the mere absence of the words expressly giving the right will not deprive the Court of ordinary and necessary powers. Every Court of review should have this power, and I think the Circuit Courts are no exception. On this simple ground, and setting aside altogether the question of our jurisdiction to interfere, directly or indirectly, with what is truly a Circuit Court judgment, I am for adhering.

THE COURT adhered.

D. CRAWFORD & J. Y. GUTHRIE, S.S.C.—ADAMSON & GULLAND, W.S.—Agents.

No. 19.

Nov. 16, 1876.
Fleming v.
Walker's
Trustees.

JOHN FLEMING, Pursuer.—*Guthrie Smith—Gebbie.*
THOMAS DUNCAN AND OTHERS (Walker's Trustees), Defenders.—*Mackintosh.*

THE COMMERCIAL BANK OF SCOTLAND, Defenders.—*Alison.*

Title to Sue—Bankrupt—Bankruptcy Act, 1856 (19 and 20 Vict. c. 79), 99.—At a meeting of the creditors of a bankrupt called for the purpose of charging the trustee a resolution was passed and intimated by the trustee to the bankrupt abandoning a claim to certain property. In an action by the bankrupt prosecuting the claim the preliminary plea, that as he had not been reinvested in his estates he had no title to sue, was stated for the defenders, and *repelled*.

1ST DIVISION.
Lord Rutherford
Clark.
B.

THIS was an action of reduction and count and reckoning by John Fleming against the trustees of Alexander Walker, the Commercial Bank and other persons. The purpose of the action was to assert the pursuer's right to certain leasehold property in Larkhall formerly held by him and which he alleged had been fraudulently assigned by one Maclean, trustee, to Walker, after whose death it was conveyed by Walker's trustees to onerous purchasers.

The Commercial Bank stated this preliminary plea:—The pursuer having been sequestrated, and not having been reinvested in his estates has no title to sue.

The facts on which this plea was founded were as follows:—The pursuer's estates were sequestrated in July 1863. In 1866 he was discharged without composition, and on 21st March 1876 the trustee in the sequestration was discharged. It appeared from the sederunt-book that the trustee brought the claim under the creditors' notice in September 1864 and a valuation of the property was made. In a state of the funds dated 17th March 1864 it was stated,—"The (heritable) property, some months before the sequestration, was assigned to certain trustees for behoof of the bankrupt's creditors. The assignation was *ex facie* absolute, but actually in trust for payment of the bankrupt's debts. A back-letter should have

en granted to the bankrupt, but this was not done. The only acting trustee under this deed has been repeatedly called upon to denude in favour the trustee under the sequestration, but this he refuses to do. Law proceedings were instructed to be raised against the assignee; but there being no funds on hand belonging to the estate to meet the expenses, and the creditors declining to become security for them, the trustee does not place himself in a position to proceed with the action.*

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Nothing was done in the sequestration after the bankrupt's discharge till 1875. On 9th December 1875 a meeting of creditors was held, which had been called for the purpose of authorising the trustee to apply for his discharge, no notice being given of any other business. The following minute was passed:—"The meeting expressed itself satisfied with the conduct of the trustee and the statement of accounts submitted, and empowered the trustee to apply for his discharge. The meeting also approved of the trustee giving a letter to the bankrupt, John Fleming, abandoning his right, on behalf of the estate, to the property in Larkhall, consisting of shops and dwelling-houses."

Accordingly, on 3d February 1876, the trustee wrote to the pursuer abandoning the claim on behalf of the sequestrated estate, and intimating that so far as the creditors were concerned he was at liberty to prosecute the right in any action.

The Lord Ordinary dismissed the action.*

The pursuer reclaimed, and argued;—It was settled by the cases quoted to the Lord Ordinary that an undischarged bankrupt might pursue a claim if it was abandoned by his creditors. That had been done; and no notice was necessary in calling the meeting of 9th December 1875, as the claim had been long ago formally and repeatedly under the notice of the creditors, and yet had never been proceeded with, and it was impossible that the trustee could be discharged without all outstanding claims being disposed of.

The defenders argued;—Notice of the purpose of the meeting was indispensable under the 99th section of the Bankruptcy Act, 1856.

At advising;—

LORD PRESIDENT.—I am unable to concur with the Lord Ordinary's judgment. It is settled that though a bankrupt is not retrocessed in a claim if it has been abandoned his radical right revives to the effect of entitling him to prosecute the claim. The sole question is, whether there is sufficient evidence that this claim has been abandoned. The evidence seems to me very complete. The sequestration substantially came to an end in 1866, when the bankrupt was discharged. Looking into the sederunt-book I find that nothing took place between that time and 1875. That of itself goes far to shew that the creditors did not think the claim was likely to produce a fund for division. But, besides, it had been several times brought under their notice by the trustee. The first mention of it occurs in September 1863, when the trustee expressly called attention to the claim. In consequence of that report a valuation was made, and

* "NOTE.—The pursuer maintained that he was in effect retrocessed in the date to which this action relates, by virtue of the resolution of creditors at the meeting on 9th December 1875, and the letter written by the trustee by their authority. But in calling the meeting no notice was given that any such business was to be taken up, and the Lord Ordinary thinks that the resolution is beyond the power of the creditors. The cases cited were Marshall, 22 D. 25; Galbraith, 1 Macph. 644; Graham, 9 Macph. 798; and Gavin, 5 D. 191."

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then again it appears from the minute of 17th March 1864 that "the (heritable) property, some months before the sequestration, was assigned to certain trustees for behoof of the bankrupt's creditors. The assignation was *ex facie* absolute, but actually in trust for payment of the bankrupt's debts. A back-letter should have been granted to the bankrupt, but this was not done. The only acting trustee under this deed has been repeatedly called upon to denude in favour of the trustee under the sequestration, but this he refuses to do. Law proceedings were instructed to be raised against the assignee; but there being no funds at hand belonging to the estate to meet the expenses, and the creditors declining to become security for them, the trustee does not feel himself in a position to proceed with the action."

That minute is good evidence that in 1864 the creditors had this alternative presented to them by the trustee: "Here is a claim against Walker. Do you wish me to prosecute it? If you do, you must put me in funds, or find security. The creditors declined to do either. That looks as like abandonment as anything that can well be imagined."

But when that is followed up by the discharge of the trustee himself, even if no notice of this claim had been taken in the proceedings for discharge, is it not evidence of the strongest kind that the creditors do not intend to persist in the claim when they extinguish the title of the trustee, who would be the proper person to prosecute it? For nine years they had acquiesced in the view that the claim was not to be prosecuted, because there were no funds for the purpose, and then they discharged the trustee. I shall say that without any further notice being taken of the claim that would have been perfectly good evidence of abandonment. But the evidence does not stop there. When creditors are summoned for the discharge of a trustee the first question necessarily is, whether there is anything more for him to do. If there is a substantial claim still to be realised his work is not finished. Therefore the creditors must have been satisfied that he had recovered everything which was to be recovered or which they wished him to recover.

The circumstances are quite conclusive against any claim being now made by any creditor or by the trustee. If a creditor had come forward and said he had suffered a wrong, because the thing had been done behind his back, that would have been a different case. But there is no one here in the least degree in that position. I have no hesitation in accepting the trustee's letter of 3d February 1876 as a valid abandonment of all claims by the creditors, and an authority to the bankrupt to prosecute this action.

LORD DEAS.—We must keep in view what was necessary to give the pursuer a good title. He did not require to be retrocessed. It was sufficient if there was a refusal by his creditors to take up the claim. The question, is what evidence of that refusal is to be accepted. Now, if a long period of time elapsed and nothing is done in the way of taking up a claim, and then the creditors discharge both the bankrupt and the trustee, it is difficult to say that this of itself does not amount to a refusal to take up the claim. But here we have in addition an express resolution to that effect. The only objection stated to it is that there was no express notice given of the intention to propose that resolution. But even if the claim was not previously abandoned by the creditors that resolution must at least stand till it is reduced. And who can reduce it? Must it not be by the creditors, or some one in their right? No one here is in that position. And

rides, does it follow that because creditors in whose absence the resolution was passed might be entitled to reduce it these defenders can take up the same plea? know of no authority for that proposition.

LORD MURE concurred.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Repel the defences stated as objections to the pursuer's title to sue: Find the defenders liable in expenses," &c.

DANSON & GULLAND, W.S.—ALEXANDER MORISON, S.S.C.—MELVILLE & LINDSAY, W.S.—THOMAS CARMICHAEL, S.S.C.—Agents.

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MRS JEANIE GIRDWOOD OR THOMSON, Pursuer.—*Fraser—J. C. Smith.*
THE NORTH BRITISH RAILWAY COMPANY, Defenders.—*Lord-Adv. Watson*
—*Balfour—Jameson.*

No. 20.

Nov. 16, 1876.
Thomson v.
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Reparation—Damages—Reasonable Precautions for Safety of Public—Contributory Negligence.—In an action of damages against a railway company at the instance of the widow of a passenger killed at one of the company's stations two issues were sent to the jury—(1) fault on the part of the company, and (2) counter issue of contributory negligence. It was proved that the up platform at the station could only be reached by passengers by means of a level crossing. In a winter evening the pursuer's husband, who intended to travel by an up train which was overdue, was waiting with others on the down platform in the sitting-room, in which there was a fire—there being no fire in the waiting-room on the up platform. A train was standing on the down line of rails, which obstructed the up line. The whistle of a train approaching on the up line was heard, and a railway porter in uniform, who was not on duty, but intended to travel by the slow train, then twenty minutes overdue, sprang off the down platform and crossed to the up one by the level crossing. The deceased followed him closely; but as the train turned out to be an express—more than an hour late—and not a stopping train, he was caught by the engine, and received injuries of which he died the same night. The stationmaster admitted that it was part of his duty to warn passengers not to cross the line in front of approaching trains, but said that he had fulfilled that duty by "bawling out" to the two men to "stand back" when he saw them starting to cross. This evidence was not corroborated to the full extent that he had called out in time. It was the custom of ringing a bell when a stopping train was coming up, and no bell was rung on the occasion. The jury, by a majority, found for the pursuer on both issues, and assessed the damages at £600. On a motion for a new trial, on the ground that the verdict was contrary to evidence, the Court refused to disturb the verdict.

Reparation—Railway—Level Crossing—Foot Bridge—Reasonable Precautions—Observed, that although a railway company is not bound to erect a foot bridge over their line to give passengers access from one platform to the other, and the want of such a bridge will not *per se* make them liable for injuries received by the public on that account, still the absence of such a precaution throws a greater onus on the company to provide for the safety of the public.

MRS THOMSON raised this action against the North British Railway 2^D DIVISION. company for damages and solatium for the death of her husband, Thomas Thomson, wine-merchant's traveller, who, she alleged, had died in consequence of being knocked down by the engine of a passing express train at Castlereary Station, on the defenders' line between Glasgow and Edinburgh, on the evening of 6th December 1875.

The defenders, *inter alia*, pleaded contributory negligence.

The issues sent to the jury were as follows:—"Whether, at or near

No. 20. Castlecary Station, on or about the 6th day of December 1875, the late Thomas Thomson, while crossing the line for the purpose of travelling by the defenders' railway, received injuries, in consequence of which he died, by and through the fault of the defenders, to the loss, injury, and damage of the pursuer? Damages laid at £3000 sterling. Or, Whether the said injuries were caused or materially contributed to by the fault of the late Thomas Thomson?"

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On 21st and 22d July 1876 the cause was tried before Lord Ormrod and a jury, and eventually the jury, by a majority, found for the pursuer on both issues, and assessed the damages at £600.

The following are the facts of the case as they appeared from the notes of evidence:—

Castlecary is a station on the North British line, between Glasgow and Edinburgh, through which 71 trains pass in the course of every 24 hours. There are two platforms, a north and a south one; but the only access to the station is from the south, and any one desiring to reach the north platform, which is the one for persons travelling towards Edinburgh, has to cross the line by a level crossing consisting of old sleepers laid on the four-foot, or spaces between the rails, and the six-foot, or space between the up and down lines. This level crossing is reached on the south side by two steps, the depth from the platform to the rails being 1 foot 10 inches, and on the north by two steps also; but the distance between the rails and the platform on that side is 2 feet 8 inches. The station is situated on a curve, the end of which nearest Glasgow runs into a cutting, and a person on the platform could see a train approaching at the distance of between 300 and 400 yards. There is a waiting-room upon each platform, but on the occasion in question there was no fire in the waiting-room on the north platform, the only fire being in that on the south one. Mr Thomson on 6th December had been employed all day in his usual avocations, and came to Castlecary to return to Edinburgh by a parliamentary train leaving Glasgow at 5.30 p.m., and due at Castlecary at 6.1 p.m. Owing to some delay caused by an accident to a train earlier in the afternoon, this 5.30 slow train was late; and not only that, but the 5 o'clock express train from Glasgow to Edinburgh, which was not time to stop at Castlecary, was upwards of an hour behind its time. Thomson remained on the south platform until some time after the train he intended to travel by was due, and in the meantime a slow train from Edinburgh to Glasgow came up at 6.32, and after depositing and picking up passengers began to move off. At this time the whistle of a train approaching from Glasgow was heard, and a railway porter (Rutherford) in his uniform coat and cap, but with a greatcoat over his uniform coat, who was not on duty, but intended to travel by the 5.30 parliamentary train from Glasgow, which was by that time 20 minutes late, and thinking the approaching train was his train, proceeded to cross to the north platform by the level crossing. He was closely followed by Thomson. The train, however, proved not to be the slow train, but the 5 o'clock express now upwards of an hour overdue; and instead of stopping it ran through the station at the rate of about 40 miles an hour. Rutherford, the porter who was in front of Thomson, narrowly escaped being caught by the engine, and Thomson himself was caught by it and knocked down, and severely injured that he died the same night when being conveyed home to Edinburgh. From the evidence of the porter Rutherford it appears that, in consequence of the train from Edinburgh being at the north platform, it was impossible to see the approaching train until the end of the Edinburgh train had been passed and "the six-foot" was reached, so that even then he did not think it was an express train which would

pp, and had accordingly gone on. The stationmaster, in his evidence, No. 20. deposed that he had been, along with the porter and guard of the train, engaged in getting the Edinburgh train despatched, but that when, immediately after the whistle of the express was heard, he saw two men—Thomson and Rutherford—stepping out from among the other persons on the platform, he “bawled out to them to ‘stand back there.’ I did not see there was a train coming. There was no time for me to do more than did. I was about the length of one carriage and the van from them when they made as if to cross. They did not stand back when I bawled, it went across. The whole thing was the work of a moment—the twinkling of an eye.” This statement was corroborated by Cruickshanks, the signal-porter at Castlecary, to this extent—“I saw only one man spring I heard the stationmaster calling out something just as the man sprang off the platform. I cannot be certain what it was he called out.” The clerk at the station, whose back, however, was turned, also deposed to hearing the stationmaster calling out, but could not say what he said. Rutherford—the porter who had crossed the line in safety—on the other hand, gave the following account:—“Nobody warned me not to cross the line. I did not hear the stationmaster or porter warning anybody when I stepped down off the platform. I was at the back end of the train that was moving away. When I was on the four-foot of the up line” (Glasgow to Edinburgh) “I heard somebody calling out. I could not have turned then. My safest course was to jump up.” This statement was corroborated in the following manner by a Mr Kirkwood, who happened to be present on the south platform on the evening in question:—“Immediately after he (Thomson) was struck I heard a cry from somebody—I do not know from whom—in the direction where I had seen the stationmaster standing. I heard no cry before that. I am certain it was far too late to save Thomson.” The only other evidence on this point was that of a man Neilson, who also was on the south platform:—“I did not hear anybody crying out, either before or at the time of the accident. I did not hear the stationmaster or porter tell anybody not to cross.”

It was proved to be the practice at Castlecary to ring a bell before the arrival of a stopping train, and no bell was rung on this occasion. The stationmaster admitted in cross-examination that he considered it part of his duty to warn people not to go over the level crossing when an express train was due or overdue.

The defenders obtained a rule on 4th November 1876.

The pursuer shewed cause. In dealing with questions such as this, the Court was not entitled to consider what result they themselves would come to upon the evidence, but whether the jury were justified on the evidence before them in coming to the conclusion at which they had arrived. There was here sufficient evidence to shew that the railway company had not taken sufficient precautions for the safety of the public.¹ The only access to the north platform was across the rails. It would have been a reasonable precaution to have provided a foot bridge, such as was customary at many stations. Thomson, moreover, would not have been entitled to cross the line at any other part except at the level crossing.² He thought his train was coming up, he knew it was late, and he

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¹ Jarvie v. Caledonian Railway Co., March 18, 1875, *ante*, vol. ii. 623; Potter v. North British Railway Co., June 7, 1873, 11 Macph. 664, 45 Scot. Jur. 413; Daniel v. Metropolitan Railway Co., Feb. 10, 1868, L. R. 3 C. P. 216, Justice of the Peace, p. 222.

² 31 and 32 Vict. c. 119 (Railways Regulation Act, 1868), sec. 23; Deas on Railways, Appx. p. ccxx.

No. 20. no doubt assumed it would not wait long for passengers, so he was anxious to reach his proper platform. It was quite clear on the evidence that he had not received any warning not to cross. Moreover, he followed the company's servants in uniform, and was entitled to assume that they were in safety in so doing.

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The defenders supported the rule. After a railway company had provided every reasonable protection to the public the public must do the best to protect themselves. Every one using a railway crossing is bound to use it cautiously and circumspectly, because it may be attended with danger.¹ Here there had been no caution or care at all. Thomson rushed recklessly on to the line, whereas he should have waited and gone over after the train had come to a stand-still. With regard to what had been said as to its being the duty of the railway company to supply a foot bridge, the Board of Trade had not considered it necessary to stop late for this as one of the necessary protections to the public.

At advising,—

LORD ORMDALE.—In this case we granted a rule to the defenders on the pursuer to shew cause why a new trial should not take place, and we are now to determine whether the rule should be discharged or made absolute.

The action is at the instance of Mrs Thomson, the widow of the deceased Thomas Thomson, who was a commercial traveller, and who received injury at the level crossing at Castlecary Station on the defenders' railway in December 1875, so severe as to cause his death within a few hours thereafter; and the action was laid upon the ground that his death was caused through the fault of the defenders. Accordingly an issue was sent to a jury to say whether or not the injuries he had received, and in consequence of which he died, were received by him by and through the fault of the defenders, to the loss, injury, and damage of the pursuer; and a counter issue was also sent to the jury, taken on the part of the defenders, putting the question, whether the said injuries were caused or materially contributed to by the fault of the late Thomas Thomson. If the injuries were caused by the fault of the railway company they would be answerable under the first issue; but then if, on the other hand—it might be their fault to some extent—the deceased himself contributed to a material extent to the accident, that might be a sufficient answer, and the pursuer could not now recover. The jury returned a verdict by a majority finding for the pursuer on both issues, and assessing the damages at £600. No complaint was made that the damages are excessive; the only ground of application for a new trial was that the verdict was contrary to evidence—against the weight of the evidence that was laid before the jury.

Now, there can be no doubt that there could scarcely be conceived a more eminently fitted for the decision of a jury. Whether they might be right or wrong, according to our view of the matter, in the conclusion at which they arrived, is not the question for us now. The question which we have to determine, and the only view we can take of it, is this, had the jury such evidence laid before them as, on consideration of the case, warranted them in returning the verdict which they did return?

Without going into any very minute detail, two points were made on behalf of the pursuer at the trial, and also adverted to in the argument before the

¹ Stubbley v. London and North-Western Railway Co., Nov. 18, 1865, L. R. 10 Exch. 13.

the rule, as shewing fault on the part of the defenders. It was said, in the first place, that there was no bridge for passengers to cross the line at Castlecary Station, and that in order to cross from the south to the north side, which he required to do in order to go by the train he intended to go by—the train from Glasgow to Edinburgh—on the occasion in question, the late Mr Thomson had no other method than by using the level crossing across the rails. There was a bridge there, and it was said that that was one of the precautions which were wanting, and which were incumbent upon the railway company, who were bound to use, in a reasonable sense, all necessary precautions for the safety of their passengers at that station. Secondly, it is said that, independent of the want of a bridge, there ought to have been warning given to the passengers, including Mr Thomson, on the occasion in question, not to cross till they got notice that the rails were clear and that it was safe for them to do so; and that at the time when the unfortunate man was killed an express train was long overdue and might come up every minute.

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Now, in regard to the first of these matters—the necessity for a bridge across the line—we cannot tell how far the jury may have proceeded upon that, or whether they may have proceeded upon it at all. For myself, and with a view to the conclusion at which I have arrived, I do not think it is necessary for us to hold that it was incumbent upon the railway company to have a bridge across at that station. I would rather for myself be disposed to think there was not sufficient in the evidence or otherwise to entitle us to say any such obligation lay upon the railway company. There has been no such bridge at that place since the railway was established, and so far as was seen from the evidence no complaint was ever made in consequence of the want of a bridge there. I am rather inclined, therefore, to adopt the view which I took in charging the jury, and which, I observe is stated in the report of the case of *Stubley v. The London and North-Western Railway Company*—a case which was cited by the Lord Advocate in the argument before us, and which related to an action for damages at the instance of the representatives of a man who was killed on a level crossing on a railway in England. There an application was made for a new trial, and Baron Pollock, alluding to this matter about a bridge, said—“It is true that the public footway crosses the line on the level, but the Legislature saw no mischief in allowing the railway to be conducted thus without requiring the erection of a bridge, and it cannot be said that the defendants were bound to make one of their own accord.” Now, that statement tends itself to me in reference to the bridge in the present case. I do not think that any other of the learned Judges in that case—and the whole of the opinions of the Court of Exchequer gave their opinions—dissented from that view of the matter of a bridge which was stated by Baron Pollock.

But there is a great deal in this case independent of that question of a bridge, and upon another branch of the case a different view may legitimately enough be taken. With regard to the allegation of the pursuer, that no warning was given on behalf of the railway company to the late Mr Thomson not to cross when he did cross, or about the time that he did cross from the south to the north side of the railway, we have a good deal of evidence; and I find the stationmaster Robertson saying this, which is very important—“When an express train is expected, if it is due or overdue, I consider it my duty to warn people not to go over the level crossing. At 6.30 on the evening in question a 5.0 express (from Glasgow) was overdue. It was my duty to warn people

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on the platform not to cross. I fulfilled that duty by giving warning in the way I have mentioned." And the way he mentions is—"I bawled out to them to 'stand back there.' I did not say there was a train coming." Now, that is the evidence of the stationmaster. Is there evidence to the effect that he did give that warning, or is there evidence to the effect that he did not? The next witness I require to notice who speaks to this matter is Cruickshanks, who was standing on the south side just about the time of the accident, attending to a train on that side of the line. "I remember the arrival of the train from the east," he says, "at 6.32 that evening." There was a train from the east standing on the south side of the station at the very time; and that is the train to which he there alludes. Then he says—"I heard the stationmaster calling out something just as the man sprang off the platform"—that man being either Thomson, or Rutherford, who had succeeded in crossing immediately before him, and the platform being the platform on the south side from which they required to cross to the north side. That is what Cruickshanks says; but we have a good deal more evidence besides as to whether there was a warning in any shape given to the passengers who were waiting to cross. We have it stated by Kirkwood—"Immediately after he (Thomson) was struck I heard a cry from somebody—I do not know from whom—in the direction where I had seen the stationmaster standing. I heard no cry before that. I am certain it was far too late to save Thomson." That was the evidence of Kirkwood, who was at Leith-cary Station that evening with Thomas Neilson. Well, Neilson says when examined—"I did not hear anybody crying out either before or at the time of the accident. I did not hear the stationmaster or porter tell anybody not to cross." And we have still some more evidence on this important matter. We have the evidence of Rutherford, the man who did manage to get across. He says—"Nobody warned me not to cross the line. I did not hear the stationmaster or porter warning anybody when I stepped down off the platform. I was at the back end of the train that was moving away. When I was on the four-foot of the up line I heard somebody calling out. I could not have turned then." Now, that is the evidence on this important matter; and I think it is impossible to doubt or to question that there was evidence here of a conflicting description as to whether or not warning had been given by the stationmaster, or by anybody on behalf of the defenders, either to Thomson or to any of the other passengers, not to cross the line, as an express train was expected. Surely there was evidence for the jury upon that question, and I think a very important matter of evidence was here raised for their consideration. They had it all before them, and it is to be presumed that having considered it, and given to it all the attention they possibly could give, they came to the conclusion—looking to the verdict they gave—that that warning was not given, or if given at all by the stationmaster (as he says himself) bawling out to the people to stand back, that it was given when it was too late and of no use. Rutherford, who most narrowly escaped, crossing immediately before Thomson, says that he heard the cry when he was on the four-foot on the north side. Then there were some other persons who were in a position to hear the warning, and none of them say (except the stationmaster himself) that warning was given in time for Thomson to desist attempting to cross. Well, if I am right in the views I have now suggested, this was undoubtedly a fair enough question of evidence for the jury to consider, and to come to a conclusion on the evidence, which is of a very conflicting nature. I rather think the preponderance of evidence would lean

the conclusion that the warning which the stationmaster says it was his duty give was not given, or at least not given in time. If that be so, we cannot hesitate to say that the jury were warranted in coming to the conclusion in regard to this matter that there was fault on the part of the defenders.

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That, however, may not be enough to dispose of the case. There is the other sue, which we cannot overlook,—the counter issue taken on the part of the defenders,—to the effect that if there was fault on their part the accident was materially contributed to by Thomson himself,—that it was in a great degree rash and imprudent in him to have attempted to cross by the level crossing, or rather behind the train from the east, which was standing on the level crossing at the time, in the face necessarily of a train coming in the opposite direction. If it had been the train by which he intended to travel—the slow train—he might have managed to cross in perfect safety, because that slow train would have stopped for a minute on the north side before it proceeded on its way, in place of (as the express did) rushing past and catching him and causing the injuries which resulted in his death. Again, that question whether or not there was imprudence, thoughtlessness, and rashness on the part of the pursuer sufficient to entitle the jury to return a verdict that there was contributory negligence and fault on the pursuer's part, and to bring in a verdict for the defenders on that issue,—that question, I say, was just a question eminently for the consideration of the jury. It is an exceedingly difficult question. I felt at the time of the trial that that was the most difficult point in the whole case, and I may say that I feel the greatest difficulty yet in regard to that question; for I would be sorry that any observations made, in so far as I am concerned at all events, should lead the public to suppose that they are not to take care of themselves and protect themselves by vigilance and circumspection. It would be most dangerous to relax that rule in the least degree. It is impossible for railway companies, with all the duties they have to attend to, to ensure, or anything like ensure, the safety of their passengers. If passengers will not be careful in looking out for their own safety it is impossible, considering the exigencies of railway travelling and the various duties incumbent upon railway companies, to hold that there would be any safety at all. But if there was a duty here,—and the stationmaster at Castlecary says there was,—to give warning to passengers not to cross at this particular juncture of time, when an express was expected, and was past-due a considerable time, and might necessarily have been expected every minute and every second,—and if it is true he neglected to give that warning, or to give it in time,—then it can hardly be said that, having received no warning, there was any such rashness on the part of the deceased as to make it incumbent on the jury to say there was contributory fault on his part. I think they were fairly enough entitled, looking to the evidence, to reject the counter issue taken for the defenders, and to return a verdict in favour of the pursuer upon that as upon the first issue.

Upon these grounds, and without entering into further detail as to what might or might not be my opinion now or at the time of the trial in regard to that second issue, I have come to the conclusion that there are not sufficient grounds to entitle the Court to say that the jury were wrong or were not entitled to return the verdict they did return, and therefore I think the rule ought to be discharged.

LORD NEAVES.—I think this is a case in which we are peculiarly called upon

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to inquire, not what we would have done as a jury—a duty for which perhaps the bench is not the best adapted,—but what the jury were in the circumstances entitled to do—not what conclusion I or anybody else should have arrived at, but whether the jury, having arrived at a certain conclusion by a majority, were entitled, upon the evidence led, to arrive at that conclusion. If they were entitled to do so, it is perfectly clear that we have no ground upon which to order a new trial.

Now, it appears to me that this class of cases is always very peculiarly for the consideration of a jury. There may be cases where juries go perfectly wrong, and therefore we may set their verdicts aside and order a new trial; but in general they are the judges, and the best judges, of such questions, if they approach the subject with deliberation and with a desire to arrive at a just conclusion. Now, I cannot doubt that that was the case here; at least I see no ground for doubting it.

The case is a very peculiar one. The whole circumstances taken together raise considerations that are of very great importance to the public, and also to railway companies. There was no bridge at this station, and I quite concur with Lord Ormisdale that we are not entitled to say it was the specific duty of the railway company to make a bridge at such a station. They were not called upon to do so by their statute, and we cannot say it was their specific duty, the non-observance of which would have of itself rendered them liable for the consequences, or what might be the possible consequences of such a neglect. But we have very few cases in which an absolute rule exists by which a particular specific thing must be done, the general rule being that the railway must be so constructed and so managed as to provide reasonable security for the safety of the public. If you have not that which may be said to be absolute security, you must observe the next best means of security and provide for that. The want of a bridge is not a ground of liability, but it is a ground of responsibility for taking other means of securing the lives and limbs of the passengers. Well, that was the first duty of the railway company. Another circumstance—slight as it may be of its own nature—was an element in the case. There was on the north side of this railway a waiting-room, there being another waiting-room on the south side along with the booking-offices. Now, in the waiting-room on the north side there was no fire that evening of the accident. I do not say it was the bounden duty of the company to have a fire there any more than it was their bounden duty to have a bridge; but it is impossible not to see that the want of a fire on the north side, and the existence of a fire on the south side, was, if not an invitation, at least a temptation to go to the warm side instead of the cold one. There are many persons to whom cold is an extreme evil—a very great cause of suffering—and often a cause of very great danger to health; and with the detention of an hour or two by reason of the unpunctuality of the trains, it may be a very serious matter to have to wait in a room as cold as ice in the middle of winter. Therefore I think it is very unfortunate if the railway company make it the duty or interest of people to go to the wrong side, and they ought to be all the more careful that every precaution is used for the safety of passengers. I do not know what amount of money is saved by not having a fire in that room during the winter. Some railway companies are exceedingly economical in such matters; but possibly when the damages and costs in this case are summed up it may be found not to be a very great saving to induce the passengers, by the temptation of keeping themselves warm, to go to the wrong

ida. Well, if these be things that are not in themselves grounds of liability, at circumstances which affect the position of parties on that occasion, then comes the question whether there was neglect on the one side or fault on the other? Now, I cannot help thinking that here a great deal is to be left to the jury. The considerations which affect a case of this kind are not always considerations that may be made matter of evidence. A great deal depends on human feelings, human tendencies—what a reasonable man may expect in such circumstances, and what he can complain of if he does not get. Now, without going the length of saying that the ordinary judicial tribunals are less likely to enquire whether people are protected against these dangers by special care, I think that the common feeling of humanity for those who are travelling by railway—what they are entitled to ask, and what they will naturally expect in point of safety—is better known and more appreciated by a jury than by anybody else. Upon the whole, you are entitled to look to that quarter for a due appreciation of the duties the public are entitled to expect, and of the want of which they are entitled to complain. Well, if we look to the circumstances of the case we find that this was a dark winter evening; the utmost confusion prevailed with respect to the trains; everything was out of joint and order. Two trains were too late, but at the last the time comes when this unfortunate man thought that his train was coming up, and that it was time he should bestir himself. The stationmaster said it was not his business to go about telling people as to the trains. Perhaps not; I do not say it was. But he admits it was his duty to call out in some way—and it is a part of the jury question here whether he called out timeously or not, and distinctly or not—to warn those who intended crossing that they should not go across in that manner. They could not tell—at least not every one of them could tell—and it was no great crime not to know—all the distinctions between the bells and the arrivals of one train and another; and when the stationmaster says that he called out, it does not clearly appear on the evidence that he called out timeously. Upon that point I think Rutherford's evidence was very material, for surely if he had heard the call of the stationmaster not to cross he would not have crossed; but he did cross. Considering the confusion and the darkness of the night, even though this man was not on duty, it is inconceivable that it could have been so palpably a wrong thing to cross when he did it; and it occurs to me that, being there, he might have been quite easily utilised to warn those on the platform that they were not to attempt to cross, and that the approaching train was not the train they were to go by. Now, all these are jury questions to consider—what the company might have been expected to do? what was proved? what was not proved? and upon the whole I think they were entitled to arrive at the conclusion at which they did arrive, viz., that there was fault on the part of the railway company—which they did with the concurrence apparently of the Judge himself.

But then there was the other question of contributory negligence. Now, that is a very different question, and I confess I think the jury were as much entitled to judge upon it as they were upon the other. I do not take Rutherford's evidence as conclusive upon that question; but I say this, that it is not clear that Thomson was warned. The stationmaster admits there was a duty of warning, because he says he did it, and he did it in consequence of his sense of duty; but it is a question whether it was timeously and efficiently done? When he saw an official there who might be misled, or might mislead others, he ought to have been particularly careful about giving warning; but, again, that is a

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No. 20. question for the jury—Was it done in such a manner as amounted to a clear and distinct and sufficient warning to the people who were on the south side not to go across to the north side at that time because the approaching train was not a stopping train? The jury, I think, were better judges as to that than I am, and therefore I am not disposed to set aside their verdict. I think it all the more important that there was a division amongst the jury, and also that it appears that the Judge who tried the case thought there was a doubt on that question. That gave the greater security that the difficulties would be considered, and therefore there is every reason to believe that the case was fairly tried, and to hold that the decision should not be overturned.

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LORD GIFFORD.—I am entirely of the same opinion. No more difficult or delicate duty is ever laid upon the Court than to decide whether the verdict returned by a jury is or is not to be overturned; and if that duty is difficult and delicate in all cases, it is peculiarly so in a case like this, for the two questions which the jury had to decide can hardly be stated without shewing how very difficult they are, and how easily the balance may be turned one way or the other in reference to both those questions.

The first question was, Whether the railway company had provided at the station and at this time reasonable means of enabling the public to cross the line in safety? The very word "reasonable," which we can hardly escape using, shews how the jury had a vast variety of circumstances to look at in order to see whether reasonable means were taken, and reasonable precautions employed by the railway company to secure the safety of the public whom they invited to cross the line at that place. Now, I agree with both your Lordships that it is impossible to lay down that the railway company were bound to erect a bridge here. The Board of Trade have not prescribed that; the statute has not prescribed it; and it is a question of circumstances. But then it is equally questionable that if a footbridge for passengers who had occasion to cross the line were not provided, a great deal more burden and onus lay upon the company, through their officials, to take care that accidents did not happen to persons necessarily crossing the line of railway upon the level crossing. Now, the circumstances have been so fully considered by both your Lordships that I do not think it necessary to enlarge. The slow train past-due, an express train an hour late, of which the passengers could know nothing, and which might come sweeping past at any moment at the rate of fifty miles an hour, make a very serious danger, and a danger which laid the railway company under obligation to take great precautions, through their servants, that it should not lead to fatal accidents. Surely that was a question for the jury—and a question so entirely special, and depending so entirely upon common sense considerations, that I would not interfere to upset the jury's verdict upon it unless it were made perfectly plain to me that no reasonable man could upon the evidence have reached the result which was reached by the jury. Now, we cannot say that I myself would feel extremely nervous if I knew that an express train was past due and I had to cross in front of it, my own train being past due also, and I had no means of knowing which would come first, or what would happen. It is true that in point of law the railway company are not bound to provide a bridge, and that the want of it will not *per se* make them liable; but it is surely a matter for the serious consideration of railway companies whether they should not even do things they are not bound to do in order to secure abundance

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dety to the public ; and seeing that all that was wanted here was a light foot-
ridge for passengers to cross when an express train was about to pass without
opping, it is surely matter for consideration whether it was not a mistake that
ch a bridge had not been provided.

The same considerations apply to the second question, Whether there was
ch rashness on the part of the late Mr Thomson in crossing at the time he
id that the jury could say he had fairly and materially himself contributed to
ne fatal accident. Here we must use an indefinite and flexible expression—
material contribution,"—and here again it is just such an expression as the
ry must deal with on a view of the whole circumstances of the case. The fact
of the crossing of the line by a railway servant, who, though not on duty at the
time, was dressed in uniform and had on a uniform cap—that and the other
circumstances which have been already adverted to are so much for the jury to
consider that I could not reach the conclusion I would need to reach in order
to set aside the verdict, viz., that the jury, acting as sensible and intelligent
men, had no evidence to go upon, and went right against the evidence in holding
that Thomson did not materially contribute to the accident. Therefore I am of
opinion that the rule should be discharged.

Lord JUSTICE-CLERK.—I entirely concur in that result. Your Lordships
are very clearly expressed the grounds upon which it has been reached, and I
shall only make a very few observations. The question is one full of interest
and importance both for railway companies and for the public. In the first
place, I should be very slow to have disturbed this verdict, even if my own
opinion had been otherwise, seeing that the Judge who tried the case is of
opinion that the verdict is not contrary to the evidence he heard. Where a
motion is made for a new trial on the ground of the verdict being contrary to
evidence, I think that such a circumstance would of itself be an insuperable ob-
jection. But I entirely concur in the views which have been expressed, and
indeed, I think I may say that, on the whole, the balance of my opinion is in
favour of the verdict. It seems to me that the evidence justified the verdict,
and that the verdict is not only not contrary to the evidence, but, on the whole,
is in accordance with the evidence.

There are two questions here—first, Whether the railway company were
guilty of negligence in not providing a safe mode for the passengers to cross this
line from the south to the north side? and, secondly, Whether the deceased was
guilty of negligence which materially contributed to the result—the result, I
mean, that he was run over by this express train and killed on the spot.

Now, in regard to the first point, Whether the railway company took reason-
able precautions to secure the safety of their passengers in crossing their line
from the one side to the other—that they are bound to provide reasonable
means is perfectly certain ; the question is whether they did so? and that, I
think, was a question entirely for the jury. The jury are the judges of what
are reasonable means, and I think it would be very difficult for us, on a body of
evidence of this kind, to assume to ourselves the right to take that question out
of the hands of the jury.

I may mention there was a case a few days ago in the Court of Appeal—
Robson v. The North-Eastern Railway Company, 10th November 1876¹—where

¹ L. R. 1 Q. B. D. 85.

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that very question arose. It seems that in the Common Law Courts in England there had been a practice of considering this question of negligence or sufficient precaution as one for the Court; and in that case—which was the case of a train overrunning a station, and a woman getting out of one of the carriages and being materially injured—the presiding Judge took the case from the jury, and held that there was no evidence of negligence to go to them. The whole question came up before the Court of Appeal, and was very fully argued, and the result was that they held that the case of *Bridges v. The North London Railway Company*,¹ has settled that the question of sufficient precaution is entirely a question for the jury, and accordingly they upset the ruling of Justice Archibald in the case of *Robson*.

In regard to the question, What are reasonable means of crossing? it is said that the company are not bound to provide a bridge, and the case of *Stubley* referred to as having settled that point. But it is manifest that that case is entirely different from the present one. We are dealing here with a station upon a line with a great deal of continuous traffic, and I must say I do not entirely sympathise with all the observations which were made by Baron Pollock in that case. My impression is that there is a very great obligation laid upon a company where there is a line with a large through traffic, and many express trains not stopping at the station but going on; it is their duty to provide sufficient means of crossing; and it is no answer to say that that is encouraged by individuals not to look out for their own safety, because a very large proportion of those who travel by passenger lines consist of aged and infirm persons, women, and children—persons of whom you would not expect that in the darkness of a winter evening they shall have all the presence of mind that a man of health and strength ought to have. You must provide for them, and accordingly the question for the jury was whether sufficient means of crossing had been provided? What “sufficient” means I have been quite unable to ascertain from the evidence in this case. I find that when the unfortunate man arrived at the station there were at least two trains from the west over the line. Whether he knew anything about them or not I do not know. But this I know, that until the accident occurred there was never one moment in which he could have set his foot upon the permanent way with any assurance of safety. It is said he should have waited until his own train came up, and then crossed the line behind it. Now, I doubt greatly that that was incumbent upon him. The company were bound to afford him means of crossing in safety at the time his train was due. But supposing he had done that, and his own train had come up and stopped there, and an express from the east (for we have no express now) had come up at the rate of fifty miles an hour before he crossed—is that a safe mode to enable passengers to cross? The result is that there was no mode of enabling him to cross in safety that night, because the trains were entirely out of order, and no one could calculate upon when they would come up.

It is said that notice was given—and that is a very important element—if notice had been given this case would have been entirely different. On the very worst features against the company is that no notice whatever was given. The stationmaster says he was bound to give notice, and there is nothing easier than to have given that notice to the passengers assembled.

¹ *Bridges v. North London Railway Co.*, June 22, 1874, L. R., 7 App. Cas. 21

did not open his mouth until the unfortunate man was in the very act of ringing from the platform. Nothing can be more clear on the evidence than that; and therefore on the first of the questions I have referred to I have no doubt at all.

As regards the question of contributory negligence I have only to say that in the traffic in such a condition as it was, and with such an utter want of closure to the passengers of that which should have been disclosed to them, a state of matters that evening was really a trap for contributory negligence; and that the jury have not found that this man was guilty of contributory negligence when he attempted to cross the line under the belief that the approaching train was the train by which he was to travel. I do not think he was, and the jury did not think he was.

I shall only say, in conclusion, that I agree with what your Lordships have remarked about the bridge. A bridge is a safe mode of crossing at such a station, and if the company were wise they would adopt the precaution and take that mode, which is certainly a safe mode. That they are under a legal obligation to do so I am far from saying, but so long as they do not they will be exposed to actions of this kind. We discharge the rule.

THE COURT pronounced this interlocutor:—"Discharge the rule formerly granted to shew cause why the verdict in this case should not be set aside and a new trial granted: Refuse to grant a new trial: Further, apply the verdict, and decern in terms thereof in favour of the pursuer for £600: Find the pursuer entitled to expenses."

WYD, MACDONALD, & LOWSON, S.S.C.—ADAM JOHNSTONE, S.L.—Agents.

ANDREW FLETCHER of Salton and LORD SINCLAIR of Herdmanston (Bishop Burnet's Trustees), Petitioners.—*Lee—Jameson.*

The REV. THOMAS NINIAN DRUMMOND, Respondent.—*Pearson.*

ROBERT BATHGATE AND OTHERS, Respondents.—*M^r Kechnie.*

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First—Charity—Scheme of Administration.—Circumstances in which the Court approved an alteration on the scheme of administration of an educational charity for the purpose of adapting it to the altered requirements of the time, and, *inter alia*, authorised the substitution of bursaries for the payment of apprentice fees.

The following narrative is taken from the opinion of the Lord President:—1ST DIVISION.
This is a petition to the Court praying that the Court will make or sanction a new scheme for the management, regulation, and continuance of a certain charity established by the will of Gilbert Burnet, Bishop of Salisbury, who died in the year 1714. By that will Bishop Burnet left a sum of 40,000 merks, of which one-half was destined to the University of Aberdeen, and the other for the benefit of the parish of Salton in Lothian. It is with the latter half that we have to deal in the present case.

The Bishop assumes that the one-half destined to Salton parish will produce 1000 merks annually, and directs these 1000 merks to be thus disposed of—"Thirty children of the poorer sort shall be put to school to learn reading, writing, and casting accounts; to every one of these ten merks Scottish shall be given to cloath them, in plain grey cloaths, all of the sort—this is three hundred merks; after they have been four years at school, and are fit to be bound out to trades, or to follow husbandry,

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they shall receive forty merks a-piece—which is four hundred merks more; but this four hundred merks, during these four years that they are at school, shall be applied to the building a good schoolhouse near the churchyard, and for purchasing half an acre of ground for a garden and outlet to the schoolhouse. I appoint one hundred merks a-year in addition to the schoolmaster's allowance, and fifty merks a-year to the increase of the library began for the minister's house and use, of which he shall give an account to the Lairds of Salton and Hermistoun, and to any neighbouring ministers, which they shall be obliged to sign for his charge, unless they can shew reason to the contrary.' He then provided for the way in which the children are to be selected, giving the patron to a great extent to the land of Salton. And then he directs 'the remaining one hundred and fifty merks to be distributed yearly to the poor of the parish by the minister, with the approbation of the Lairds of Salton and Hermistoun, and such others as join with him in taking care of the poor of the parish.'

"That is the substance of the Bishop's bequest as it stands in his will, and the destinations of the fund may summarily be stated thus:—

300	merks	to clothe the children.
400	"	to put them out to trades.
100	"	to the schoolmaster.
50	"	to the library.
150	"	to the poor of the parish.

1000 merks in all.

"Some difficulty occurred at first in consequence of the testator having provided no means for carrying the charity into practical operation. A private Act, 22 Geo. II. No. 62, was, however, obtained in 1749, which provided for the appointment of trustees and the investment of the money in their names, and for its application to the purposes of the charity, subject to the control and direction of this Court.

"Under this statute a petition was presented to the Court in 1750, and an investigation having been made and report given in to the Court, the money was directed to be paid over to the then Lairds of Salton and Herdmanston and the minister of the parish of Salton as trustees, and to be invested by them, and the proceeds applied in terms of the Bishop's will. This was accordingly done, and the fund has been administered by the successive Lairds of Salton and Herdmanston and the ministers of Salton as trustees ever since without any material departure from the directions of the Bishop's will and the Act of 1749."

The income of the trust-funds from the first considerably exceeded the sum contemplated by Bishop Burnet, and consequently his scheme was inadequate to exhaust it. But the trustees, in the exercise of their discretion, applied such parts of the surplus as seemed to them to be necessary to supply the educational wants of the parish. By accumulative and judicious investments, and otherwise, the funds under their management were considerably increased, and the free income at the date of the petition was stated as averaging £85 per annum.

No change in the administration of the fund occurred until the passing of the Education Act of 1872. On the election of a school board for the parish of Salton an action was raised to determine to what, if to any extent, the funds administered by the trustees fell to be paid over to the school board under the 46th section of the Education Act. In this action it was determined that only the 100 merks a-year appointed by Bishop Burnet's will to be paid as an addition to the salary of the schoolmaster of the parish fell to be accounted for to the school board, and that the

rustees were entitled to retain and administer the remainder as here- No. 21.
fore.

In view of the altered circumstances, however, the trustees judged it expedient to apply to the Court under their Act 22 Geo. II. No. 62, to settle a new scheme for the administration of the charity. Nov. 17, 1876.
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This petition was accordingly presented to the First Division by Mr Fletcher of Salton and Lord Sinclair of Herdmanston, two of the trustees, the other trustee, the Rev. Mr Drummond, being called as a respondent, on the ground that he had only a few days before been presented to the parish, and had no knowledge of the affairs of the trust.

The trustees proposed a new scheme which, as amended and subsequently approved of by the Court, was as follows :—

"The whole funds and estate bequeathed by the late Bishop Burnet for the purpose of carrying into effect the provision for settling an endowment for behoof of the parish of Salton, contained in his will, and codicil thereto, both dated 24th October 1711, shall continue to be held by the Lairds of Salton and Herdmanston, and the minister of the parish for the time being (hereinafter called 'the trustees') as trustees for the administration of said fund, and shall be applied by them for the uses, ends, and purposes hereinafter specified, viz. :—

"I. The whole interests and annual profits derived from the said funds and estate shall be expended by the trustees as nearly as may be in manner set forth in the following state :—

Annual income—say	£85	0	0
<i>Deduct—</i>			
Annual payment to school board or to teacher of public school of Salton, £5, 11s. 1 ¹ / ₂ d.—say	£5	12	0
For expenses of management, &c.—say	5	8	0
			<hr/>
		11	0 0
			<hr/>
		£74	0 0

Divisible as follows :—

1. For purchase of books and maintenance of Burnet Library—	£5	0	0
2. For distribution among poor persons in said parish in manner after-mentioned :—	10	0	0
3. For education of thirty children, school fees, school books, &c.,	30	0	0
4. For bursaries for four more advanced scholars, of £7, 5s. per annum each,	29	0	0
			<hr/>
		£74	0 0

"VI. The share of annual income above provided for the education of thirty children shall be administered as follows :—Thirty children of the poorer sort shall be nominated from the children residing in the said parish as follows, viz.—twenty by the Laird of Salton and ten by the minister; or otherwise, if the Laird of Salton and the minister approve thereof, by the trustees or their quorum in ordinary meeting assembled. Each child so nominated shall be entitled to the benefits of the fund for four years, unless the trustees shall see cause to remove any child from the fund on account of misconduct, of which the trustees shall be sole judges, or because such child has ceased, in the opinion of the trustees, to belong to the class of children whom the truster designed to benefit.

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"VII. The trustees shall expend a sum not exceeding £1 sterling per annum for behoof of each of said thirty children, said sum to be applied in the first instance, to payment of school fees, and the remainder shall be expended for school books, or in such other way as the trustees shall think best.

"VIII. The children to be chosen shall not be below five or above ten years of age at the date of their nomination, and it shall be in the power of the trustees to direct to which school in the parish said children shall attend, and to take measures for securing the regular attendance of the children at such school. The education to be afforded to the said thirty children shall comprehend English reading and grammar, geography, arithmetic, writing, and religious instruction, according to use and wont.

"IX. The share of annual income above provided for bursaries, which shall be called the Burnet Bursaries, shall be administered as follows:—The trustees shall each year choose from among the children on the fund one child to receive and hold for four years one of said bursaries, to be paid to or applied by the trustees for behoof of said child while continuing his or her education in one or other of the schools in said parish, or at any other school that the trustees may select, or while learning sea trade or business as may be approved of by the trustees.

"X. The bursars may be selected by the trustees either by means of oral or written competitive examination, or without such examination; and the trustees shall have power, at the end of any year, to remove such bursar from the benefits of the fund if such bursar shall have been guilty of misconduct, of which the trustees shall be sole judges, or has ceased in the opinion of the trustees, to belong to the class of children properly entitled to the benefit of the fund."

Appearance was made and answers lodged for the minister, and also for certain of the parishioners.

At advising,—

LORD PRESIDENT.—(After the introductory narrative quoted *supra*)—The trustees now suggest that some alteration should be made on the scheme of administration of the charity to adapt it better to the requirements of the times, and to render it more useful. They represent that the application of four hundred merks to the payment of apprentice fees is no longer a desirable or practicable arrangement; that Salton is a purely agricultural district, and that the practice of apprenticing children to agriculture has long ceased to be known in this country; and that not only is the expenditure of the money in apprentice fees as directed by the Bishop practically impossible, but it may be more judiciously and expediently employed in furthering otherwise the objects of the charity. There is no design to divert any of the funds from the use specified by the testator. On the contrary, under the proposed scheme, the thirty children will still receive the whole proceeds of the funds, except what was directed to be distributed among the poor, &c.

The scheme which the petitioners propose is thus stated in a tabular form. The income of the fund which has very considerably increased in their hands now amounts to an average of £85 per annum. Deducting £5, 12s., which they are bound to pay to the school board or to the teacher of the public school of Salton, and say £5, 8s. for expenses of management, in all £11, there remains £74. This they propose to distribute as follows:—

1. For purchase of books and maintenance of Burnet Library,	£5	0	0	No. 21.
2. For distribution among the poor of the parish,	10	0	0	
3. For education of thirty children, school fees, school books, &c.,	30	0	0	Nov. 17, 1876. Burnet's Trustees.
4. For bursaries for four more advanced scholars of £7, 5s. per annum each,	29	0	0	
	<hr/>			
	£74	0	0	

Now, it is the last proposal to institute bursaries that raises the main question for consideration. The money sought to be so disposed of is obtained by taking the apprentice fees and applying them to this purpose. The trustees being of opinion that it is neither expedient nor practicable any longer to devote this portion of their income to payment of apprentice fees, suggest that these bursaries come very near to the main design of the testator, and, in the altered circumstances of the case, afford the most expedient method of applying the fund.

This appears to me to be very reasonable, and I am of opinion that it is quite within the power of the Court to sanction such a deviation from the original scheme. I think we must accept the fact that it is no longer expedient to apply any part of the funds towards paying apprentice fees, and that being so, there is no more expedient way that presents itself to my mind of employing the funds so to be liberated, in accordance with the purpose of the testator—namely, the advancement of the children in life after their elementary education is finished—than by instituting the proposed bursaries.

I am therefore inclined so far to approve of the trustees' scheme.

The other change proposed is one certainly in accordance with modern ideas. Three hundred marks were to be expended in clothing the children in a uniform of plain grey clothes, to distinguish those on the Bishop's charity from the rest of the children at the school. It is proposed to abolish this uniform as creating an unnecessary and invidious distinction, and instead, to apply the money, in the first instance, to the payment of school fees, and the remainder to the purchase of school books, and in such other way as the trustees shall think best—by which it was explained that the trustees intended, when the surplus is sufficient, to apply it to the purchase of some necessary articles of clothing for the children, such as boots, &c. This appears to me to be a slight and expedient change in the administration of the fund to which we ought to give effect.

These are the two main points of difference between the proposed new scheme and that which has hitherto been followed.

There are one or two minor points in which we shall require the scheme to be altered before approving it. I have noted them on a copy of the scheme, and think it is unnecessary to mention them farther.

The only other point to be noticed is the objection which was made to the eighth head of the proposed scheme, in that it gives the trustees power "to direct to which school in the parish said children shall attend." It is objected that there should be no choice of schools, that the children should be obliged to attend the school board school, and no other. I do not think the matter was ever in the contemplation of the founder, and that we should therefore regulate it simply by present expediency. There are two schools in the parish,—the one under the school board, and the other under private management, but admittedly placed where an additional school is much required. Now, it

No. 21. appears to me to be most desirable that if any of the thirty children are resident in the neighbourhood of this second school, and at a distance from the first school, the trustees should have the option of sending them to the second school. I think, therefore, that this objection is not well-founded.

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LORD DEAS concurred.

LORD MURE.—I concur. I had at first some doubt as to the proposal about the bursaries and superseding the provision as to clothing. But I am satisfied, from the explanations made in the petition and at the bar, that neither the clothing directions nor those applicable to apprentice fees are suited to the existing state of things in the district, and that some alterations now require to be made in the rules and regulations of the charity. And as the money under the proposed new scheme is to be applied for the benefit of the precise same class of beneficiaries as those contemplated by the founder, although in a somewhat different manner, I think that the scheme as now proposed may be approved of, with the alterations which have been suggested by your Lordship.

THIS interlocutor was pronounced:—"Approve of the 'amended scheme' appended to the petition, No. 1 of process, as the 'scheme for the management, regulation, and continuance of the fund mortified by the late Dr Gilbert Burnet, Lord Bishop of Salisbury, for behoof of the parish of Salton:' Interpone authority thereto, and decern: Appoint the expenses of the petitioners and of the respondent, the Reverend Thomas Ninian Drummond, to be taxed by the Auditor, to be paid out of the funds in the hands of the petitioners," &c.

SCOTT MONCRIEFF & WOOD, W.S.—MACRAE & FLETT, W.S.—ROBERT A. VEITCH, S.S.C.—Agents.

No. 22.

MRS JANE ROSS OR MACPHERSON AND ANOTHER, Petitioners.—

D.-F. Watson—Nevay.

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MRS A. S. ROSS OR MACKINTOSH, Petitioner.—*Asher—Low.*

H. T. BODDAM AND ANOTHER (Reid's Trustees), Petitioners.—*Blair—Hall.*

JOHN ROSS DUNCAN, Petitioner.—*Fraser—Guthrie Smith.*

Evidence—Hearsay.—In questions of pedigree family tradition as to property may be proved by evidence of the deliberate statement of a deceased person, but only if it is shewn that he had special means of knowledge.

1ST DIVISION.
M.

MRS COCKBURN ROSS died in 1872 vested in the lands of Shandwick as heir under the entail of William Ross of Shandwick.

Competing petitions for service as heir to Mrs Cockburn Ross were presented by several parties to the Sheriff of Chancery, and were appealed to the Court, and the case was tried on several issues before the Lord President and a jury, and a verdict returned on 27th July 1876 in favour of J. Ross Duncan and the trustees of A. G. Reid, two of the competing petitioners.

In the course of the trial the deposition of Alexander Mackenzie, carpenter, Balintore, Ross-shire, aged 85, taken on adjusted interrogatories was tendered on behalf of Mrs Macpherson and A. R. Robertson, who claimed as heirs-portioners of the entail. Their case was that the great-grandfather of Mrs Macpherson and of Robertson's mother was an uncle of the entail.

Counsel for Duncan and for Reid's trustees objected to the evidence, and the Lord President rejected the 12th, 13th, 14th, 15th, and 18th answers, except the passages within brackets in the 13th and 18th.*

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On a bill of exceptions for Mrs Macpherson and Robertson they argued;—The rule of the law of Scotland was that the evidence of a deceased person was admissible, if he had had an opportunity or might be supposed to have had an opportunity of knowledge. The English rule was understood to start from the point that hearsay evidence was not admissible at all, but the rule was relaxed in cases of pedigree to the extent of admitting the statements of deceased members of the family. The ruling of the judge was in effect to apply the English rule. But that was not the law of Scotland, and other people might have better opportunities of knowledge than members of the family. The two important facts were the burial of George Ross' wife in the Shandwick burying-ground, and the fact that a man who knew George Ross said that he went to Sweden. The test was whether the evidence of those persons would have been admissible if they were alive, and it would have been admissible¹

Argued for Duncan and Reid's trustees;—(1) This was hearsay of a kind which the law did not recognise; and (2) it was not evidence at all. The early rule was to exclude hearsay.² The rule was very slowly relaxed. Hume on Crimes, 2, 406, seemed to confine the exceptions to cases of deathbed. The present rule was not older than the present century, that every pertinent statement made by a dead man might be moved by a person who heard it if it was made in unsuspicious circumstances. But how far was that rule to be carried? The evidence of a dead man would only be admitted if it could be shewn that he had special means of knowledge. But this was an attempt to prove mere rumour. It would not have been evidence from a living witness, and could not be made so because the persons were dead.³

* 12. Who was the paternal grandfather of the said George Ross of Lochee; what was his occupation; where did he live; did he go abroad; if so, where did he go? Deposes—The paternal grandfather of the said George Ross of Lochee was George Ross, who was the uncle of William Ross of Shandwick. He stayed sometime at Tarrel, working there, and was married there, and got a son, and then took into his head to go to Sweden, where he stopped the rest of his days.

13. Was the said grandfather of George Ross of Lochee married before he went abroad; if so, what was his wife's name; had he any child or children by his said wife, and what was or were the name or names of such child or children; when and where did his wife die? State the grounds of your knowledge. Deposes—Yes. The grandfather of George Ross of Lochee was married before he went abroad, and had one son, whom he called Andrew, after his own father, Andrew Ross of Shandwick, and this last Andrew, who was Andrew Geodh, had his son George Ross, Lochee, George, after his father, George Ross, of Shandwick. The wife of the grandfather of George Ross of Lochee was Merran or Margaret Manson. George, who went abroad, had no child but Andrew by his wife Merran. He did not wait long with her. Merran was stopping with her son Andrew on the Loans of Tullich, where Andrew had a bit farm. She died sometime before Andrew, and was buried in the Shandwick burial-ground, where Andrew himself was buried the year before William Ross of Shandwick—that

¹ Alexander v. Off. of State, March 30, 1868, 6 Macph. H. L. 54 (Lord Macmillan), p. 62, 40 Scot. Jur. 470; Smith v. Bank of Scotland, Dec. 7, 1826, 3. 90; Dickson on Evidence, sec. 109.

² Stair, 4, 43, 15.

³ Lord Fyfe, 1 Murray, 97; Stein v. Bowman, Jany. Term, 1839, 13 Curtis Superior Court Decisions, 126.

No. 22. At advising,—

Nov. 17, 1876. **LORD DEAS.**—The exception here is in regard to admitting or rejecting *et al. v. Reid's* tain portions of the evidence of Alexander Mackenzie, a witness eighty-five years. *Trustees et al.*

is, Andrew was buried the year before William Ross of Shandwick. Merna died at Tullich in her son's house. I knew this by all the neighbours. There was no word about it till William Ross of Shandwick was killed, and there was a great talk about who was the heir of Shandwick. I heard this from many, particularly from John Polson, the elder, Hill of Fearn. He died about eleven years ago, and was then, I believe, about eighty-nine years of age. [Also from John Vass, Ballintore, who was at William Ross of Shandwick's funeral. John Vass is now dead. He died some time ago, and was about eighty years of age when he died. John Vass has told me that at the funeral of William Ross, the entailer of Shandwick, he got on a gravestone to get a good view, and saw the coffin taken out of the hearse, and heard Simon Graham, the grave-digger of Fearn, call aloud,—‘Where is George Ross, the heir, till he put his friend's head in the grave?'] That was George Ross, Lochee. I have also heard these things from William Ross, farmer, Hill of Fearn, who himself was well acquainted with George Ross, Tarrel. He is also dead a long time ago. Also from Donald Munro, Loans of Tullich, who is also dead a long time ago. And Alexander Hendry, Tullich, who died a long time since,—I am sure fifty years since. All these died old men. It was the common talk of the country. These men I have named above I remember myself to have heard speak of these matters. They would often come to my father's house on a winter evening when I was a boy from ten to thirteen, and they would always have some story to speak about, and I, as young boys are, was very ready to take it up.

“14. Where was the father of the said George Ross of Lochee buried; what was his wife buried; and where was his mother buried? State the grounds of your knowledge. Depones—The father of the said George Ross of Lochee was buried in the Shandwick chapel at Fearn, and his wife and his mother were buried there also. I stated the grounds of my knowledge of this in my answers to the last interrogatory.

“15. Was there any relationship between the father of the said George Ross of Lochee and William Ross, the entailer of Shandwick? If so, state what was the relationship. State the grounds of your knowledge. Depones—Andrew Ross, the father of George Ross of Lochee, was the first cousin of William Ross, the entailer of Shandwick. The father of the said Andrew was George, who was brother to David, called Dhai Mhore, the father of William Ross, the entailer. I know this as I know the matter stated in my answer to the thirteenth interrogatory.

“18. Had Andrew Ross of Shandwick, the grandfather of William Ross, the entailer, any other sons besides the entailer's father David; if so, what were their names? State what you know of their history; state the grounds of your knowledge. Depones—He had. His first son was Andrew Ross, who was merchant in Tain. The next was Alexander, who had no family; and the next was David, the father of William, the entailer; and the next was George, the youngest of all. He had none but the four sons that I heard of. I never heard of a son called Walter, nor of one called Charles, nor of one called Farquhar. I never heard of a son of his called William, a writer in Edinburgh. I never heard of a son called Hugh, nor of a son called Robert. I heard that Andrew Ross, merchant in Tain, and son to Andrew Ross of Shandwick, had a daughter called Mary, who married Bailie Reid of Tain, from whom is descended the claimant Reid, and another daughter called Catherine, who was married to David Ross, commissary-clerk, Tain, from whom is descended the claimant Duncan. I remember John Polson, the elder, at Fearn, telling me that shortly after William Ross, the entailer, came to Shandwick he, Polson, was present while a conversation took place between his father George Polson and Andrew Ross Geodh. George Polson said in this conversation to Andrew Geodh, ‘You'll be a ;’

[age, who was examined on commission ; and as I read that evidence there were mainly two things in his testimony which, if admitted, were considered of importance to the cause of the party taking the exception. Mackenzie says that George Ross, the paternal grandfather of George Ross of Lochee, and who is said to have gone to Sweden, was a member of the Shandwick family ; and he says that the wife of George of Lochee was Merran or Margaret Manson, who died after she had gone to Sweden, and that she was buried in the Shandwick burying-place. It was contended at the trial that there were two George Rosses, and a great deal came to turn upon whether the claimants were descended from the one or the other. If they were descended from George Ross the member of the Shandwick family, that was a material point for them ; but if they were descended from a George Ross who was not a member of the Shandwick family, then, of course, this step in their descent was of no value to them. Now, the date when George Ross, the paternal grandfather of George Ross of Lochee, is said to have gone to Sweden does not, I think, very distinctly appear, but it is plainly a very old story, and it is not pretended that the witness Mackenzie could know anything about it except from what he had heard from or through parties long dead. So, likewise with regard to the question whether Merran or Margaret Manson was buried in the Shandwick burying-ground,—that also was a very old story. I cannot discover exactly the date which is attributed to it, but it is obviously an old story, of which the witness Mackenzie could know nothing except from what came down to him through people long dead. Now, there can be no question that according to the law of Scotland the testimony of a living witness as to what he heard from a dead witness is, in certain circumstances, admissible. So far as we know, the law of England upon that subject it is not the same as ours ; and it is not safe, therefore, to reason from the one to the other ; which of the two is the best law it is unnecessary to inquire, because there can be no doubt at all that the law of Scotland is as I have stated it to be. One thing, however, is essential, particularly in a question of pedigree such as we have here, that the dead witness from whom the information is said to have been derived should appear to have had some special means of knowledge of the thing or things to which he is said to have spoken. I do not say that this special means of knowledge must consist in being a member of the particular family whose genealogy is in question. If he was a member of that family that would be very important in the question of the admissibility of his evidence. But it is quite conceivable that he might have very special means of knowledge although not a member of that particular family. But, as regards the traditional things spoken to by this witness Mackenzie, it does not appear that the dead people from whom they are said to have been derived had any special means of knowledge at all. Coupling this with the great antiquity of the things which are said to have so come down,—the vagueness as to the time when this witness is said to have come to their knowledge,—and particularly with the manner in which he says he came to hear of them, it appears to me that your Lordship was quite right in holding his evidence, so far as rejected, not to be admissible. So far as he says he heard

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man now since this rich friend of yours came here,' and that Andrew answered, 'Well, supposing he died without a family my children would have a right to all he would leave.' Mr Hood told me how many sons there were of Andrew Ross of Shandwick, besides other people. I don't see any occasion to give you any more of the history of the sons of Andrew Ross of Shandwick."

No. 22. these things from particular individuals, there certainly is neither allegation nor reason to believe that these individuals had any special means of knowledge, and so far as regards the very important part of the case as to Merran or Margareta Manson being buried in the Shandwick burying-ground, it will be remarked that that does not appear ever to have been taken notice of at all by anybody until William Ross of Shandwick was killed in a duel, as I understand it, in the year 1790, which was before the witness was born. Then it appears, from his own evidence, that he heard nothing of it until he was from ten to thirteen years of age, so that all that time, at least, after the period at which he says there had first come to be any word about it, must have elapsed before he himself could have heard of it; and although he mentions the names of persons from whom he says he heard what he speaks to, he sums up the whole by saying "it was the common talk of the country. These men I have named above I remember myself to have heard speak of these matters. They would often come to my father's house on a winter evening when I was a boy from ten to thirteen, and they would always have some story to speak about; and I, as young boys are, was very ready to take it up." This he makes applicable to the whole matters of which he had previously spoken, which seem to resolve them into neither more nor less than rumours among persons who, according to his evidence, had no special means of knowledge of and nothing to do with the matters spoken of at all, but who were talking among themselves for their mutual entertainment, and exchanging stories which might or might not be true, but of which they knew no more than the rest of the public. Now, while undoubtedly we admit the statements of dead witnesses to be proved under certain circumstances, it must appear that the circumstances are such as to shew that some reliance can be placed upon the evidence. They must amount to something of value in the way of evidence, and if they are of no value in the way of evidence I do not think the Judge at the trial is either bound or entitled to let them go to the jury when it would be his duty to tell the jury that they ought not to consider them at all. It is not, properly speaking, a question of competency. It is not incompetent to put questions as to what dead persons may have said. But if these dead persons had themselves no means of knowledge,—if it is plain upon the face of the thing that the testimony in regard to their statements ought not to be listened to by the jury, then the evidence becomes inadmissible, because it is really no evidence at all. The testimony rejected here might have misled the jury, but could not have been matter for their consideration, and therefore, without at all trenching upon any general rule of the law of Scotland, I think it was quite rightly rejected.

LORD MURE.—I have come to the same conclusion. The witness Mackenzie who was born in 1790, is brought to speak to the relationship of a George Ross of Tarrel, who is said to have been one of the Shandwick family, and to have left this country somewhere about the year 1738, to the two claimants, Mr Macpherson and Mr Ross Robertson. It is proposed to prove this by what Mackenzie heard from other people. Now, the rule which has been followed in practice, and which has been most authoritatively laid down by Lord Chalmers in the case of Alexander in the House of Lords, is that such evidence is competent only where the parties, whose statements it is proposed to prove, were either actually related to, or had some peculiar means of knowing the parties whose relationship they are speaking to. In this case, the first part of the evidence

lence that was rejected was the answer to this question, "Who was the paternal grandfather of the said George Ross of Lochee; what was his occupation; where did he live; did he go abroad; if so, where did he go? Depones—The paternal grandfather of the said George Ross of Lochee was George Ross, who was the uncle of William Ross of Shandwick. He stayed some time at Tarrel working here, and was married there, and got one son, and then took into his head to go to Sweden, where he stopped the rest of his days." Now, it is admitted that the George Ross who went to Sweden died in 1783; that is, seven years before the witness Mackenzie was born. Consequently, it is plain that the statements which he thus makes cannot have been within his own knowledge, and that he must have heard of them from somebody else. He is not asked to give any reason or ground for his knowledge of the facts he is called on to speak to; and having regard to the fact that he is speaking to events which took place relative to a man who died seven years before he himself was born, I think that his evidence was inadmissible, because there is nothing to shew what were his grounds of knowledge as to matters about which he himself could not have known anything. In the next answer he gives the grounds of his knowledge in regard to the facts which he is there questioned about; and what we have now to dispose of is whether they are such as would have warranted the Judge at the trial in admitting the evidence. I am of opinion that they are not. The statement in the answer as to how he heard about these things appears to me to be nothing more than the ordinary gossip of the country which the witness seems to have heard, according to his own account, somewhere about the beginning of this century, from men who were friends of his father, and who used to come about his father's house when he was a boy. He gives the names of the persons to whom he refers, and whose statements it is proposed should be admitted as evidence. But they are in no sense of the word relations of the family of Ross of Shandwick, and there is nothing to shew that they had any peculiar means of knowledge of what they were speaking about; and when one comes to examine the account the witness gives of the matter, it does not appear that the persons he names could have had any knowledge themselves of the more important facts which he says he heard them state. Because, taking, in the first place, the statements of John Polson, whom he particularly refers to, what he says about him is—"I heard this from many, particularly from John Polson, the elder, Hill of Fearn. He died about eleven years ago, and was then, I believe, about eighty-nine years of age." Now, if he died eleven years ago at eighty-nine years of age, he must have been born in 1775; so that what the witness says he heard from Polson took place before Polson was born, because one of the things he says Polson spoke to was that George Ross, Tarrel, went to Sweden, and it is admitted he went there about the year 1738, thirty-seven years before Polson was born. He could not therefore have had any knowledge himself of what George Ross.

The only other person, whose evidence was strongly pressed upon us as that of a person with peculiar means of knowledge was William Ross, as to whom Mackenzie says—"I have also heard these things from William Ross, farmer, Hill of Fearn, who himself was well acquaint with George Ross, Tarrel." Of course, Mackenzie could not know that William Ross was well acquainted with George Ross, Tarrel, because Mackenzie was not born till after the death of George Ross. But reading his evidence to the effect that William Ross told him he was well acquainted with George Ross, I think this evidence was not evidence

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to go to the jury, because William Ross is not shewn to have had any peculiar means of knowing about the Shandwick family, and we have, moreover, not got the period of his death. Mackenzie says he died a long time ago. And assuming that he died thirty or even forty years ago, that would make him die about 1836, and in that view William Ross could not have been well acquainted with George at the time he left this country in 1738 unless he was upwards of a hundred years old, which it is not proved he was when he died. So that when the evidence is looked at in detail in this way it appears to me to be open to even more serious objection than the general one I have alluded to, and to be nothing more than the common gossip of the country side, which cannot be received.

LORD PRESIDENT.—There is no doubt that in questions of pedigree, family tradition, if it have a relevant bearing on the question at issue, is admissible in evidence. But on the other hand, it is equally clear that the gossip of the locality in which the family is planted is quite inadmissible; and it appears to me that every question like that now before us must be tested by the consideration whether the information which is sought to be given in evidence belongs to the one class or the other. Family tradition is not only admissible in evidence, but if it be a well established and constant family tradition, it may be very important and valuable evidence. But, then, to make a family tradition, you must have the fact intended to be proved—as, for example, the relation of father and son between two persons—shewn to have been matter of belief within the family, and handed down from one generation to another. The difference in this respect between the law of Scotland and the law of England I take to be, that such family tradition can be proved in the law of England only by the direct testimony of members of the family. By direct testimony I do not mean the testimony of the witness in the box, but the statement of deceased members of the family, made seriously and deliberately to the person who is put in the box; whereas, according to the law of Scotland, we admit such statements repeated at second hand, if they have been made by persons who, though not members of the family, have special means of knowledge. I think our rule in this respect is a rational and intelligible rule. It is quite possible that though in the general case members of the family will have the best means of knowledge, there may be members of the family who, from accidental circumstances, know very little about the family pedigree and lineage; whereas, on the other hand, there may be confidential servants who have been a long time in the family, or very intimate friends, who have much more peculiar means of knowledge and of hearing the family traditions than members of the family who may be absent and out of the country or otherwise estranged. I think it is the means of knowledge, therefore, that ought to be the test of the value of any statement made by a deceased person and repeated in the witness-box. Both laws equally exclude, I apprehend, anything like common gossip; that is to say, talk between persons who have no special means of knowledge whatever. Now, the evidence which I excluded in the present case was evidence brought, no doubt, to establish a very important fact—the fact that the paternal grandfather of Mrs Macpherson's father was a member of the Shandwick family, the youngest uncle of the entail. His name was George, and there is no doubt that such a man existed. Mrs Macpherson's object was to trace her pedigree from that George. The case against her was that although she was apparently descended from a George Ross, that George Ross was a different man from the George Ross of the Shandwick family.

rick family. Now, under the 12th interrogatory the witness Mackenzie is No. 22.
 asked, "Who was the paternal grandfather of the said George Ross of Lochee; ^{Nov. 17, 1876.}
 what was his occupation; where did he live; did he go abroad; if so, where ^{Macpherson}
 did he go?" (George Ross of Lochee was the father of Mrs Macpherson.) His ^{et al. v. Reid's}
 answer is, "The paternal grandfather of the said George Ross of Lochee was ^{Trustees et al.}
 George Ross, who was the uncle of William Ross of Shandwick. He stayed
 some time at Tarrel, working there, and was married there, and got one son, and
 then took into his head to go to Sweden, where he stopped the rest of his days."
 Now, taking that answer by itself, I agree with Lord Mure that it is plainly
 inadmissible upon the face of it, because the witness is speaking to events which
 it is proved must have occurred before he was born, and therefore he could not
 speak to them of his own knowledge. If that interrogatory and answer, there-
 fore, had stood alone, they would have been plainly inadmissible upon that
 simple ground. But I was rather inclined at the trial, and I am still inclined,
 to take a more lenient view of this question and answer, and to connect them
 with the 13th interrogatory and the answer thereto. There are some farther par-
 ticulars given there, not so important as what I have read, respecting that George
 Ross, and then the witness proceeds to say from whom he derived his information;
 and I think the statement as to the persons from whom he derived his informa-
 tion was intended to be applicable to the information contained in the answers
 both to the 12th and 13th interrogatories. So I read the deposition, which is un-
 doubtedly the most favourable way for the party taking the exception to read
 it. Now, this is his means of knowledge—"I knew this by all the neighbours.
 There was no word about it till William Ross of Shandwick was killed, and
 there was a great talk about who was the heir to Shandwick. I heard this from
 many, particularly from John Polson, the elder, Hill of Fearn. He died about
 eleven years ago; and was then, I believe, about eighty-nine years of age. Also
 from John Vass, Balintore, who was at William Ross of Shandwick's funeral."
 Then there is interposed a passage regarding what happened at the funeral; and
 as John Vass, from whom the information was derived, was at the funeral him-
 self and communicated what took place there to the deponent, I admitted that
 part of the evidence. But after that he goes on further—"I have also heard
 these things from William Ross, farmer, Hill of Fearn, who himself was well
 acquaint with George Ross, Tarrel. He is also dead a long time ago. Also
 from Donald Munro, Loans of Tullich, who is also dead a long time ago; and
 Alexander Hendry, Tullich, who died a long time since—I am sure fifty years
 since. All these died old men. It was the common talk of the country. These
 men I have named above I remember myself to have heard speak of these
 matters. They would often come to my father's on a winter evening when I was
 a boy from ten to thirteen, and they would always have some story to speak about,
 and I, as young boys are, was very ready to take it up." Now, I can hardly
 conceive a more graphic description of mere gossip than is contained in that part
 of the deposition, and it was upon that ground, and because it was not shewn,
 or even alleged, that any one of the persons from whom the witness' informa-
 tion was derived had any peculiar means of knowledge, that it appeared to me
 that the evidence was inadmissible. There was one person from whom the wit-
 ness received information—William Ross, farmer, Hill of Fearn—who was re-
 presented to have special means of knowledge, for he was well acquainted with
 George Ross of Tarrel. Now, in the first place, it appears to me that the state-
 ment that William Ross was well acquainted with George Ross of Tarrel de-

No. 22. *pende* entirely upon the testimony of the deponent Alexander Mackenzie himself, who could not know the fact. But even if the meaning of this statement is that Nov. 17, 1876. William Ross, Hill of Fearn, told the deponent that he was well acquainted with Macpherson George Ross of Tarrel, I should not think that that improved the matter in the *et al. v. Reid's Trustees et al.* least, because I think it requires to be established in some other way than by a mere loose statement of the party from whom the witness' information is derived that he had some means of knowledge; it requires something more than that to shew that the informant of the witness was a person possessed of special knowledge. And after all, what special knowledge arose from the fact that he was acquainted—well acquainted, as it is expressed—with George Ross? What the nature of that acquaintance was we are not told. It was apparently a mere acquaintance—no relationship—no special bond of friendship between them—nothing at all indicating that this George Ross had any reason to place confidence in this William Ross of Hill of Fearn, so that this part of the deposition, when it comes to be examined and analysed, really drops into the general pool of scandal and gossip, which is the only thing reproduced in the testimony of Mackenzie.

THE COURT disallowed the exceptions.

RONALD & RITCHIE, S.S.C.—H. & A. INGLIS, W.S.—PHILIP, LAING, & MUNRO, W.S.—W. J. SANDS, W.S.—Agents.

No. 23. THE CALEDONIAN RAILWAY COMPANY, Pursuers and Complainers.—
Lord-Adv. Watson—R. Johnstone.
Nov. 17, 1876. ROBERT HENDERSON AND OTHERS, Defenders and Respondents.—
Caledonian Railway Co. v. *Balfour—Mackintosh.*
Henderson and Others, *HENDERSON AND DIMMACK, Pursuers.—Balfour—Mackintosh.*
et c contra. THE CALEDONIAN RAILWAY COMPANY, Defenders.—
Lord-Adv. Watson—R. Johnstone.

Railway—Minerals—Statutory Purchase—Sale—Servitude.—A proprietor sold to a railway company "the perpetual servitude and right to use and occupy so much of" certain ground "as is at present used and occupied by the pillars or pillars of their viaduct."

The private Act of Parliament of the company contained provisions similar to those afterwards enacted by the Railways Clauses Act, 1845, to the effect that minerals were excepted from the conveyance of lands purchased by the company, but that the company might acquire the minerals within forty yards of their works on payment of compensation.

In a question between the railway company and the proprietor and lessee of the minerals the company maintained that they were entitled to prevent the minerals from being worked under and near the viaduct, so as to endanger the viaduct, without any compensation, because they had purchased a servitude of support, which implied that their works would not be endangered. *Held* that the right acquired by the company was subject to the same conditions in regard to payment of compensation for minerals as a statutory conveyance of the land in ordinary form.

1ST DIVISION. BY disposition, dated 7th November 1845, John Wilson of Dundyvar.
Lord Young. sold, alienated, and disposed to the Glasgow, Garnkirk, and Coatbridge
B. Railway Company a stripe of ground extending to one acre, two rods,
five poles, "bounded on the north . . . , on the east by the piece
of ground belonging to me, the minerals whereof are in the second place
disposed . . . ; and in the second place . . . the ironstone
situated under the piece of ground following, extending to one acre, and

unded, &c. . . . , but reserving right to drive two mines through No. 23.
e ironstone; and in the third place, I do hereby give and grant, dis-
ne and convey, unto the said railway company and their foresaids, the Nov. 17, 1876.
eternal servitude and right to use and occupy so much of the ground in Caledonian
e second place above described as is at present used and occupied by Railway Co. v.
e piers or pillars of their viaduct, and the ground whereon the said via- Henderson
ct rests measures one rood seven poles imperial standard measure, and Others,
gether with free ish and entry to the ground in the second place above et c contra.
scribed, at all times when necessary, for inspecting or repairing the said
iaduct or works connected therewith, which perpetual right so granted
ll be, as it is hereby declared to be, and remain in all time coming, a
urden and servitude in favour of the said railway company and their
oresaids affecting the piece of ground in the second place above described,
and my remaining lands of Muirend and Dundyvan after described."

The disposition bore to be in implement of the award of certain arbiters
(to whom, by submissions dated in November 1844 and May 1845, the
parties had referred Wilson's claims against the company for the value of
land and minerals taken by them), and in consideration of the sums paid
under the award of the arbiters.

In 1873 Wilson's trustees let the minerals of the Dundyvan property
for nineteen years to the Drumpeller Coal Company, of which Robert
Henderson was a partner, and in 1874 Henderson bought the property.

In 1875 the workings of the coal company approached within forty
ards of the viaduct. They gave a statutory notice under the Lands
auses Act, 1845, section 71, to the Caledonian Railway Company, now
n right of the previous company. The railway company desired the
coal company not to work the minerals near the viaduct, and ultimately
the compensation to be paid by the railway company for coal under and
near the viaduct was fixed by a jury on 12th April 1876 at £733.

Two days previously, however, the railway company raised an action
against the proprietor and lessees, concluding for declarator that Wilson
by his disposition had imposed on himself and the lands the burden and
servitude of giving support to the viaduct, and that the defenders were
not entitled to work the minerals so as to withdraw the support. They
at the same time brought a relative suspension and interdict.

The defence was that Wilson's disposition was granted subject to the
provisions of the Act of Parliament of the Glasgow, Garnkirk, and Coat-
edge Railway Company,* and therefore that if the railway company
demanded that the coal should not be worked they must pay for it.

* vii. and viii. Vict. cap. 87, dated July 19, 1844, section 56. — "And with respect
to any mines of coal, ironstone, lime, slate, or other minerals under any land
owned by the company, be it enacted that the company shall not be entitled
to any such mines or minerals, except only such parts thereof as shall be neces-
sary to be dug or carried away, or used in the construction of the railway and
works by this Act authorised, unless the same shall have been expressly pur-
chased; and all such mines, excepting as aforesaid, shall be deemed to be
excepted out of the conveyance of such lands, unless they shall have been
expressly thereby conveyed, but providing that the owners thereof shall not
have power to make openings in the surface of the lands so to be acquired by
the company."

Section 84. — "And for the purpose of protecting the railway and works from
danger to be apprehended from the working of any mines either under or closely
djoining the railway, be it enacted that if the owner, lessee, or occupier of any
mines or minerals lying under the railway or any of the works connected there-
with, or within forty yards therefrom, be desirous of working the same, such owner,
lessee, or occupier shall give to the company notice in writing of his intention

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Shortly afterwards Henderson and Dimmack, the partners of the Drummeller Coal Company, raised an action against the railway company for payment of the £733, on the ground that the proceedings constituted a concluded purchase at that price, but this contention was not pressed in the sequel.

The three processes were conjoined, and the Lord Ordinary pronounced this interlocutor:—"In the declarator assolvies the defenders from the conclusions of the summons, and decerns: Finds the pursuers liable in expenses. In the suspension and interdict repels the reasons of suspension, refuses the interdict, recalls the interdict formerly granted, and decerns: Finds the complainers liable in expenses. And in the ordinary action at the instance of Henderson and Dimmack against the Caledonian Railway Company decerns against the defenders in terms of the conclusions of the summons: Finds the defenders, the railway company, liable in expenses," &c.*

so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appears to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work the same; and if the company and such owner do not agree as to the amount of such compensation the same shall be settled as in other cases of disputed compensation."

Section 85.—"And be it enacted that if before the expiration of such thirty days the company do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines so that the same be done in manner proper and necessary for the beneficial working thereof; and if any damage or obstruction be occasioned to the railway or works by improper working of such mines the same shall be forthwith repaired or removed, as the case may require, by the owner, lessee, or occupier of such mines or minerals, and at his own expense; and if such repair or removal be not forthwith done it shall be lawful for the company to execute the same and recover from such owner, lessee, or occupier the expense occasioned thereby, by action in any competent Court."

* "OPINION.—There is here no question about imperilling the stability of the railway viaduct by mineral workings. The minerals which the railway company have signified their desire to have left unworked for the safety of the viaduct are to be left alone in any view of the rights of parties. The railway company on the usual notice from the mineral owners, and no doubt after due consideration of the matter by skilled advisers, intimated the extent under and around the viaduct to which they desired that the minerals should be left unworked, and their willingness to make compensation; and the amount of the compensation has in fact been ascertained by jury trial under the statute. I only notice the question whether the valuation proceedings ought not to have been under the special Act instead of (as they were) the general Act, in order to observe with satisfaction that the pursuers, in defence to the action for the sum awarded, make no point of this, but express their willingness 'to hold the sum awarded by the jury as the price of the minerals in question, should they ultimately be found liable.' The defenders (the mineral owners) do not threaten to invade the prohibited bounds, and the question, whether or not the railway company are liable for the compensation awarded, is to be considered without any apprehensions for the safety of the viaduct, which may be held secured to the company's satisfaction.

"It was apparently an afterthought on the part of the railway company to dispute their liability to make compensation for the minerals which they requested to be left unworked for the safety of their viaduct, but they are none the less entitled to succeed if the law be with them, although in that case it must be

The railway company reclaimed, and argued;—Wilson's disposition to
 ie railway company was not a statutory but a voluntary contract. It
 as not a sale of land but of a servitude of support, which a proprietor

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easily regretted that the cost of a seven days' jury trial should have been need-
 ily incurred. But, indeed, it is in any view very unfortunate that a trial of
 ch dimensions should be possible about the exact worth of the coal situated
 nder a railway viaduct; and a litigation on the back of it, forming the subject
 of no less than three actions in this Court, to determine whether the trial was
 ot after all an idle proceeding, which might have been avoided by an earlier
 attention to the legal rights of the company, is more unfortunate still.

"The question which I have to consider is, whether or not the railway com-
 any are liable for the amount (£733, 19s. 9d.) ascertained and awarded against
 hem in these proceedings of their own institution?"

"The respondents are the lessees and occupiers, and one of them is the owner,
 of the minerals in question: that is not disputed. Had the railway company
 purchased the land under which they lie, it is, I think, clear that the company
 must have paid for these minerals which they desired the owner (I confine my-
 self to one title for convenience) not to work. The complainers dispute this on
 the authority of the case of Caledonian Railway Company v. Sprott, June 16, 1856,
 2 M'Queen, 449. But this case is, in my opinion, inapplicable as an authority.
 The question here turns on the applicability and construction (if applicable) of the
 statute referred to in the defenders' statement. In Sprott's case, the rights of the
 proprietor and of the railway company were governed by a conveyance before the
 Act, and it was held by the House of Lords that if the Act applied at all (which
 was not decided) it was applicable only with reference to the rights of parties as
 landing on the prior title by which, although the company did not choose to
 exercise their option of prohibition with compensation, the proprietor was still
 restrained from any working whereby the necessary support of the surface,
 whether vertical or lateral, would be withdrawn. There is here no case of prior
 title, and I cannot countenance the notion that the company—giving notice to
 the mineral owner under their Act—may resist payment of the compensation
 awarded in pursuance of the Act, and substitute an interdict for the protection
 of their works which the statute gives, subject to the obligation of paying that
 compensation. I must therefore hold that had the company purchased the land,
 they must have paid the compensation awarded to the mineral owner for the
 minerals which they required him to leave unworked.

"But as the company did not purchase the land but 'the perpetual servitude
 and right to use and occupy so much of the ground specified as is at present
 and occupied by the piers and pillars of their viaduct,' the conclusion
 regarding what would have been their obligation had they purchased the land
 itself is not conclusive, but available only as an argument. On the one hand,
 the company say,—here is a servitude of support for the viaduct, which neces-
 sarily restrains the proprietor of the servient tenement from doing anything
 inconsistent with it. On the other hand, the defenders contend that there is
 no servitude of support, but only such a right to use and occupy the ground as
 would have been implied and included in a right of property in the ground by
 purchase, and that to exempt the company from paying compensation for the
 minerals which they required to be left unworked would involve the absurdity
 of constraining the lesser right as really greater and more valuable than the larger,
 which would have implied and included it. Both parties refer to the sale of
 the ironstone, and each maintains that it supports his view. My opinion is
 with the defenders. I think the company have no greater or better secured
 right to use and occupy the ground with their viaduct than they would have
 had as purchasers of the ground; and that, having required the mineral owners
 to leave the minerals unworked, they must pay the compensation that has been
 awarded under the statutory proceedings. As regards their purchase of the
 ironstone, I think the effect of that is only, that with respect to it they are them-
 selves the mineral owners, and so under no necessity to give notice or make
 compensation."

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could not be compelled to grant. The minerals were dealt with on a special footing, and not left to the operation of statute. The railway company bought the ironstone, the better to secure their support. The proprietor might work the coal, but not so near as to endanger the viaduct. There was a right not merely of vertical but of lateral support.

The argument that the contract was not governed by the Act, because the submissions upon which the disposition proceeded were anterior to the Act, was not pressed.

The proprietor and lessees argued ;—The whole disposition was subject to the provisions of the Act. The railway company's right over this piece of ground was made one of servitude, because, as the viaduct was already made, it was unnecessary for them to acquire the whole ground. But that could not give them a higher right, with regard to the minerals, than a statutory disposition. Indeed, a statutory disposition to a railway company really gives precisely a right of this kind, a right to use the ground for certain purposes and no others, and subject to certain conditions as regards the minerals. A precisely analogous case had been decided in England.¹

At advising,—

LORD PRESIDENT.—At the commencement of the argument in this case considerable difficulty was raised in consequence of the contention of the railway company that the land which they acquired from Mr Wilson of Dundee for the purpose of constructing the Coatbridge branch of their railway was acquired by them previous to the Act of 1844, and that the transaction between the parties was therefore not to be regulated, or, indeed, in any way affected by the provisions of that Act of 1844 respecting minerals. If that had been so we should have had a very different question to dispose of from that which really arises upon this record, and a question which might have been attended with very considerable difficulty. But it was conceded on the conclusion of the argument, and is, indeed, quite apparent from an attentive examination of the deed of conveyance by Mr Wilson to the railway company, dated in November 1845, that the transaction between these parties was in reality a transaction under the Act of 1844 ; in short, it was a purchase by the company, not made not in the exercise of compulsory powers, but by voluntary agreement under the provisions of that statute. It is therefore, I think, quite obvious that the clauses of that Act regulating the matter of minerals as between the landowner and the company apply to this case. The effect of the 56th clause of the Act is to insert by statutory implication in every conveyance of land a reservation of the disposer of the minerals under the land. But then it is further provided as a necessary arrangement for the safety of the railway that the owner is not to work the minerals if the railway company are apprehensive that that would injure their property and are willing to purchase the minerals. And further, it is provided by section 85 that if the company will not purchase them the owner is entitled to go on and work, subject to certain conditions. Now, these clauses, which are substantially repeated in the general Railways Clauses Act of 1845, were introduced upon considerations which are very obvious and of great importance. The minerals lying under land purchased by the railway company may be of various descriptions, and they may be likely to be wrought within

¹ London and North-Western Railway v. Ackroyd, Feb. 26, 1862, 31 L. J. Ch. 588.

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very short time, or they may be very unlikely to be wrought for a considerable time after the purchase. There are minerals too, under ground purchased for always purposes, which are very imperfectly explored, the value of which is very little known, and can hardly be ascertained until they are actually wrought, and therefore to settle at the time of the purchase of the land for railway purposes what shall be paid as compensation for the mineral estate to be conveyed along with the surface would obviously be a most inexpedient proceeding, and a great injustice might result either to the company on the one hand or to the landowners on the other by that kind of speculative and conjectural valuation which would alone be possible at that time, and, therefore, the Legislature, on the device, a very expedient one obviously, of postponing the valuation of the minerals until they should come to be wrought. And if, when they come to be wrought, the railway company found it necessary to acquire the minerals under the railway, or within forty yards of it, they should have an opportunity of acquiring them at the value which could then be ascertained and fixed. Now, keeping in view that this is the object of the clauses of the statute with which we are dealing, let us see what it is that the parties have done in this connection for the purchase of the land by the railway company from Mr Wilson. Mr Wilson, in consideration of the various sums of compensation which have been awarded to him by arbiters chosen between the parties, appears in the first place, but under the reservation aftermentioned, to and in favour of the said Glasgow, Garnkirk, and Coatbridge Railway Company, to be conveyed, both in terms of their Act of incorporation,—“All and whole piece or piece of ground, being part of the lands aftermentioned, extending to 3 roods and 5 poles imperial standard measure, and bounded,” &c. The boundaries are unimportant, except in so far as to shew that this piece of ground is bounded on the east by another piece of ground afterwards conveyed; and that the two pieces of ground are adjacent to one another. Then there is this reservation:—“But reserving always to me and my forebears the mines and minerals under the piece of ground in the first place above described, with full power and liberty to work, win, and carry away the same, subject to the conditions and restrictions contained in the said railway company's Act of incorporation.” Now, it is needless to say that this reservation is an unnecessary reservation, because the statute had already made that provision for the disponent. At the same time it did no harm; it was merely a confirmation and referring to the Act of Parliament itself. Then he proceeds, in the second place, to dispose,—“All and whole the ironstone situated under the piece of ground following,”—(then follows a description of a piece of ground immediately to the east of the ground conveyed in the first place). This is the second subject conveyed,—the ironstone under that secondly described piece of ground. And, in the third place, he conveys “the perpetual servitude right to use and occupy so much of the ground in the second place above described as is at present used and occupied by the piers or pillars of their viaduct, and which viaduct is delineated on the foresaid plan and marked No. 1, the ground whereon the said viaduct rests measures 1 rood 7 poles imperial standard measure, together with free egress and entry to the ground in the second place above described, at all times when necessary, for inspecting or repairing the said viaduct, or works connected therewith, which perpetual right and servitude shall be, as it is hereby declared to be and remain in all time coming, in and to the said railway company and their forebears and assigns.”

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affecting the piece of ground in the second place above described and by remaining lands of Muirend and Dundivan after described." Now, there is here a very obvious distinction between the conveyance of the piece of ground upon which the viaduct rests and the conveyance of the piece of ground to the west of it, which I understand is covered by an embankment of the railway. In the case of the ground covered by the embankment, the property of the ground is conveyed in the usual form; but in regard to that portion of the ground over which the viaduct extends, what is conveyed is not the property of the ground but the perpetual servitude and right to use and occupy so much of the ground as is occupied by the piers of the viaduct. Undoubtedly in the ordinary case where a viaduct is to be constructed the company take the ground which is to be covered by the viaduct in the ordinary form, either by voluntary conveyance or by notice under the 17th section of the Lands Clauses Act, and in that case they have acquired the property of the surface under the viaduct throughout its whole length. When such land is taken the viaduct has not been constructed and it becomes necessary to take the whole stripe of ground to a certain line of deviation on either side, because, until the viaduct comes to be actually built nobody can foresee what are the precise spots of ground that are to be occupied by the piers of the viaduct. But it appears upon the face of this conveyance that the piers of the viaduct were already built when the transaction took place, and that being so it was quite easy to limit the right of the railway company to the ground actually occupied by the foundations of their piers, and so, instead of taking the whole stripe of ground they take the servitude or right to use and occupy the ground on which the piers of the viaduct actually stand. That, I take it, is the explanation of the peculiarity of this deed.

Now, it is maintained that the effect of this in law is to take the case out of the operation of the mineral clauses of the Act of 1844 altogether, because it is said for example, that the 56th section applies only to mines under land purchased by the company, and so, in like manner, the other clauses are constructed with reference to the 56th regulating the working of mines under the land which has been acquired by the railway company for the purposes of their works. But here the company contend that this land has not been purchased, but only a servitude, and that servitude is a servitude of support, and the ground being granted expressly for the purposes of a servitude of support, and not being a statutory conveyance at all, the servitude of support necessarily requires that the mine under the thing to be supported shall not be wrought, and therefore they say "at common law, for this is a common law transaction and not a statutory conveyance, at common law you who have given me this servitude of support cannot derogate from your own grant and insist upon working out the mine below so as to destroy the support altogether." That is a very ingenious argument, but I confess it has not made very much impression upon my mind. I am humbly of opinion that what has been done here is really and in all practical effect a taking of land under the statute for the purposes of the railway and its works. And, indeed, it differs very little, if at all, from the effect of taking land in the ordinary form. What is it that a company does under the 17th section of the statute when it serves a notice upon a landowner? It gives him notice that a certain piece of land is required for the purposes of the railway and will be taken and used. That is the general style of the notice, and it is quite in conformity with the 17th section of the statute. The form of the conveyance, no doubt, is an ordinary disposition of the piece of land; but that

statutory conveyance, and we must consider what is the effect of the conveyance, No 23.
 and not look at the mere words of it; and the effect of the conveyance is to enable the railway company to use the land for the purpose of constructing their railway or works thereon, and for no other purposes whatsoever. The railway company having acquired the land cannot use it for any purpose except that; and if they do not require it for that purpose they are bound to sell it back to the owner. So that the land is acquired in the ordinary case for a limited use only, and if it be land acquired for the purpose of being occupied by a portion of the line of railway, and not for any special purposes of station room or the like, but merely for the purpose of sustaining the rails in one part of the line, then all that the company do acquire in practical effect is the right to lay down and maintain their rails upon the surface of that ground, or to make a cutting through the ground for the purpose of laying down their rails and maintaining them there, or to lay down an embankment upon the ground for the purpose of sustaining their rails or to build a viaduct for that purpose. That is the only right the company ever can acquire under their statutory powers of taking land, whether they get it by voluntary agreement or by the exercise of compulsory powers. Now, what have they got here under the conveyance of a perpetual servitude and right to use the land? They have got the exclusive possession of the particular pieces of ground occupied by the piers, just as exclusive possession as they would have got under a conveyance in the ordinary form, because the piers standing upon the ground, the ground can never be occupied for any other purpose. But, on the other hand, they have got it for the one special and limited purpose of their railway, or that portion of it which consists of the piers of the viaduct standing upon and being supported by this ground. So that really the right which they obtain under this part of the conveyance is in all practical effect the same right which they get under the other portions of the conveyance, which conveys to them in appearance and formally and technically the property of the land itself. Now, I think it would be a most unreasonable construction of such an Act of Parliament as this to say that because the conveyancer chooses to put the thing in this particular shape in making out his conveyance of the subject, therefore this shall not be taken to be a purchase of land within the meaning of the 56th and other clauses of the statute. I think it is a purchase of land just as much as the purchase of the other piece of land. It is a purchase of land for a special and limited purpose. So is the other. And the special and limited purpose in the one case is just as special and limited as it is in the other—neither more nor less. It is for the same purpose in both. I am therefore of opinion that the mineral clauses, as they may be called, of the statute, 7 and 8 Vict. c. 87, are clearly applicable to this part of the conveyance as well as to the other, and therefore I am for adhering to the Lord Ordinary's interlocutor.

LORD DEAR.—The question in this case is whether the mineral clauses, sections 56, 84, and 85 of the Act of 1844, are applicable? The Caledonian Railway Company originally maintained their inapplicability on two grounds, 1st, because the transaction on which the conveyance proceeded was prior to the year 1844; and 2d, because this was not a purchase of land but the constitution of a servitude. Latterly, the second became the sole ground contended for by the company.

They say this was not a purchase of land in the sense of the statute, because

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the transaction and conveyance were not of a sort which the railway company could have compelled the granters to enter into and execute, but a mere voluntary transaction and conveyance to which the statute has no application. I am of opinion that this contention is not well founded, and I rest my opinion upon the simple ground, that the reason why a conveyance of land brings in those clauses of the statute is because the conveyance of the land implies the constitution of this servitude of support. That is the sole ground of it. Now here we have this servitude of support, constituted not by implication, but by an express deed. My humble opinion is that that makes no difference in the result.

LORD MURE.—I have come to the same conclusion, and very much on the same grounds. The substance of the transaction is the acquisition of ground under the Act of Parliament for the use of the railway. That is distinctly shewn throughout the whole of the conveyance. And although there is a peculiarity in the wording of the conveyance of the servitude right, which I was at first struck with, I am satisfied that this arose from the fact that the viaduct was actually built and in use at the time the land was acquired by the railway company for the purposes of their extension line. Having regard, therefore, to the terms of the disposition, and to the clauses in it by which the provisions of the Act of Parliament are, as it appears to me, imported into the conveyance, I think that the rights of parties relative to the working of the minerals must be regulated by the rules which, in respect of the Act of Parliament, are applicable in all such cases. In the deed, after the words of conveyance, it is provided that the ground taken by the railway company is to be held by them and their successors "according to the true intent and meaning of their Act of incorporation;" and that provision is applicable not merely to the land acquired, but to the whole premises expressly above mentioned."

On these grounds I have come to the conclusion that the interlocutor of the Lord Ordinary should be adhered to.

THE COURT adhered.

HOPE, MACKAY, & MANN, W.S.—T. J. GORDON, W.S.—Agents.

No. 24.

Nov. 17, 1876.
Fenning v.
Meldrum.

G. AND J. FENNING, Pursuers and Respondents.—*Wallace.*
JOHN IRVING MELDRUM, Defender and Appellant.—*Fraser—Muir.*

Oath on Reference—Admission.—Observed (per Lord Deas), that when, on reference to oath of the constitution and resting owing of an alleged debt, a deponent admits receipt of a sum of money, and does not depone to having charged himself of it in any way, the deposition is affirmative of the reference.

1ST DIVISION.
Sheriff of
Dumfries.
M.

THIS was an action for payment of the balance of an account by G. and J. Fenning, lessees of certain granite quarries at Dalbeattie, against J. Meldrum, who had acted for several years as their manager. The constitution and resting owing of items prior to 1871, to which prescription applied, was the defender's oath.

parties, so far as these items were received from the pursuers and

defender deponed as follows:—"From the evidence endorsed by me, I see that I must have

at the sum of £50, with which I am debited under date 2d December 870. I do not recollect what said sum was sent to me for. I think it must have been to make payments of some sort for the pursuers, and not on my own use. I cannot say whether or not I borrowed that sum from them. I admit the correctness of the credit side of the account in question. The account brings out an apparent balance against me of £57, 9s. 4d. I have not paid that sum in cash, but I consider that nothing was really due by me at the end of said account, as I had done much work for them in preparing estimates for which they did not and would not pay me. I rendered no account at the time. One of the estimates was for lighthouses in the Isle of Man, a very large job, worth about £24,000. That was in the early part of 1869. The other was for a pedestal for a royal statue, I think in Manchester. There was no stipulation about my remuneration in connection therewith, and I never have claimed any. I regarded it as a set-off against the balance of £7, 19s. 4d., which is all I admit as due by me on said account. I cannot say whether or not the £50 contained in the cheque was ever paid."

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The Sheriff-substitute and Sheriff held that the oath was affirmative of the reference.

The defender appealed.

In the course of the advising,—

LORD DEAS said—I am of opinion that this deposition is affirmative of the reference. The Sheriff-substitute says that it contains certain things so improbable that he does not believe them. I do not go on these grounds. It is not necessary that we should believe what the deponent says, or that it should be probable. The question is, what he has sworn. Now, the deponent admits having received the £50, and he does not say anything which can discharge him of it. That is the legitimate ground for holding the oath to be affirmative.

THE COURT pronounced this interlocutor:—"Having heard counsel on the appeal, record, and proof, Find that the pursuers (respondents) have proved that the balance of . . . is resting owing to them by the defender (appellant): Therefore refuse the appeal, and decern: Find the appellant liable in expenses," &c.

J. & A. HASTIE, S.S.C.—WM. OFFICER, S.S.C.—Agents.

HECTOR CHARLESON, Petitioner and Appellant.—*Fraser—Moncreiff.* No. 25.
JAMES CAMPBELL, Respondent.—*Macdonald—Rhind.*

Nov. 17, 1876.
Charleson v.
Campbell.

Trade-Mark—Descriptive Name—Distinguishing Variation.—Held that the proprietor of a hotel near a railway station, known as the "Station Hotel," was entitled to object to the proprietor of a neighbouring hotel adopting the designation "The Royal Station Hotel," in respect that the term "Station Hotel" is a descriptive designation applicable to both, and the word "Royal" a sufficiently distinctive variation.

HECTOR CHARLESON became tenant at Whitsunday 1875 of a hotel which, for some years prior to the petitioner's entry, had been known as The Station Hotel, Forres." 2D DIVISION.
Sheriff of
Elgin.
I.

James Campbell in 1873 became proprietor of another hotel in Forres, which at the time he purchased it was known as "The County and Family Hotel." He at first altered its name to that of "The Royal Hotel"; and in June 1875 he commenced to advertise it in railway time tables, &c., as "The Royal Station Hotel, Forres." From that date also his servants

No. 25. commenced to solicit custom for it under the name of "The Station Hotel" and "The Royal Station Hotel"

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Charleson applied for interdict to the Sheriff of Elgin on the averment that these proceedings of Campbell and his servants were misleading to parties intending to put up at his hotel, and "were illegally, fraudulently, and wrongfully done. The foresaid illegal and fraudulent advertisements and representations by the respondent have injured and are still injuring the petitioner's business, and he has suffered loss thereby."

It was admitted that the hotels of the respondent and the petitioner were both on the outskirts of Forres, and on opposite sides of a straight road leading from the passenger station to the town. Both hotels were visible from the station, that of the respondent being distant 100 yards, and that of the petitioner 360 yards therefrom.

The petitioner pleaded;—(1) The hotel occupied by the petitioner having been the first to adopt the name or title of "The Station Hotel," and having been for many years known to the public as "The Station Hotel," the petitioner is entitled to the exclusive use of this name or title.

The respondent pleaded;—(1) The petitioner, in respect he does not occupy a hotel which is entitled from its situation and locality to be called the Station Hotel, it being at the very extremity of the street or road in which it is situated, while the railway station, which is at the other extremity, is upwards of 360 yards apart, he has no ground of action against the respondent for calling his hotel "The Royal Station Hotel," seeing that it adjoins the railway platform, and is truly from its situation the Station Hotel of Forres. (3) The petitioner having no exclusive right or monopoly to use the words "Station Hotel" in reference to his hotel he has no legal ground of action or complaint against the respondent.

The Sheriff-substitute (D. Macleod Smith) sustained the defences, and dismissed the petition.

The Sheriff (Bell) adhered.

The petitioner appealed to the Court of Session.¹

LORD JUSTICE-CLERK.—I am very far from saying that a hotel proprietor whose house has been known by a specific designation, may not have a right of property in that designation as in a trade-mark. But the designation of the appellant's hotel in the present case is not a specific but a descriptive title. There is no doubt that the hotel has been known under that descriptive title for a considerable time. But neither is there any doubt that another hotel proprietor may put up a hotel to which the designation is equally applicable. To make the appellant's application relevant it would be necessary to add the averment that the designation was assumed for the purpose of deceiving the public and drawing away the custom of the established hotel. Whether that would be sufficient to make the complaint relevant or not I do not mean to decide. It is at any rate it is essential, and is totally wanting here.

But the case falls under another principle. It is not even averred that the respondent has assumed the descriptive name of the appellant's hotel with variation. It is not said that he has called his hotel "The Station Hotel."

¹ Perry v. Truefitt, 1842, 6 Beavan, 66; Lawson v. The Bank of London, 1856, 18 Scott's Common Bench Reports, 84; Wotherspoon v. Currie, 1857, L. R. 5 E. & I. App. 508; Ford v. Foster, 1872, L. R. 7 Chan. App. 611; v. Haley, 1869, 39 L. J. Chan. 284.

"The Royal Station Hotel." Now, when a man gives his house a merely descriptive title, and another, to whose house the description equally well applies, assumes the same descriptive title with a distinguishing addition, the latter is within his rights, and the former is not entitled to complain. Now, I am of opinion that with regard to such a descriptive title as this even the addition of the word "Royal" is a sufficient distinction. No. 25.
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I by no means say that a descriptive title may not be acquired by a hotel which could not be assumed by another without a sufficient distinguishing mark, but I am of opinion that we have not a case of that sort here.

Neither am I moved by the contention of the respondent that he has built a hotel nearer the station, and therefore is better entitled to the use of the descriptive title "Station Hotel" than the appellant. Provided the descriptive term was fairly applicable to the appellant's hotel I do not think the respondent was entitled to appropriate it without variation, even though more fully applicable to his own than to the appellant's house.

In the present case I am quite satisfied to dismiss the appeal—(1) Because there is no sufficient allegation of the assumption for the purpose of injury; and (2) because the proceeding of the respondent is not shewn to have been a piracy or usurpation of the appellant's title, nor even a colourable imitation, but the adoption of the title with a sufficient distinction.

MR. NEAVE, LORD ORMDALE, and LORD GIFFORD concurred.

THE COURT affirmed the judgments appealed against, and dismissed the appeal.

WILLIAM OFFICER, S.S.C.—ROBERT MENZIES, S.S.C.—Agents.

JOHN LAWSON (Inspector of Poor of Parish of Annan), Pursuer.—

Balfour—Young.

GEORGE GUNN (Inspector of Poor of Parish of Cramond), Defender.—

Fraser—Burnet.

No. 26.

Nov. 21, 1876.
Lawson v. Gunn.

Locatic—Settlement.—Held that a woman, imbecile from infancy, had at the time of her father's death, which happened after her majority, a de facto settlement from her father in the parish of his birth, and that the parish of her own birth was not liable for her support.

ALEXANDER FERRIE was born in the parish of Cramond. For many years he led a wandering life as a hawker, and never acquired any residential settlement. Towards the end of his life he settled in Annan, and there on 19th December 1872. Shortly after coming to reside in Annan he became an object of parochial relief, and was receiving an allowance of 2s. 6d. a-week at the time of his death. The parish of Cramond acknowledged liability for his support, and repaid to the parish of Annan its disbursements.

Alexander Ferrie was survived by a widow, who after his death continued to reside at Annan. The allowance made to her husband of 2s. 6d. a-week was continued to her at the expense of the parish of Cramond.

Alexander Ferrie was also survived by a daughter, Maria Ferrie, who was born in 1851 in the parish of Yair. She lived constantly in family with her father till his death, after which she continued to live with her

2d DIVISION.
Lord Ruthven.
furd Clark.
R.

No. 26. mother until 19th February 1874, when she was removed to the Southern Counties Lunatic Asylum.

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The parish of Annan thereupon called on the parish of Cramond to relieve it of the expense of her maintenance in the asylum, she being a proper subject of parochial relief.

Maria Ferrie had been subject to epileptic fits from infancy, which had produced extreme imbecility from her earliest years, but she was not a congenital idiot.

The parish of Annan pleaded;—(1) The parish of Cramond, as the parish of her father's birth, is liable for the pauper's support.

The parish of Cramond pleaded;—(1) The pauper having first become chargeable as a pauper at the age of twenty-three, and more than a year after her father's death, her parochial settlement is in the parish of her own birth, and not in that of her father's birth.

The Lord Ordinary, on 1st July 1876, decerned against the defender on terms of the conclusions of the libel.*

The defender reclaimed.¹

LORD JUSTICE-CLERK.—I see no reason to differ from the Lord Ordinary. The

* "NOTE.—The pauper, when she became chargeable, was twenty-three years of age. She was then in a state of extreme imbecility, and incapable of doing anything for her support. This has been her condition during all her life, though it has not been proved that she is a congenital idiot, it is plain enough that her infirmity has existed from her earliest infancy.

"Her father died in December 1872. At his death he had no residential settlement, and hence his settlement was in the parish of Cramond, where he was born.

"The pursuer maintains that the pauper's settlement is in Cramond, inasmuch as that was the settlement of her father at the time of his death. The defender admits that he would have been bound to support the pauper if, at her father's death, she had been in pupillarity. But he contends that, inasmuch as she was in majority at the time when she became chargeable, her settlement is in the parish of her own birth. His argument is, that in the absence of any residential settlement, original or derivative, every adult must have recourse to his own birth settlement; that the rule by which children retain their father's birth settlement was introduced in order to keep the family together, and can have no place as regards adult lunatics; and that though a lunatic may be looked upon as no more than a child when anything depends on choice, the law, by assigning every adult pauper to his own settlement, excludes all exercise of will, and therefore all analogy between a pupil and an adult lunatic.

"The Lord Ordinary has not been able to adopt the argument of the defender. He thinks that the reasoning on which the Court proceeded in the case of *Craig v. Macph.* 1172, applies equally to a pupil and a person in the position of the pauper. She has always remained *in statu pupillari*. She has never been *pro jure*, or in a condition to exercise any civil rights. On the contrary, she has been under a constant legal incapacity. The Lord Ordinary therefore is of opinion that the judgment of the Court in the case above mentioned rules the present. This appears to be in accordance with the view of the law taken by Lord Neaves, as well as by the Court, in *Walker*, 8 Macph. 893."

¹ *Authorities cited*.—*Barbour v. Adamson*, July 2, 1851, 13 D. 1279, 23 Scot. Jur. 603, May 30, 1853, 15 D. (H. of L.) 46, 1 M'Q. 376, 25 Scot. Jur. 419; *Hay v. Paterson*, Jan. 29, 1857, 19 D. 332, 29 Scot. Jur. 152; *Crawford v. Beattie*, Jan. 25, 1862, 24 D. 357, 34 Scot. Jur. 180; *M'Crorie v. Cowan*, May 7, 1862, 24 D. 723, 34 Scot. Jur. 365; *Craig v. Greig and M'Donald*, July 1, 1863, 1 Macph. 1172, 35 Scot. Jur. 670; *Hopkins v. Ironside*, Jan. 27, 1865, 1 Macph. 424, 37 Scot. Jur. 203; *Walker v. Russell*, June 24, 1870, 8 Macph. 893, 42 Scot. Jur. 531.

important consideration in such cases is to lay down and follow intelligible rules of the regulation of the liability of parishes. Now, it has been conceded that it has been conclusively settled that a pupil follows the settlement of his father, even although the father be dead. It has been held in the cases of Hopkins and Walker, to which we have been referred, that while the father is alive an imbecile child, although past the years of pupillarity, is still to be considered a pupil. I think it follows that the same rule is to be applied after the father's death on the same analogy. Here the pauper is wholly incapable of earning her own subsistence, and has always been so. I am satisfied with the views the Lord Ordinary has expressed.

No. 26.

Nov. 21, 1876.

Lawson v. Gunn.

LORD NEAVES concurred.

LORD ORMDALE.—I am of the same opinion. It is very desirable that in such cases as the present decisions already pronounced should not be departed from, and I think that the authorities referred to have already substantially decided the point here in question.

There can be no doubt that the pauper, being insane from childhood onwards, never had a settlement apart from her father during his life. Her father's birth settlement, therefore—he having never acquired a residential one—was her settlement up to the date of his death. The question then is, did his death after she had attained majority, but while she was still insane, make any change in her settlement, so as to throw her back from her father's settlement to her own birth settlement. As the disabilities of pupillarity endure in the case of the insane beyond the years of pupillarity during the father's life I see no reason why they should cease on his death. I therefore agree with your Lordship in holding that the principle of decision in Hopkins v. Ironside covers the present case.

LORD GIFFORD.—I concur. It appears to me that the ground on which the Lord Ordinary has based his judgment is entirely satisfactory. But I am prepared to come to the same conclusion on another and independent ground. I think the pauper must be held to have been actually chargeable as against the parish of the father's settlement during her father's life. The father became a pauper before his death, and died in receipt of parochial relief. Now, when a father who has an imbecile and helpless daughter entirely dependent upon him is unable to support either himself or his daughter, and becomes chargeable on the parish, although technically he is the pauper, his daughter, who has only a derivative settlement through him, is really chargeable, and is really supported by the parish as well as her father. The father and the daughter are both paupers, and are both actually being relieved by the parish of his settlement, and that parish cannot rid itself of liability for the support of the imbecile child simply because of the father's death. The daughter remains chargeable, and retains her derivative settlement. Indeed she can acquire no other settlement.

THE COURT adhered.

J. KNOX CRAWFORD, S.S.C.—W. & J. BURNES, W.S.—Agents.

No. 27.

JOHN M'MEEKIN, Pursuer.—*Balfour—Pearson.*JOHN ROSS (Scott's Trustee), Defender.—*Guthrie Smith—R. V. Campbell.*

Nov. 22, 1876.
M'Meehin v.
Ross.

Sale—Bankruptcy—Mercantile Law Amendment Act, 1856, 19 and 20 Vict. c. 60, sec. 1.—Sec. 1 of the Mercantile Law Amendment Act enacts,—“When goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same.” *Held* that the section did not apply to a contract by which a shipbuilder sold the scrap iron lying in his yard and the scrap iron which should be produced during a certain period.

Observed that the section only applied to cases where the purchaser acquired a *jus ad rem specificam*, of which the seller retained possession.

1ST DIVISION.
Lord Ruther-
furd Clark.
B.

ON 17th March the estates of Messrs Scott, shipbuilders, Inverkeithing, were sequestrated, and Mr John Ross was appointed trustee.

John M'Meehin, iron-merchant, Coatbridge, brought the present action against the trustee, concluding for declarator “that at and prior to the sequestration of the estates of the defenders, John Scott and Sons, and of John Scott senior, Thomas Scott, and John Scott junior, the individual partners of that firm, the pursuer was, and that he still is, entitled to demand and receive delivery of the whole scrap iron which the said defenders, John Scott and Sons, had in stock in or about their works or other premises at Inverkeithing at 11th January 1876, and also of the whole scrap iron thereafter made or produced by them, and which was in their possession at their said works or premises or elsewhere, or under their control, at the date of the sequestration of their estates as aforesaid; and that the defender, the said John Ross, as trustee foresaid, and the other defenders, for any interest they may have in the premises, are bound to give to the pursuer, or to permit the pursuer to take immediately upon demand, delivery of the whole of the said scrap iron; and the defender, the said John Ross, as trustee foresaid, ought and should be decreed and ordained, by decree foresaid, immediately or upon demand, to deliver to the pursuer, or to permit the pursuer to take delivery, of the whole of the said scrap iron.”

The pursuer alleged—(Cond. 1) “The pursuer has dealt with the defenders, John Scott and Sons, for the last eight years. On 22d September 1875 the said John Scott and Sons wrote* to the pursuer, offering to

* The following are the letters referred to:—

Messrs Scott and Sons to Mr John M'Meehin, 22d September 1875.—“Dear Sir,—We have something like 30 tons of scrap iron at present, and making more daily. The present is to state that we are willing to let you have these, and what will be made for the next six or eight weeks, at the same price as last, with permission to us to draw upon you now for £250, at 4 m/d. You would have delivery of what is now ready at once if wished, or the whole could lay and be taken at one trip. Your reply by return will oblige.”

Mr M'Meehin to Messrs Scott, 24th September 1875.—“Gentlemen,—I received your note, and accept your offer of all your scrap iron for eight weeks from date, at the same price as I paid for last. I have enclosed a stamp signed, which you can fill up for four months, and date it to the 25th September, as I have entered it in my books so. Also please make it payable at the Clydesdale Bank, Coatbridge. I think it will be better to let them lie till I get the whole, ‘as one trip would do it,’ unless I see a possibility of the market coming down.”

Messrs Scott to Mr John M'Meehin, 11th January 1876.—“Dear Sir,—

deliver to him 30 tons of scrap iron then in their hands, along with what-
 ver would be made for the succeeding six or eight weeks, at the same
 price as their immediately preceding transaction, which was at the rate of
 33, 15s. per ton. In this letter they stipulated that the pursuer should
 allow them to draw upon him for £250 at four months' date." (Cond. 2)
 The offer was accepted by the pursuer in a letter dated 24th September
 1875, and a bill was drawn upon him by the said John Scott and Sons
 for £298, 12s. 6d. Towards implement of this contract two cargoes of
 scrap iron were delivered by the said John Scott and Sons to the pursuer,
 conform to invoices dated respectively 8th and 25th December 1875, the
 former amounting to £92, 16s. 3d., the second to £98, 1s. 3d. There was
 thus a balance of £107, 15s. remaining, for which no value had been
 given." (Cond. 3) "When the said bill for £298, 12s. 6d. matured the
 pursuer, in a letter dated 15th January 1876, proposed that as the whole
 quantity of scrap iron had not been delivered to him a renewal of the
 bill should be granted. It was ultimately arranged that this renewal
 should be for £140, which was granted, and this bill falls due on 27th
 April 1876." (Cond. 4) "On 11th January 1876 the said John Scott
 and Sons wrote and sent a letter to the pursuer, whereby they offered to
 sell to him all the scrap iron which they then had in stock, as also the
 scraps which would be made by the said John Scott and Sons up till 1st
 April 1876, at the market prices for the ensuing two months, if he would
 allow them to draw upon him for £200. A bill stamp sufficient to cover
 that amount was enclosed in the letter, in order that the pursuer should
 sign across it, and so complete the arrangement." (Cond. 5) "The pur-
 suer accepted the said offer by letter written and sent to the said John
 Scott and Sons on 15th January 1876, and this acceptance was duly ac-
 knowledged by John Scott and Sons by letter dated 18th January 1876.
 Further, the pursuer signed the said acceptance for £200, and forwarded
 the same to the said John Scott and Sons. The contract was thus com-
 pleted."

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The defender answered—"It is not admitted that the letters constitute
 any real and complete contract of sale. Admitted that the pursuer, for
 the bankrupts' accommodation, sent his acceptance for £200, which is
 still current. The transaction intended by the said letters only pur-
 ported to give the pursuer security over the scrap iron which the bank-

We will have another lot of scraps soon from a ship we are about to plate,
 besides what we have still in stock. You may have them secured to you if
 you promise market price during the next two months. If you have no ob-
 jection, we will draw @ 3 or 4 mos. to the extent of £200 for what we make—
 say to 1st April. Several offer to buy, but we give you the first chance. We
 enclose 2s. stamp, which you can sign across face if you agree to the above, and
 return same."

Mr M'Meekin to Messrs Scott, 15th January 1876.—"Gentlemen,—I only
 received your note to-night, having been from home. Enclosed you will find
 the acceptance, signed. I will take the scrap on the conditions mentioned. I
 see your bill for £298, 12s. 6d. comes due on the 28th January. As I have
 not got the whole quantity, and will not get cash for the last lot till the end of
 February, I would like if you would renew say £130 of it."

Messrs Scott and Sons to Mr John M'Meekin, 18th January 1876.—"Dear Sir,
 —We duly received your favour of 15th inst., with 2s. stamp accepted, for which
 accept thanks. We note you accept our offer of scrap iron for forward delivery.
 As regards your acceptance, £298, 12s. 6d. maturing 28th instant, if you will
 send a 2s. stamp accepted we will fill it up for £130 @ 2 m/d., as we do not
 wish both to fall due same time; proceeds will be remitted in good time. We
 have filled up stamp last sent for £200 stg. @ 4m/ this date, and due at Clydes-
 dale Bank, Coatbridge, 18/21 May next, which please note."

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The pursuer alleged—(Cond. 8) "At the date of the sequestration of the estates of the said John Scott and Sons a considerable quantity of scrap iron was lying in their premises ready for delivery to the pursuer, and at present there is scrap iron deposited in the premises of the said John Scott and Sons for that purpose. There was no other scrap iron in the premises, custody, or possession of the said John Scott and Sons except that which had been sold to the pursuer as aforesaid, and the said scrap iron was separated and set apart, or was and is at all events easily distinguishable from the other articles in the said premises."

The defender answered—"Admitted that at the date of sequestration there was a quantity of scrap iron lying about the premises of the bankrupts, the value whereof at present rates is probably from £70 to £80. Only some part of this whole quantity can be the subject of the alleged sale to the pursuer. The plating of the ship referred to in the bankrupt's letter of 11th January 1876 was unfinished at the date of sequestration. It is impossible to distinguish how much of the scrap iron about the premises was in stock on 11th January 1876, and how much came from the plating of the said ship, and from other work unconnected with the said ship. At the sequestration the subject of the alleged sale to the pursuer could not be identified, and the quantities and prices were not ascertained."

The pursuer pleaded ;—(1) The pursuer having purchased and paid for the said scrap iron as aforesaid, and the same having been allowed to remain in the custody of John Scott and Sons as aforesaid, the pursuer is entitled to decree of declarator, as concluded for.

The defender pleaded ;—(1) The pursuer's averments are irrelevant and insufficient. (2) The alleged contract of sale being incomplete as to subject, quantities, and prices, the pursuer has no ground of action. (3) There having been no sale of specific and existing goods at a certain price, the Mercantile Law Amendment Act has no application.* (4) The bills founded on by the pursuer not being payments of the prices of the goods sued for, and in any event the said bills not having been yet retired by the pursuer, the defender is entitled to refuse delivery.

The Lord Ordinary pronounced this interlocutor :—"Assoilzie the defender Ross from the conclusions of the action, and decerns : Finds him entitled to expenses," &c.†

* The Act 19 and 20 Victoria, cap. 60, section 1st, provides :—"From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same, and the right of the purchaser to demand delivery of such goods shall, from and after the date of such sale, be attachable by or transferable to the creditors of the purchaser."

† "NOTE.— The action is laid on the contract, and on the 1st section of the Mercantile Law Amendment Act.

"The defender maintains—1st, That the pursuer did not buy the whole scrap iron to be made after the date of the contract, but only a portion of the make ; and 2dly, That even though he did, the pursuer cannot avail himself of the provisions of the Act, because there was no completed sale of any definite quantity of goods.

"The Lord Ordinary is disposed to hold that the contract does not complete

The pursuer reclaimed, and argued ;—The defender was bound to give delivery of the iron which was in the bankrupts' possession, both at the date of the letter of 11th January and at the date of sequestration. There might be a completed sale, although the risk did not pass. As soon as the scrap iron was produced the sale was complete. The price was actually paid by the bills which the pursuer signed. There was here a specific article sold for a price which was ascertainable by measuring the quantity of iron. It was quite possible to sell a thing which was not in existence, but was to be produced. The moment the scrap iron came into existence the purchaser had a *jus ad rem*. As nothing required to be done to it except to weigh it, the property passed to the purchaser. The case of Hanson did not apply, because it dealt with the question whether the risk passed, which was a different question from one of a personal contract of sale.¹

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Argued for the defender ;—There was no complete contract of sale. The scrap iron was not in existence at the date of the alleged sale, and there was no obligation to bring it into existence. Four things had to be ascertained before the contract of sale was complete, viz., *quid, quantum, quid, and pretium*, and none of these were here ascertained. The question depended on sec. 1 of the Mercantile Law Amendment Act, which related to the case of goods lying ready for delivery, and where nothing was required to be done, whereas here the iron required to be weighed in order to ascertain the price.

The object of the Mercantile Law Amendment Act was to assimilate the law of England and Scotland, and therefore the English cases were of assistance.²

It was scrap iron made by the bankrupts, but only so much of it as was produced in plating the particular ship referred to in the letter of 11th of January. It may not be sufficient to dispose of the case without inquiry, inasmuch as it is not out that no scrap iron was actually made, except what fell under the contract. He is, however, of opinion that the pursuer has not brought himself within the provisions of the Mercantile Law Amendment Act.

There was not at the date of the contract any definite subject, nor at that or any other date was there a definite price. The contract related to a scrap to be produced, and the sum due under it was to be determined by the amount of the production. Before the bankruptcy no step was taken to ascertain the amount of the scrap iron that was made ; and indeed this could not have been the case, because the contract included the make up to 1st April, and the contents of the bill were intended to cover the whole price, subject to adjustment either way according to the amount of production.

In these circumstances, the Lord Ordinary cannot hold that the sale was complete, so as to admit of the application of the Mercantile Law Amendment Act. He refers to and adopts the opinion of the Lord President in the case of *Hanson v. Craig*, Feb. 4, 1859, 21 D. 432, 31 Scot. Jur. 236 ; see also *Benjamin v. Sale*, p. 235."

¹ *Hanson v. Craig*, Feb. 4, 1859, 21 D. 432, 31 Scot. Jur. 236 ; *Wyper v. Harvey*, Feb. 27, 1861, 23 D. 606, 38 Scot. Jur. 298 ; *Edmond v. Mowat*, Nov. 4, 1868, 7 Macph. 59, 41 Scot. Jur. 32 ; *Black v. Glasgow Bakers*, Dec. 1867, 6 Macph. 136, 40 Scot. Jur. 77 ; *Bell on Sale*, p. 31 ; *Gourlay v. Gourlay*, June 2, 1875, ante, vol. ii. p. 738.

² *Bell on Sale*, p. 16 ; *Hanson v. Meyer*, July 2, 1805, 6 East, 614 ; *Sim v. Sim*, June 3, 1862, 24 D. 1033, 34 Scot. Jur. 517 ; *Hutchison v. Henry and Co.*, Nov. 26, 1867, 6 Macph. 51, 40 Scot. Jur. 36 ; *Wyllie and Lochhead v. Mitchell*, Feb. 17, 1870, 8 Macph. 552, 42 Scot. Jur. 258 ; *Benjamin on Sale*, 1st ed. pp. 227, 235 ; *Simmons v. Swift*, 1826, 5 Barnwell and Creswell, 857 ; *Albutt v. Hickson*, June 5, 1872, L. R., 7 C. P. 438 ; *Jaffé v. Ritchie*, Dec. 1860, 23 D. 242, 33 Scot. Jur. 107.

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LORD PRESIDENT.—The question here is whether the transaction between Scott and Son, whose trustee is the defender in this action, and the pursuer was a contract of sale within the meaning of the 1st section of the Mercantile Law Amendment Act. The Lord Ordinary has decided the case on relevancy, and it is necessary, if we are to adhere to his judgment, to take the statement of the pursuer upon record as representing the transaction. Now, he begins by mentioning that "the pursuer has dealt with the defenders, John Scott and Sons, for the last eight years,"—that is, I understand, in the same kind of transaction as the present. Then he goes on—"On 22d September 1875 the said John Scott and Sons wrote to the pursuer offering to deliver to him thirty tons of scrap iron then in their hands, along with whatever would be made for the succeeding six or eight weeks, at the same price as their immediately preceding transaction, which was at the rate of £3, 15s. per ton. In this letter they stipulated that the pursuer should allow them to draw upon him for £250 at four months' date." Now, we are entitled also to take the letters referred to into consideration, along with the pursuer's averments, and to correct the statements of the one by the other. Now, the statement in the letter as to the scrap iron is not quite the same as in the condescendence. It is—"We have something like thirty tons of scrap iron at present, and making more daily. The present is to state that we are willing to let you have these, and what will be made for the next six or eight weeks, at the same price as last, with permission to us to draw upon you now for £250 at 4 m/d. You would have delivery of what is now ready at once if wished, or the whole could lay and be taken at one trip." That statement means, Scott and Sons are willing to go on supplying the pursuer with scrap iron at the same rates as before. The letter mentions that there were over thirty tons of scrap iron, and the time of the proposed contract is six or eight weeks. The acceptance fixes the contract for eight weeks, and otherwise is in terms of the offer. The 2d article of the condescendence goes on—"The offer was accepted by the pursuer in a letter dated 24th September 1875, and a bill was drawn upon him by the said John Scott and Sons for £298, 12s. 6d. Towards implement of this contract two cargoes of scrap iron were delivered by the said John Scott and Sons to the pursuer, conform to invoices dated respectively 8th and 25th December 1875, the former amounting to £92, 16s. 3d., the second to £98, 1s. 3d. There was thus a balance of £107, 15s. remaining, for which no value had been given." The result of that is, that while the pursuer had advanced the sum of £298, 12s. 6d. in a bill, he had only obtained delivery to the amount of £190, 17s. 6d., and so matters stood when the next letter, of 11th January, was written. In the meantime the original bill had been advancing to maturity, and a renewal had been proposed and was agreed to to the amount of £140. Then comes the letter of 11th January 1876, and in reference to it the pursuer says—"On 11th January 1876 the said John Scott and Sons wrote and sent a letter to the pursuer, whereby they offered to sell him all the scrap iron which they then had in stock, as also the scrap which would be made by the said John Scott and Sons up till 1st April 1876, at the market prices for the ensuing two months, if he would allow them to draw upon him for £200. A bill stamp sufficient to cover that amount was enclosed in the letter, in order that the pursuer should sign across it, and so complete the arrangement." Then the 5th article goes on to say—"The pursuer accepted the

aid offer by letter written and sent to the said John Scott and Sons on 15th January 1876, and this acceptance was duly acknowledged by John Scott and Sons by letter dated 18th January 1876. Further, the pursuer signed the said acceptance for £200, and forwarded the same to the said John Scott and Sons. The contract was thus completed. The counter statement in answer is denied." No. 27.
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Now, with regard to the second transaction, the eight weeks during which the arrangement of the 22d September was to endure had expired some time before; and when Scott and Son proposed to sell to the pursuer all the scrap iron they had in stock at that date, viz., on 11th January 1876, it does not follow that any part of that iron fell under the original contract. It does not appear, and it is not even averred, that any more iron was produced in these eight weeks than was delivered at the two deliveries of 8th and 25th December. If there was, it certainly became indistinguishable from the iron to be delivered under the arrangement of 11th January. We have it, then, that the pursuer was to take all the scrap iron in the work at 11th January, and all that might be produced till April.

Then the condescendence (7th and 8th) goes on to say—"On 17th March 1876 the estates of the defenders, the said John Scott and Sons and the individual partners of that firm, were sequestrated by the Sheriff of Fife, and on 29th March 1876 the defender, the said John Ross, was appointed trustee on the sequestrated estates." "At the date of the sequestration of the estates of the said John Scott and Sons a considerable quantity of scrap iron was lying in their premises ready for delivery to the pursuer, and at present there is scrap iron deposited in the premises of the said John Scott and Sons for that purpose. There was no other scrap iron in the premises, custody, or possession of the said John Scott and Sons, except that which had been sold to the pursuer as afore-said, and the said scrap iron was separated and set apart, or was and is at all events easily distinguishable from the other articles in the said premises. The amount of the said bill, which the pursuer will retire in due course, is greatly in excess of the market price of the said scrap iron. The counter statement is denied." Now, this last article is not very intelligible or consistent with itself. It represents, in the first place, that all the scrap iron in the premises was sold to the pursuer; then it says that it was "set apart" or "at least was easily distinguishable." If all the scrap iron was sold, that is unmeaning. I take it, however, to mean that all the scrap iron in Scott and Sons' premises fell under this running contract with the pursuer. Now, then, what is the meaning of this arrangement? It seems to be a continuing arrangement under which Scott and Sons agreed to furnish the pursuer with scrap iron; and there was an advance made by bills of exchange in anticipation of future deliveries. As far as delivery was concerned, deliveries were to be made from time to time as the scrap iron grew. And money was, on the other hand, to be advanced from time to time to pay for the iron. The question is, is that a sale in the sense of the 1st section of the Mercantile Law Amendment Act? I am of opinion it is not. In the first place, the subject is not a specific *corpus*, and therefore in purchasing the pursuer acquired no *jus ad rem specificam*. In the second place, it is plain that the delay in delivery arose from the nature of the contract itself, and did not accidentally arise from any carelessness or want of precaution. The provision of the first section of the Mercantile Law Amendment Act is—"Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent

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for any creditor of such seller, after the date of such sale, to attach such goods, as belonging to the seller, by any diligence or process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same." That is the only case where this Act applies, and what is contemplated there is a present sale in the ordinary sense, whereby the seller is under an immediate and present obligation to deliver a specific *corpus*. The buyer, on the other hand, is under an obligation to pay an ascertained price, while the goods are allowed to remain or happen to remain in the custody of the seller contrary to the spirit of the contract, which contemplates immediate delivery. Any other construction of the clause would lead to strange consequences.

It was a peculiarity of Scotch law before this Act was passed that where the price had been paid but the goods not delivered, the seller remained undivested owner of them, and was entitled to retain them in security for the unpaid balance of a current account, or, in the event of his bankruptcy, his creditors could attach them. In that respect Scotch law differed from the English law, for then where there was a well-ascertained obligation to deliver the goods the property was with the purchaser, and the hardship that might arise under our law could not occur. It was to avert that hard case that the Mercantile Law Amendment Act was passed; but if we hold that the pursuer is to prevail here we shall introduce into our law a principle not known in the law of England. This contract, which is very like a contract for furnishings with advances, would be assimilated to a contract of sale, and therefore, as I think that there can be no doubt that the section of the Act of Parliament refers to the case of a present sale where there is a right *ad rem specificam*, and where a certain price has been paid and immediate delivery may be required, I am for adhering to the Lord Ordinary's interlocutor.

LORD DEAS.—The first section of the Mercantile Law Amendment Act, which has been quoted by your Lordship, bears—"Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for the creditors of any such seller, after the date of such sale, to attach such goods as belonging to the seller, by any diligence or process of law." Now, in the present case the contract related to a subject which was to be produced, and there was no obligation on the seller to produce it. The amount to be delivered was to be determined by the amount produced. That being the nature of the contract, I am of opinion with your Lordship that it does not fall within the category mentioned in the statute of goods sold but not delivered to the purchaser remaining in the custody of the seller. There was no present right of delivery conferred on the purchaser at the date of the contract, and I do not see that there was any right to demand delivery at the date of the sequestration. It is not necessary to determine which of these dates is the proper one to look to, because whichever you take the result is the same.

The only difficulty I have had arose from the suggestion that there were two contracts, one made by the letter of 22d September 1875 and the other by the letter of 11th January 1876, and the question which occurred to my mind was whether a different rule might not be applied to the first contract, so far as the scrap iron under it remained undelivered. But supposing that it had been averred that there was undelivered scrap iron under the first contract at the date of the second, the construction which the pursuer puts on that second contract

makes it impossible for him to contend for any distinction between the contracts, because he says in the 4th article of the condescendence—(His Lordship here read the 4th article). If that is a correct description of the contract there can be no distinction between the scrap iron sold under the first and second contract. I think the construction of the letter of 11th January is by no means clear, and I would have had considerable difficulty in construing it in the way the pursuer has done. But he adheres to his statement, and does not propose any amendment. But supposing that the pursuer had not got delivery of all the scrap iron to which he was entitled under the contract of 22d September, he would require not only to aver that he had not got delivery, but also that the scrap iron which he was entitled to under the contract of 22d September was distinguishable from the scrap iron comprehended under the contract of 11th January. No such averments are made, and we must therefore take the case on the assumption that the whole subject of the sale is comprehended under the contract of 11th January 1876.

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In taking the contract, it is just a case in which the subject of the contract was first to be produced, and in which there was no obligation to produce it. The price to be paid was also to be ascertained by the amount produced and the price at the time. I am therefore of opinion that the case does not fall under the provisions of the first section of the Mercantile Law Amendment

MURK—I have come to the conclusion that the contract now in question does not fall under the first section of the Mercantile Law Amendment Act. I had some difficulty with regard to that part of the iron which I understood was claimed as undelivered under the first contract, because that iron was sold at a fixed price per ton, and as I read the summons it concludes for delivery of a portion of that iron. If, therefore, the pursuer had been able to show that a part of the iron sold under that contract was undelivered at the date of the second contract I should have had difficulty in holding that he had no demand delivery of it. But, as I understand the matter from the explanations which have been made during the discussion, the pursuer so construes the second contract as to make it cover all the scrap iron in the premises of Messrs. James and Sons at its date, and all that was to be produced up to the 1st of January. And when the communications between the parties are examined I see why the second contract is so worded. What the pursuer bought under the first was thirty tons, and the produce of the months of October and November. But the correspondence shews that he delayed taking delivery till January, and did not get the whole; and he accordingly got delivery on the 8th and 25th of January of what appears to have been made under that contract; and there is no averment that any of the scrap iron produced during October and November was undelivered. We have now, therefore, nothing to do with the first contract, and the terms of the second are peculiar. With the exception of the scrap iron that may have been collected in December, the subject sold was not in existence in January 1876, and there was no definite price fixed, as it was to be paid for at the current market price. So that at the end of the year the iron would not only require to be weighed in order to ascertain the quantity, but the market price would also require to be ascertained in order to fix the price of the iron, and as to that there might be disputes, as the market price might fluctuate considerably during the period. The transaction was there-

- No. 27. fore not a sale in the ordinary sense of that word, but it was, as your Lordship has described it, a continuing arrangement to supply iron until a bill was run off, and such an arrangement cannot, I think, be held to fall under the clause of the statute.

THE COURT adhered.

LINDSAY, PATERSON, & Co., W.S.—J. & A. PEDDIE, W.S.—Agents.

- No. 28. ARCHIBALD ALLAN AND OTHERS, Pursuers.—*Lord-Adv. Watson*—*Balfour*.
Nov. 22, 1876. The Rev. WILLIAM CÆSAR AND OTHERS (Stiell's Trustees), Defenders.
Allan v. Stiell's Trustees. —*Lee*—*J. P. B. Robertson*.

Trust—Powers of Trustees—Charity School.—A testator directed his trustees to employ the residue of his estate in founding and endowing a hospital (to bear the testator's name) "for the aliment, clothing, and education of poor children for ever." He gave directions for the building of a hospital to accommodate thirty inmates, a master, &c., with a school-room for the education of the inmates, and of sixty day scholars, or of a greater or lesser number should be deemed expedient. He empowered the trustees "from time to time as they shall see cause, to make such alterations, amendments, improvements & additions to the rules and regulations laid down by me for the management of the said hospital and public school, they always keeping in view the original intention of said charitable institution." The benefits of the charity were limited to a certain district, and some inhabitants of the district raised an action against the trustees to have them compelled to carry out the intentions of the founder. The pursuers alleged that the trustees were acting contrary to the will of the founder by (1) the discontinuance of inmates of the hospital; (2) the institution of a preliminary examination before entrance to the school; (3) the division of the school into a higher and a lower school, and the institution of an examination for pupils passing from the lower to the higher school; (4) the provision of higher education in languages and physical sciences; (5) the increase of the teachers' salaries; (6) the institution of bursaries; and (7) the introduction of paying pupils along with the free scholars.

Held that all these changes were within the power of the trustees if the bursaries were confined to the free scholars, and the paying pupils paid the whole expense which their education cost the charity.

- 1st DIVISION. GEORGE STIELL, smith, North Bridge Street, Edinburgh, died in 1812.
Ld. Mackenzie. leaving a trust-disposition and settlement, by which he conveyed his property, which consisted of houses and superiorities in Edinburgh, and his personal estate, amounting to £2300, to trustees. The free income at the time was about £700, and (after paying for the building) at the time the present action was brought was about £800. The purposes of the trust after paying expenses and some small legacies, were as follows:—

"Fifthly. The whole residue shall be accumulated as into one capital at my death, and the yearly interest or profits arising thereon shall be applied in founding and endowing a hospital or charitable institution within the village of Tranent, or in its immediate vicinity, in the county of East Lothian, and for the aliment, clothing, and education of poor children for ever, and which hospital shall always be called, denominated and described 'George Stiell's Hospital.' And for this purpose my said trustees shall, as soon as convenient after my death, purchase or lease a piece of ground in the said village of Tranent, or vicinity thereof, of not under half an acre in extent, as a site for the said hospital, the price of which to be taken from the moveable or personal property to be left by me at the period of my death, and the annual rents arising from the heritable property above disposed, and the value of which purchase or lease shall form part of the consolidated fund as above. And I recommend:

the said trustees to procure, as soon after my death as possible, a space in the church of Tranent fit to accommodate the boys and girls to be admitted into the hospital, and the master, assistant, mistress, and servants belonging to it.

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"Sixthly. The yearly rents, interest, or profits of my said heritable and moveable property, accumulated as aforesaid, shall also be accumulated till the same amount to a sum sufficient for the building, erecting, and finishing, upon the said piece of ground to be purchased or feued as above mentioned, a house having accommodation for thirty children, or a larger or lesser number, according to circumstances, a master, assistant, and servants, and a schoolroom for the education of these children, and of sixty children, or a larger or lesser number, as shall be deemed expedient, to be admitted as day-scholars. Then I appoint such house or hospital to be built and finished under the direction of my said trustees, upon a plan to be framed on by them, and to be called 'George Stiell's Hospital;' and I recommend to my trustees that the building be neat and commodious.

"Seventhly. After the said hospital is built and completely finished, in manner before-mentioned, I appoint my said trustees herein named, and they are to be assumed, to select with care a master and assistant for the said hospital, of good and respectable characters, qualified to explain the doctrines and duties of the Christian religion, and capable of teaching the English language grammatically, writing, and arithmetic; and be allowed salary, to the master or rector, the sum of forty pounds sterling per annum, and to his assistant, the sum of thirty pounds sterling per annum.

"Eighthly. As soon as the said hospital is fit to be possessed, I appoint my said trustees to select from the parish of Tranent sixty boys and girls, of a larger or lesser number, according to circumstances (those of the name Stiell to be preferred), and to admit them into the day-school within the hospital, where it shall be the duty of the said master or rector and assistant to teach them the English language, writing, and arithmetic, between the hours of nine in the morning and one in the afternoon, and between three and six o'clock in the afternoon, during the summer months; and between the hours of nine aforesaid and twelve o'clock noon, and one o'clock afternoon, during the winter months. And it shall also be the duty of the said master or rector and his assistant to meet the children in the schoolroom on Sunday evening after their return from the worship, to instruct them in the principles of the Christian religion, specially the doctrines and duties of our holy religion according to the approved standards of the Church of Scotland; and the said master and his assistant shall be bound to subscribe the formula prescribed by law to all the teachers within the realm of Scotland; and the conduct and behaviour of the said master and his assistant, as well with regard to their mode of teaching as in other respects, shall be subject to the inspection, direction, and control of the said trustees; and it shall be in the power of the said trustees, if they see cause, to remove either the master or his assistant, or both, upon three months' previous notice being given. And I appoint the elections for all children to be admitted into the said hospital, either to reside therein, as hereinafter provided, or as day-scholars, as afore, to take place within the hospital twice in the year, upon the first Monday of April and first Monday of October respectively; and no boys or girls shall be admitted who are affected by any contagious distemper, unless they are elected upon either of the said days, except the first election for day-scholars, which is to take place as soon as the hospital is fit to be possessed, as above directed.

"Ninthly. When the yearly rents, interests, or profits of the subjects hereby disposed shall be more than sufficient to defray the salaries to

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the rector and his assistant, servants' wages, and all other contingent and necessary expenses of managing and maintaining the said establishment and hospital as a day-school, I appoint the said trustees herein named, or to be assumed in manner after-mentioned from time to time, to choose from residenters for at least three years in the said parish of Tranent, and to admit into the said hospital as many boys or girls as the surplus of the said yearly revenues will afford to maintain, clothe, and educate; and the said boys and girls shall attend the said public school at the hours before-mentioned, or at such other hours as the said trustees shall think proper, and be taught to read English grammatically, writing, and arithmetic. The said boys or girls shall not, at the time of their admission, be under seven, nor above ten years of age; nor shall they be allowed to remain in the said hospital after they attain the age of fourteen years complete.

"Tenthly. I appoint the preferences of admission into the said hospital, either to reside therein, or as day-scholars, to be as follows:—(1) Boys or girls of the name of Stiell, and failing of them, boys or girls of any other name or names belonging to the parish of Tranent; (2) boys or girls belonging to the parishes of Prestonpans, Gladsmuir, and Pencaitland, lying in the said county, respectively and successively after others.

"Twelfthly. I recommend to the said trustees to appoint a mistress or governess for the said hospital, whose business shall be to take charge of the girls in the hospital when not attending their education in the public school, and at least two hours in the day to teach the girls wash-seam and other necessary and useful branches of sewing, to take charge of the linens and whole furniture in the hospital, officiate as steward in purchasing victuals and drink, and to render an account thereof to the rector, so as he may account to the factor, oversee the dressing of the victuals, and superintend and direct the maid-servants of the hospital; and the mistress or governess' salary shall be such as the trustees shall think proper and reasonable.

"Seventeenthly. I hereby direct and appoint the said trustees or governors to pay to each boy or girl after they leave the said hospital, provided they have conducted themselves properly and correctly when in the hospital, such sum of money, not exceeding ^{sterling,} as the said trustees or governors shall think proper, in order to defray their outfit for any service or profession which they may choose; but the money so to be allowed shall not be paid until the boy or girl receiving the same shall have been at least three months in the service or profession which they have chosen, and upon a certificate from the master or mistress they are with that they have behaved properly during that period.

"And, lastly, I do hereby authorise and empower the said trustees or governors, from time to time, as they shall see cause, to make such alterations, amendments, improvements, or additions, to the rules and regulations laid down by me for the management of the said hospital and public school, they always keeping in view the original intention of said charitable institution. And I hereby direct and appoint the prices of the lands and others hereby disposed, which may hereafter be feued or sold by the said trustees or governors, and any other part of the accumulated capital of my estate as aforesaid which may come into the hands of the said trustees or governors, to be laid out in the purchase of other lands, or vested in heritable securities, as the said trustees or governors shall think proper, for the purposes aforesaid, and as they from time to time shall direct and appoint."

In 1818 the trustees feued eight acres of ground in the neighbourhood of Tranent, and upon this ground a hospital was completed in the year 1822 at a cost of £3500.

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In February 1874 Archibald Allan and others, all parishioners and residents in Tranent, brought an action against the trustees for declarator that all the funds in their hands should be applied "in founding and endowing a hospital or charitable institution within the village of Tranent, or in its immediate neighbourhood, in the county of East Lothian, and for the relief, clothing, and education of poor children for ever, belonging to the parish of Tranent, or, failing them, belonging to the parishes of Prestonpans, Gladsmuir, and Pencaitland, in the order of preference directed by the said trust-disposition and settlement, including the children of all residents, parishioners, or others who may be unable to defray the expense of affording proper education to their children, and which hospital ought always to be called, denominated, and described 'George Stiell's Hospital'; and that the application of the whole or any part of the said estate, heritable or moveable, or of the yearly interest and profits arising therefrom, to the providing the means of education to other than the poor children of the parish of Tranent, or, failing them, poor children of the parishes of Prestonpans, Gladsmuir, and Pencaitland, in the county of Haddington, respectively and successively after others, including under that denomination as aforesaid, was and is illegal, incompetent, and unauthorized; and that the defenders have been and are administering the funds and affairs of the said institution in a manner contrary to the will, intention, and purposes of the said George Stiell." There were conclusions for the preparation of a scheme for the management of the hospital and for an accounting by the trustees.

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The pursuers pleaded;—(1) The object and wish and intention of the said George Stiell, according to the just and true construction of his said trust-disposition and settlement, having been to afford gratuitous education to poor children of the parish of Tranent, and, failing such children, of the adjoining parishes above-named, for ever, the trust-funds ought to have been and to be applied to that purpose, and the pursuers should have decree in terms of the first declaratory conclusion of the summons. (2) The various changes and alterations made by the defenders on the constitution, management, and administration of the hospital and school being at variance with the wish and intention of the said George Stiell, were and are illegal and *ultra vires* of the defenders. (4) In respect the said institution is not being administered and managed in accordance with the will and intention of the said George Stiell, the Court ought to adjust and approve of a scheme or constitution for the future administration and management of the said institution, as concluded for.

The defenders pleaded;—(1) No title or interest to sue. (2) All parties not called. (5) The defenders having acted, in regard to the recent alleged changes, in accordance with the powers conferred upon them by the will of the founder, and trust-disposition and conveyance following thereupon, they should be absolved from the declaratory conclusions of the action.

The Lord Ordinary pronounced this interlocutor:—"Repels the first and second pleas in law of the defenders: Reserves all questions of expenses, and before answer allows the parties a proof of their respective averments, in terms of the 'Evidence (Scotland) Act, 1866': Grants diligence to both parties for citing witnesses, and appoints the proof to be led before the Lord Ordinary on a day to be afterwards fixed."

The defenders reclaimed, and the Court pronounced this interlocutor 15th February 1875:—"Recall the same in so far as the Lord Ordinary, before answer, allows the parties a proof of their respective averments in terms of the 'Evidence (Scotland) Act, 1866,' and grants diligence: *Quoad ultra* refuse the reclaiming note, and adhere to the interlocutor complained of: Further, remit to Mr Alexander S. Kinnear, advocate, to examine the

No. 28. minute-books, books of accounts, and all other books and writings connected with the administration by the defenders of the charity called
 Nov. 22, 1876. 'George Stiell's Hospital,' and to receive the explanations and suggestions of both parties, and to report to this Division of the Court, with special reference to the articles of the condensation 13 to 21 inclusive, whether the administration of the defenders has been in conformity with the provisions of the founder's trust-disposition and settlement, dated 27th January 1808, or in what respects, if any, the defenders have departed from or acted contrary to the provisions of the said deed; and appoint the defenders to exhibit to the reporter the whole books and other writings above specified, reserving in the meantime all questions of expense."

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Mr Kinnear presented a report which stated, *inter alia*,—"On the 1st January 1822 a rector was appointed for the hospital at a salary of £4 a-year, with board, &c., in the hospital, to which an addition of £10 a-year was afterwards made as a gratuity for his trouble in keeping the books of the hospital. On the 6th March 1823 an assistant-master was appointed 'upon the terms and conditions of the trust-deed,' and on the 10th April 1822 a mistress and governess was appointed at a salary of twenty guineas per annum.

"On the 6th of July 1822, sixty-one children, forty-one boys and twenty girls, were selected by the trustees as the first to be admitted to the hospital as day-scholars. The selection appears to have been made with the assistance of the Reverend Mr Henderson, minister of Tranent. This gentleman was not at that time a trustee; for the hospital had not yet been conveyed by the original trustees to the *ex officio* governors, but a minute of the meeting held at the hospital on the 3d June 1822, in which it is recorded that Mr Henderson was present, and 'mentioned to the meeting that he had made intimation both in writing and verbally to the residents in the parish, that all those who wished to send children to be educated at the hospital should make application to him, and that a great many had accordingly applied to him, of which he had taken and was keeping a correct list. And as it was proposed to open the hospital in the course of ten days or a fortnight, he would continue to take in the names of all applicants, and would, at the first meeting of the trustees lay the list before them, and which would specify the names of the children's parents, and their place of residence, and also their character and station in life, as personally known to him.'

"The complete list prepared by Mr Henderson is not engrossed in the minutes, and the number of the applicants is not recorded. But at the next meeting, July 18, 1822, the trustees are recorded to have selected from the list of applicants reported to them by Mr Henderson the number of scholars above-mentioned. A list of these, specifying their names and ages, and the names of their parents, is engrossed in the minute-book. The children are generally from eight to ten, but one is six and one twelve years of age. The occupation of the parents is also specified. The great number are said to be 'fishermen,' others are 'labourers,' 'hinds,' 'colliers,' 'weavers,' 'tailors,' and 'shoemakers.' Two are 'pensioners,' several are described as 'widows,' and one of the children is 'an orphan.' None of the parents in this list are described as paupers. This designation, however, occurs occasionally, though rarely, in the lists of the children admitted in subsequent years. The reporter has examined the whole of these lists; and, if they are accurate, which may probably be assumed, they indicate that the children selected for the benefits of the hospital during the whole period which has elapsed since 1822 have always belonged to the same class. A great number are the children of fishermen."

and the others are the children of hinds and artisans such as those above-mentioned. No. 28,

"The children admitted in 1822 were day-scholars only. No boarders were as yet admitted as inmates of the hospital. But in the following year, at a meeting of the trustees held on the 13th May 1823, twenty children, fifteen boys, and five girls were selected from a list of sixty-five, to be 'inmates, boarders, or residents within the hospital, in terms of the trust-deed of George Stiell, and to be received into the hospital as soon as it is found convenient to take them in.' The designation of the parents of those children, as stated in the list of applicants engrossed in the minute-book, are similar to those in the list above-mentioned. Nov. 22, 1876.
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"At the same meeting the directors adopted a code of rules and regulations for the administration of the hospital. The following rules, however, seemed to be important as shewing the character of the hospital at its first establishment; and the kind of education which the children were to receive:—

' RULES.

'1. The establishment is to consist of a rector, an assistant teacher, a mistress or housekeeper, and maid-servants.

'2. The number of inmates to be at present limited to twenty, viz., fifteen boys and five girls.

'3. The number of children to be admitted as free scholars to be at present limited to eighty.

'4, 5, 6 are rules for the conduct of the children.

'7. Books, paper, pens, and ink, furnished to free scholars, must be paid for to the rector when delivered, and if parents or relatives fail to make these payments when such furnishings are required, the governors are compelled to state that their children must lose the benefit which their use would give, and must be left behind in the less advanced stages of education, from which they would otherwise have been removed.'

"The number of day-scholars appears to have increased from time to time. The number of inmates of the hospital appears for some time to have been maintained.

"The minutes appear to shew that for a number of years the hospital was administered in exact conformity with the truster's directions. The staff of office-bearers was precisely that which he had appointed; the children included day-scholars and inmates of the hospital; and the instruction appointed to be given to them was, with one immaterial exception, limited to the subjects expressly mentioned in the trust-deed. The exception is that the children are to be taught church music, which appears to have included nothing more than psalm singing.

"It may be proper to notice that the truster's direction in regard to the payment of sums of money to the children leaving the hospital was also carried out after the 29th November 1828. The minute of meeting of that date directs the factor to pay to each boy or girl who have left the hospital, or who may leave it, the sum of £5 upon such boy or girl obtaining and producing the required certificates in terms of the trust-deed.

"The first important change in the administration of the charity appears to have been made on the 16th February 1830, when it was resolved to reduce the number of inmates. It is recorded in the minute of a meeting of trustees on the 6th February 1830 that the factor stated to the meeting that it 'appeared to him a matter of great importance whether, from the fall of shop and house rents belonging to the trust, it would be expedient at present to admit no new inmates into the hospital; (2) the propriety of admitting, at any time, girls into the hospital;' and the trustees resolved only to admit one boy in addition to those already in the hos-

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pital. They further resolved to fit up an additional room as a schoolroom, in which the assistant-master should teach the junior class, and resolved to admit as many scholars as would make up the number to seventy in each schoolroom.

"From this date until the recent change in the system of management of the hospital the number of inmates living at one time in the hospital appears to have been generally about six or eight. At one time there were only four, and the numbers never seem to have exceeded nine. The school appears to have been divided, in terms of the minute just quoted, into an upper and lower school, the former under the management of the rector, and the latter under that of the assistant-master.

"It appears to have been in the beginning of 1870 that it first occurred to the trustees that a material change in the system of management of the hospital might be made with advantage.

"At this time the actual condition of the hospital appears to have been as follows:—There were eight inmates, four girls and four boys, and 12 day-scholars on the foundation. The former were maintained in the hospital, and the latter received every day a roll of bread for luncheon. School-books were not supplied gratuitously to the day-scholars, but sold at prime cost. The day-scholars had also to pay a small sum per month for pens and ink. It appears from the minutes that the applications for admission were much more numerous than it was possible for the directors to grant. The children in the lower department were taught reading, the simple rules of arithmetic, and the elements of grammar and geography. The rector's classes were taught reading and grammar, with parsing, analysis, and etymology. There were also taught history, writing to dictation, composition and geography. In arithmetic they were taught the ordinary rules, vulgar and decimal fractions, and those who showed a capacity for learning were taught Latin and the elements of geometry. It should seem, however, that the instruction in these latter branches was very elementary. All the children were taught singing. All the children received religious instruction.

"It appears from the minutes that the directors were satisfied with the general condition of the school, and the minute of the meeting of 24 April 1870 bears that Mr Cæsar had that day examined the school and found it in good working order.

"The amended regulations, and a prospectus issued by the directors in September 1871, with a view to carrying out the new system, shew the most important changes introduced:—

"1. The discontinuance of the old system of boarding and maintaining children as inmates of the hospital.

"2. The restriction to sixty of the number of free scholars to be admitted on the foundation.

"3. The institution of a preliminary examination.

"4. The institution of an entrance examination at passing from the lower to the higher school.

"5. The provision in rule xii. for instruction in advanced arithmetic, Euclid, algebra, Latin, Greek, French, and the elements of physical science.

"6. The increase of the salaries of the teachers.

"7. The introduction of paying pupils to be taught along with the foundationers.

"8. The institution of bursaries provided for in rules vi. and xix.

"The prospectus published by the directors in September 1871 is generally in accordance with the regulations. It expresses the desire of the directors to extend the benefit of the funds which they administer, and to

improve the quality of the education given in the hospital; and it declares that to give effect to these views 'they have converted the upper division of the school into a high school,' to which 'those only will be admitted who pass an entrance examination.' Besides the subjects mentioned in the regulations, the prospectus contains a statement that 'it is proposed to introduce piano music, for which there will be a separate fee.'

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"To carry their resolutions into effect the directors, in October 1871, made an arrangement with the parents of the children who were then resident in the hospital, by which, in lieu of board, clothing, and £5 on leaving the school, the sum of £10 per annum was to be paid them up to the time when under the previous regulations they would cease to be inmates; masters were appointed at the higher salaries; and in addition to the masters a female teacher was appointed, first at a salary of £25 per annum with board, and afterwards, on 14th October 1873, at a salary of £60, but without board.

"The staff of masters now in the hospital is as follows:—

Head master, not including board and half of fees in upper school,	£85	0	0
Assistant, including allowance for board, and not including half of fees in lower school,	85	0	0
Assistant (female), without board,	60	0	0
Matron, with board,	28	0	0
	£258	0	0

"The rate of fees at present is—

Upper school, 5s. per quarter for English.

Do. 7s. for English, Latin, French, Mathematics, &c.

Lower school, 2s. 6d. per quarter.

"The head master estimates his share of the fees at about £20 per annum. The assistant master estimates his share at less than £10 per annum.

"In addition to teachers already mentioned, a teacher of the piano has been appointed, who is paid a separate fee by such pupils as she instructs. She receives no regular salary from the trust-estate. But the directors have agreed to pay her £10 a-year if the fees do not amount to £50. If they do amount to that sum no payment is to be made by the directors.

"The resolution of the directors to reduce the free scholars to sixty does not appear to have been carried out during any whole year. The numbers were reduced at the end of the session 1872-3. But they were increased at the beginning of session 1873-4.

"At a meeting of directors, held 5th April 1875, it was reported by the rector that there were present 181 children on the roll, of whom ninety-six were free and eighty-five paying pupils. Having considered this report and the state of the funds, the directors resolved to increase the number of free scholars from 100 to 120, and that, of this additional twenty, there should be at once admitted ten, and that the remaining ten should be admitted at the commencement of the next session. It was further agreed that Mr Caesar should give notice to this effect from the pulpit.

"The free scholars now on the foundation appear to be of the same class as before, and the reporter does not understand it to be maintained that they are not proper objects for the charity. It would appear from the designations of the parents that many of the paying pupils also belong to the same class. There are among these the children of 'hinds,' fishermen,' 'labourers,' and 'miners.' But others of the parents are described as 'farmers,' and many of them are tradesmen, whose position,

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however, cannot be exactly ascertained from the mere description of their trade. The directors certainly contemplated that the persons who might take advantage of this part of their scheme should be such as were perfectly able to pay for the education of their children, and Mr Caesar, at the meeting above-mentioned, stated to the reporter that one of the reasons which suggested the introduction of a new system was the desire of many persons throughout the parish of respectable position and comfortable circumstances to have their children admitted into the hospital for the payment of fees. The pursuers have pointed out, as indicating the class who may in this way take advantage of the new system, that the children of Mr Caesar himself, the minister of the parish, were till recently among the paying pupils.

"It must be observed that the directors have never acted on the principle that the benefits of the foundation should be confined to actual paupers, or to persons who were altogether unable to pay for the education of their children. Mr Caesar, with whom, since he became a director, the responsibility of selection has chiefly lain, explains that the children admitted have been those whose parents 'would have difficulty in paying fees,' and 'as much if not more difficulty than any other persons in the parish.' But an absolute incapacity to make any payment was not considered indispensable to qualify for admission.

"All the children, whether paying or on the foundation, are treated in school in the same manner, except that a roll of bread is given to the foundationers daily for luncheon, while the other pupils, who have the same luncheon, pay for what they receive.

"The education in the lower school does not seem to be in any respect more advanced than that contemplated by the trust-deed. Nothing more appears to be taught than the subjects specially mentioned in the ninth head of the trust-deed, with the addition of geography and singing. The addition of these subjects, so far as they can be taught in the lower school, will not probably be maintained to constitute a violation of the trust.

"The subjects taught in the upper school not included among those specified by the testator are geography, mathematics, Latin, and French. Greek, although mentioned in the prospectus, has not in fact been taught under the present system. All of these subjects including, in one instance, the rudiments of Greek, were taught occasionally, as above explained, before the new system was adopted.

"The pursuers maintain that by the changes now explained, 'the upper division of the school has been converted into a high school, to which those only are admitted who pass an entrance examination, appointed by the trustees'; and that the effect of the new arrangement is to divert the funds of the hospital from the class of poor children intended to be benefited, and to provide, partly out of the funds of the hospital, a cheaper and higher class of education for the children of parents who are able to procure and pay for it at other educational institutions in the parish of Tranent.

"The institution of an examination at entering the school, or passing from the lower school to the higher, appears to be a very proper regulation, within the powers of the directors. The entrance examination is not competitive, but is intended to enable the directors to judge whether children, who have already been provisionally selected, are qualified to benefit by the teaching given at the hospital. This examination takes place twice a-year, in April and October; and it is stated both by the rector and Mr Caesar to be extremely elementary. The subjects of the

examination are in general reading, writing, simple addition, and subtraction. But the questions vary according to the age of the child. No. 28.

"The second examination at passing into the high school is conducted by the rector, and is confined to the subjects which have been taught in the lower school. The practical result is that the children are drafted into the upper school when the masters think them fit for it, subject to the approval of the directors."

The pursuers argued;—Down to 1870 the hospital was simply a charitable institution. At that time the directors converted it into a hospital and a high school. They acted contrary to the will of the founder (1) in taking paying pupils; (2) in abolishing inmates; (3) in employing a higher class of teachers. The funds were diminished for the poor children by being spent on paying pupils. The accommodation and teaching powers were fully employed for the benefit of the poor before 1870. The name of the institution has been changed into "Stiell's Hospital and High School." The salaries of the teachers having been fixed at very low terms shewed the founder's intention that only elementary education should be given. The trustees had no discretion as to the class of children benefited, which was described by the founder as consisting of poor children.

The bursaries instituted in 1871 might go to paying pupils, who were not within the contemplation of the founder.¹

Argued for the defenders;—There was no diversion of the funds and no exclusion of the objects of charity contemplated by the founder. The new pupils were paying for themselves. Their fees were sufficient to pay the additional salaries of the masters. The tone of the school was raised and the teaching power increased by the addition of paying pupils. Besides, the object of the founder was not to educate pauper children. Children might be able to pay a small fee and yet be poor in the sense of the trust-deed.²

At advising,—

Lord President.—The pursuers of this action challenge the legality of certain new regulations made by the defenders as the acting governors and directors of Stiell's Hospital, Tranent, on the ground that they involve a diversion of the funds of the endowment for purposes not contemplated by the founder. It is not disputed that the governors have the power of making new regulations conferred upon them by the deed of foundation, and it is worth while to read the terms of that power as the limit of the discretion vested in the trustees. They are authorised "from time to time, as they shall see cause, to make such alterations, amendments, improvements, or additions to the rules and regulations laid down by me for the management of the said hospital and public school, they always keeping in view the original intention of said charitable institution." The power thereby conferred seems in accordance with the discretion always held to be vested in the trustees of a charity of this kind, subject to the control of the Court, and the principle which guides the Court is very much that has here been laid down as the power to be allowed the trustees.

¹ Manchester School Case, Nov. 11, 1865, L. R. 1 Equity, 55.

² Manchester School Case, May 13, 1867, L. R. 2 Chancery, 497; Attorney-General v. Hartley, Dec. 18, 1820, 2 Jacob and Walker, Chanc. Reports, 353; Larrow Case, Aug. 17, 1810, 17 Vesey jr., 491; Latymer's Charity, Jan. 29, 1869, L. R. 7 Equity, 353; Trinity Hospital (Clephane v. Magistrates of Edinburgh), Dec. 7, 1866, 5 Macph. 115, 39 Scot. Jur. 65, Feb. 29, 1869, 7 Macph. H. L. 7, 41 Scot. Jur. 306.

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There are a number of things complained of here without much foundation into which it is not necessary to examine in detail. But for the purpose of examining the more formidable it is necessary to understand the intention of the founder as gathered from the trust-deed. It is quite clear from it that the founder intended that the first thing to be done was to feu a piece of ground in the village of Tranent, and a certain accumulation of the capital was directed to that end. There was then to be a further accumulation of the rents and interests of the capital for a particular time, in order to put the trustees in funds to build a house for the accommodation of about thirty boarders, and a master, an assistant, and servants. The boarders were to be clothed and maintained there. But the house was also to be so situated as to have a schoolroom for about sixty children as day-scholars. The house being built, the next thing to be done was, not to appoint children to be inmates of the house, but, on the contrary, to set up the day-school; and it is quite plain that the institution of the day-school was to be preferable in point of time to the setting up of the hospital proper—that is to say, the house in which the children were to be clothed and maintained. It was only if there was a sufficient surplus after providing the day-school that this secondary object was to be carried out.

When the case was originally before us we had an argument on the relevancy of the action, and upon certain pleas which the Lord Ordinary had repelled. It appeared to us then (while we agreed with the view taken by the Lord Ordinary so far) that this was a case in which it was not desirable that proof should be taken, and we therefore remitted to Mr Kinnear to report. His report is now before us, and it is a very able and satisfactory one. Although he has not told us how far in his opinion the trustees have exceeded their power, if they have done so at all, he has furnished us with materials for forming an opinion ourselves. He says that it seems to have been in the beginning of the year 1870 that it first occurred to the governors that a material change in the management of the hospital might be made with advantage; and the most important changes introduced in September 1871 were as follows:—(1) The discontinuance of the old system of boarding and maintaining children as inmates of the hospital; (2) the restriction to sixty of the number of day-scholars to be educated on the foundation; (3) the institution of a preliminary examination; (4) the institution of a further examination of children passing from the lower to the upper branches (now for the first time introduced); (5) the provision for advanced education in languages and the physical sciences; (6) the increase of the teachers' salaries; (7) the introduction of paying pupils along with the free pupils on the foundation; and (8) the institution of bursaries.

In regard to the first of these matters—the discontinuance of the old system of boarding and maintaining children as inmates of the hospital—it is no doubt an important question. It must be kept in view that the truster himself had obviously a preference so far for a day-school in comparison with the hospital proper that it was not until the day-school had been fully and satisfactorily set up that his trustees were to proceed to elect inmates to the house. At the same time it is not possible to disguise from one's self that he did mean that as soon as the day-school was set up, capable of accommodating sixty scholars, there should be a proportion of about one-half of that number educated as inmates of the hospital. It has been represented by the governors, and it is quite within the knowledge of the Court, that there are great objections to the maintenance

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a system of that kind at the present day, and that wherever it is possible it is very desirable that the system of maintaining and clothing children in such an institution should give way to the far better object of providing a day-school. The only question is whether it is within the powers of the trustees to make at change—to discontinue and abandon altogether what constituted one part of the founder's original scheme. This question is certainly not free from difficulty, but upon the whole I am inclined to say that this is quite within the powers of the governors. The powers intended to be vested in them were to make such alterations upon the original scheme of the founder as might be considered necessary or deemed expedient in the different constitution of society and the altered circumstances of the times generally; and there are various cases in which the Court have sanctioned alterations of this kind. Within the last few days we have given our sanction to a change of a similar kind, though not exactly of the same description as this, in the case of Bishop Burnet's foundation (reported ante, p. 106), and I cannot help thinking it is within the power of these trustees, subject of course to the control of the Court, to prefer the day-school to the boarding system, even to the extent of discontinuing the boarding system altogether. Therefore I am not prepared to say that they have exceeded their powers in this respect.

The complaint which is made under the second head, that the governors have restricted their scholars to sixty, is not well founded in point of fact.

The third complaint is as to the institution of the examination for the children to be admitted into the day-school. I think this is a regulation entirely within the powers of the trustees. I do not think it can be maintained that any person has an absolute right, upon the mere ground of poverty alone, to the benefits of the educational endowments. I should be very sorry indeed to give any countenance to such a proposition, and I think it was quite within the powers of the governors of such an institution to say that they would select from among the poor children of the class intended to be benefited the most promising, and those who were likely to benefit most from the education which they were prepared to give. The preliminary examination of such a child must be of a very slight kind, but it may shew what children are best suited to reap advantage from their educational training. In the same manner, if the institution of the higher school be in itself lawful, I cannot for one moment doubt that the examination of children passing into it was also quite within the power of the trustees.

In the next place, I think the increase of salaries was quite within the power of the trustees. And further, with regard to the introduction of (1) what is called the higher school, and (2) of bursaries, I cannot see any illegality, provided that the benefits are confined to the objects of the founder's charity. But it is necessary to consider these changes in connection with the last and most important change—that of the introduction of paying pupils. In regard to that, I am far from saying that it was not in the power of managers of a charitable institution of this kind to add to it the instruction of pupils who pay for their education. Unquestionably, some of the best institutions both in Scotland and England were originally charitable institutions purely, and yet have grown up to be schools of very great importance for the instruction of the children of both rich and poor persons. The only condition that it was absolutely necessary to add to was that the paying pupils should not derive any direct benefit from the charitable fund. It would not do to say we shall take in children whose parents may pay to a certain extent, and to give them so far the benefits of the

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charity, advancing them to a higher position of culture than their parents could give them. That proceeding would not fall under such a foundation as this. There was also no objection to the bursaries, provided that the paying pupils did not benefit by them. In short, what the managers of an institution of this kind must do in adding paying pupils to the foundation is to make sure that in affording the benefits of education to the paying pupils they shall take care that the pupils paid the full value of it, or, in other words, that they shall not be educated either wholly or partially at the expense of the charity. It is not necessary that they shall make a profit by paying pupils. But if there is a margin of profit they must at least pay the full expense of what they get. The question comes to be whether they do so here. The trustees have made a mistake in confining the number of free scholars, and although they have increased their number they have not yet increased it to such a point as to exhaust the funds of the charity. On the contrary, it seems quite clearly made out that there are charity funds in their hands which would suffice to educate a large number of poor children in the proper sense of the term than they have at present in the school. And so in the present administration of these funds they are really making use of the funds for the benefit of what are called paying pupils. In short, the school funds are administered in such a way as to give instruction to those who are not objects of the charity. The amount contributed by paying pupils is plainly insufficient to furnish their quota of the expenses of the establishment. I think it indispensable, therefore, that we set the managers right in so far as regards that matter; and it follows from what has been said in respect to the institution of bursaries that these must plainly be confined to the proper objects of the trustor's charity, because if bursaries provided out of the charity were given to paying pupils the benefit of the charitable fund would be given to persons who are not the objects of the foundation.

It appears to me, therefore, as regards these matters, that we ought to direct that this part of the scheme of the managers should not receive effect. I am not disposed to say that in any other respect there is any error in principle in what has been proposed, and I can see a great deal of expediency in the general scheme. I think that the best course would be to make a finding in accordance with what has been suggested, and to remit to Mr Kinnear to adjust the scheme which the trustees have issued in accordance with these views.

LORD DEAS.—We have here a very clamorous summons against trustees who have endeavoured to discharge their duty to this charity conscientiously and to the best of their ability. If there has been an error at all, it is now admitted to have been an error of judgment merely, and I can only say, if there has been an error of judgment at all, I do not think it has been a great one. I agree with all that has been said by your Lordship in respect to the things you consider to have been within the power of the trustees. With respect to admitting or excluding paying pupils, I should prefer that there should not be any finding at present. The only conclusions of the summons which can be given effect to refer to the preparation of a scheme for the management of the hospital. These conclusions are not objected to, and there are good grounds for directing the preparation of such a scheme apart altogether from any charge or complaint against the trustees. Important changes which your Lordship proposes to make have been made—such as the discontinuance of inmates—and I quite agree with the observation that there has been a change of opinion in the present

pon that subject, and in favour of giving children the benefit of domestic
 aining, if that can be done consistently with carrying out the object of the
 under. Another change which it is proposed to sanction is the increase of the
 laries of the masters, and to this the trustees are entitled to get judicial sanc-
 on also. There are besides other changes for which, if they are proper changes,
 ie trustees are entitled to obtain the sanction of the Court, and I can therefore
 ave no doubt of the propriety of ordering the preparation of a scheme.

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That being so, I would prefer that when the scheme came before us it should
 e open for us to consider what effect the changes proposed would have on the
 uestion of admitting paying pupils. I cannot see the advantage of a finding on
 hat subject at present, but I can see great disadvantages from it, and I would
 ave liked to consider the question along with the other parts of the scheme. I
 do not think that the testator ever contemplated providing free education for all
 the poor children in Tranent, Prestonpans, and the two other parishes. It
 appears from his deed that all he contemplated was to provide for the main-
 tenance and education of thirty inmates, and the education of sixty or thereby
 day-scholars—(His Lordship here read passages from the deed). I do not
 construe the deed as shewing the founder's intention to provide, in the first
 instance, for day-scholars, and, as a secondary object, for inmates. The
 institution is said to be "for the aliment, clothing, and education of poor
 children for ever," and a house is to be provided "having accommodation for
 thirty children, or a larger or lesser number according to the circumstances,
 a master, assistant, and servants, and a school-room for these children, and of
 sixty children, or the admission of such larger or lesser number of day-scholars
 as should be deemed expedient. But this was not to be done until the hospital
 was fit to be occupied. The single thing which favours your Lordship's view
 on this subject is the passage at the beginning of the ninth head—(His Lordship
 here read the passage). The primary purpose was to have a house built called
 "Stiell's Hospital," for the education of poor children. Now, I do not see
 why the funds set free by the discontinuance of inmates should necessarily
 be devoted to increase the number of day-scholars. When you take into view
 the broad powers given in a later part of the deed to make alterations on the
 rules and regulations, I am not prepared to say that the trustees have exceeded
 their powers, or that the necessary charges made did not open up an oppor-
 tunity of conferring greater educational advantages than the founder considered
 his fund would be able to afford. The broad terms in which these powers to
 make alterations are conferred are very important—(His Lordship here read
 the first sentence of the last purpose). Now, if the trustees are entitled to
 make the other changes which they propose, I am not prepared to say that the
 reception of paying pupils may not be proper and allowable if it does not
 appear that this will diminish the funds available for the education of as many
 poor children as the founder had in view. We do not know whether it may
 add to these funds in place of diminishing them. If, on inquiry, it turns
 out that there will be no diminution, the objection will resolve into this, that
 part of the accommodation of the hospital which was, and is no longer, re-
 quired for the inmates, will be taken advantage of for the paying pupils. I
 am not in the least prepared to say that this would be unlawful. But I would
 like to reserve my opinion until the scheme is before us.

The only other thing which I wish to say at present is this: Those who are
 favoured by the deed are called poor children. Now, we know that a most im-
 portant change has been made by the recent Education Act as respects poor

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children, who now fall to be educated at the public expense. I do not think the founder intended to provide education for children who would otherwise be provided with education at the public expense. Or, in other words, to make a present of his means to the parochial boards of the parishes in which he was interested. This is a most important and novel consideration in dealing with such charitable and educational institutions, and I shall greatly regret if, when we come to discuss the proposed scheme as a whole, we shall find ourselves hampered in considering whether any, and if so, what, effect ought to be given to it.

LORD MURE.—I concur with your Lordship and Lord Deas on those branches of the case upon which you are agreed. And with reference to the admission of paying pupils, if that should involve the exclusion of children who are proper objects of the charity, I concur with your Lordship in the chair, because, as matters now stand, I do not see how a scheme can be put into proper shape unless some such finding as that proposed by your Lordship is pronounced. But I should certainly not wish to pronounce any finding which would seem to imply that the trustees had intentionally deviated from the directions of the founder, because I am satisfied that they had no such intention. On one point, however, viz, the introduction of paying pupils to the exclusion of free scholars, I am disposed to think that they have gone beyond their powers. And if the scheme proposed points to the admission of scholars not on the foundation, to the competition for bursaries provided out of the funds of the institution, that, I think, also be beyond the power of the trustees.

As regards the construction of the deed, it appears to me to be pretty clear that the intention of the founder, as explained by the terms of the deed, was to provide an institution for "poor children;" and that, while he contemplated a part of that institution a hospital for inmates who were to be maintained and clothed as well as educated, that was to be subordinate to the day-school. In these circumstances, I concur in thinking that it was within the discretion of the trustees to give up the part of the institution which consisted of resident inmates provided the funds thereby set free were otherwise applied towards the education of proper objects of the charity; and I did not understand it to be contended on the part of the pursuers that such a change, subject always to the above qualification, or that the institution of a higher and lower school, was beyond the powers of the trustees. But I agree with your Lordship that if the effect of taking in paying pupils is to lead to the exclusion, either directly or indirectly, of children who are proper objects of the charity, that is beyond the power of the trustees. And as the scheme as proposed may, in the view I take of it, operate in such a way as to lead to this result, I am of opinion, with your Lordship in the chair, that a finding or instruction to meet this state of matters should be embodied in the interlocutor to be pronounced. And I think it should also be made clear that the bursaries provided out of the funds of the institution are not open to paying pupils, who were not, as it appears to me, within the contemplation of the founder.

THE COURT pronounced this interlocutor:—"Find that the defenders, as trustees and governors of Stiell's Hospital, in framing, publishing, and acting on the prospectus and new regulations for the administration of the charity in the year 1871, and subsequently, have not exceeded the powers conferred on them by the trust-deed, in the position and settlement of the founder, or otherwise belonging to it."

them as trustees and governors, except so far as by the operation of the said new regulations pupils attending the school and paying for their education, as not being proper objects of the charity, receive benefit from the funds, property, and revenue of the charity: Find that no part of the funds, property, and revenue of the said charity can be legally employed for the education of persons who, being able to pay for their education, are not poor children within the meaning of the founder's trust-disposition and settlement: Find that the said trustees and governors are not entitled to admit pupils who are not proper objects of the charity as pupils, to the effect of excluding from the school other pupils who are proper objects of the charity, or otherwise than on the footing of the persons who are not proper objects of the charity paying fees which shall fully meet the expense of their education at the said school: With these findings, remit the cause back to Mr Kinnear to alter the said new regulations and adjust a scheme for the administration of the charity in accordance with the said findings and with the trust-disposition and settlement of the founder, and to report the same to the Court."

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DALMAHOY & COWAN, W.S.—J. & F. ANDERSON, W.S.—Agents.

WILLIAM BURRELL, Petitioner.—*Balfour—R. V. Campbell.*

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JOS AND COMPANY, Respondents and Claimants.—*Trayner—Jameson.*

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THOMAS THOMSON AND OTHERS, Claimants.—*Asher—Alison.*Burrell v.
Simpson & Co.DAVID LEITH AND OTHERS, Claimants.—*M'Kechnie.*

Insurance—Limitation of Liability—Merchant Shipping Amendment Act (25 and 26 Vict. c. 63), sec. 54.—A steamship, through improper management, ran down and sank another belonging to the same owner. The petitioner presented a petition, as owner of the vessel in fault, to have his liability limited in terms of section 54 of the above Act. In a competition which followed as to the distribution of the fund, *held* (1) that the underwriters of the ship were entitled to rank upon the fund *pari passu* with owners of cargo, repelling the plea that they were excluded as being assignees of the cargo; (2) that the petitioner was not entitled to claim for loss of freight or wages of shipwrecked crew.

A question between the petitioner and claimants, *held* (1) that in estimating "gross tonnage," as prescribed by the 54th section, the petitioner was entitled to deduct the berthage of the crew; and (2) that he was liable for interest per cent from the date of collision till consignment.

Insurance—Ship.—*Observations* on the rights of an underwriter when a ship is wholly lost.

On 4th February 1876 the steamship "Fitzmaurice" ran down and sank the steamship "Dunluce Castle" near Lowestoft. The collision was caused by the fault of the "Fitzmaurice" exclusively, and no lives were lost. William Burrell was sole owner of both vessels, and, as owner of the "Fitzmaurice," he presented this petition for limitation of his liability in respect of the collision, under the 54th section of the Merchant Shipping Amendment Act, 1862,¹ to £3590, 8s., being £8 per ton on 448'80 tons, gross tonnage of the vessel, and to rank claimants on that sum according to their rights. The petition also contained a prayer that any damages raised against him in the High Court of Justice in England by Simpson and Company, owners of cargo on board the "Dunluce Castle," should be stopped.

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The Court restrained that action. Answers were lodged for Simpson and Company, maintaining that the petitioner should be found liable in the costs of it.

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Claims were also lodged by Simpson and Company, and other owners of the cargo of the "Dunluce Castle;" by David Leith and others, seamen, who had lost their body-clothes and other property; by Thomas Thomson and others, underwriters, who had insured the "Dunluce Castle" for £6000, which they had paid to the petitioner; and by the petitioner himself, who claimed deduction for loss of freight and expenses of shipwrecked seamen.

The underwriters on record claimed the whole fund in satisfaction of their loss, and alternatively that they should be ranked *pari passu* with the owners of cargo and the crew, or otherwise should be preferred to the balance, amounting to about £800, after satisfying the owners of cargo and seamen; but in argument the two alternative claims only were maintained.

The cargo owners maintained that they were entitled to be preferred to the underwriters, on the ground that the latter could only claim as assignees of Burrell himself. If the owner of the "Fitzmaurice" had been a different person from the owner of the "Dunluce Castle" they did not dispute that the underwriters would have come in *pari passu*. The policy of insurance gave an independent title to the salvage, but not to other rights, such as a claim of damage.

The underwriters answered that the insurers were entitled to sue for compensation due to the owners,¹ and that not as mere assignees. The policy of insurance, when followed by total loss, operated as a vendition—a potential retrospective vendition, which went back to the date of the loss.

Burrell also disputed the claim of the underwriters to the balance of £800, assuming that the owners of cargo and seamen were to be satisfied before them. He argued that this was a claim against him, which could only be made through him. They were only his assignees. It was essential to the success of the claim that it might have been made good by himself.² But the person who injured Burrell was himself, therefore the claim could not be enforced. If it were otherwise, Burrell would not be indemnified under his policy of insurance. The underwriters would give the money with one hand and take it away with the other.

Answered for the underwriters, that the owner of the "Dunluce Castle" was trustee for the underwriters, and must either recover or allow them to do so.

There were some minor points in the case. The owners of cargo maintained—(1) That Burrell, in estimating the tonnage, was bound to include the berthage of the crew.⁴ (2) That he must pay interest from the date of the collision.⁵ (3) That he was liable to the successful claimants both for the expenses of this process and for those of the English suit which was restrained.⁶

At advising,—

LORD PRESIDENT.—The facts out of which the questions we are now to dispose of have arisen are simple. It appears that on the 4th of February 1876, whi

¹ North of England Insurance Co. v. Armstrong, Jan. 21, 1870, L. R. 5 Q. R. 24.

² Stewart v. Greenock Marine Insurance Co., Jan. 13, 1846, 8 D. 323, 18 Sc. Jur. 151.

³ Yates v. Whyte, Jan. 26, 1838, 4 Bingham, N. C. 272, 5 Scott, C. B. 640.

⁴ The clauses of the Acts applicable to this point are quoted in the Lord President's opinion.

⁵ Northumbria, Nov. 23, 1869, L. R. 3 Ad. and Eccl. 6.

⁶ Dundee, Dec. 19, 1827, 2 Hagg. Adm. 137.

the "Dunluce Castle" was on her passage from London to Leith, she was run down by the steamship "Fitzmaurice;" they came into collision near Lowestoft, and the result of it was that the "Dunluce Castle" was sunk, and became a total loss. The fault of the collision is admitted to have been entirely on the side of the "Fitzmaurice." And accordingly this petition is presented by the owner of the "Fitzmaurice," under the 54th section of the Merchant Shipping Act of 1862, for limitation of his liability in respect of the damage done by the collision. The statute provides that in such a case as the present, where there was no loss of life, the liability of the owners of the offending ship shall be limited to £8 a ton upon the registered tonnage of the vessel. There is a point connected with the mode of ascertaining the amount of the fund which it may be necessary to dispose of hereafter, but the important question arises in the competition among the different claimants. The claimants who are first in the field, I think, are the owners of the cargo of the sunk ship "Dunluce Castle;" and they claim not only to rank along with other claimants, but they claim an exclusive preference over the fund, which, if it be sustained, will have the effect of repairing their damage to the full amount, and leave a balance for the other claimants. There is another small claim on behalf of the seamen of the "Dunluce Castle," which I think it was hardly disputed must rank *pari passu* with that of the owners of the cargo, and even giving effect to both these claims there would still be a balance of somewhere about £800.

The next claim to be considered is for the underwriters upon the ship "Dunluce Castle;" and they claim, in the first place, to rank *pari passu* with the other claimants upon the fund, and alternatively, in the event of the owners of the cargo and the seamen being preferred to them, they then claim the balance.

The questions which have thus been raised would not be very difficult of solution if it were not for one fact, viz., that the owner of the sunk ship is also the owner of the offending ship; that is to say, the petitioner here, Mr Burrell, is the sole owner of both the offending vessel and of the sunk vessel; and that certainly gives rise to some considerations of an unusual kind and of very considerable delicacy. I do not think it can be disputed that the owners of the cargo have a good claim, and also the seamen, and I do not think it can be disputed either that under ordinary circumstances the underwriters in the sunk ship would have a good claim. But it is said that in respect of their being the assignees of Mr Burrell in the property of the ship, or what remains of the ship "Dunluce Castle," they are not entitled to compete with parties who derive no right through him, but claim adversely to him, and so it is said that the owners of cargo must prevail against them, and Mr Burrell says, that as in a question with him the underwriters upon the ship "Dunluce Castle" are not entitled to claim as against him, and would not be entitled to maintain an action against him for the wrong done to the "Dunluce Castle" by the "Fitzmaurice" because of the identity of ownership of the two vessels.

Now, in order to determine these questions it is necessary to consider very particularly what is the effect of a total loss, either actual or constructive, as in a question between the owners and the underwriters of the lost vessel. There can be no doubt that whether the loss be actual or constructive, if it be a total loss, the property of the sunk vessel passes to the underwriters. And it is also quite settled that all the incidents of that property pass with it. But it is necessary to go a little deeper than that general statement of principle in order to see what is the precise relation of the underwriters and the owners after the property

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No. 29. of the vessel has so passed from the one to the other. It is quite clear that in any transference either of an heritable subject or of a corporeal moveable by voluntary conveyance nothing passes as an incident of the subject of the nature of a claim of damages. The disponee of an heritable subject, or the purchaser of a corporeal moveable, takes it just as it stands at the time of the conveyance, with, of course, all the incidental rights belonging to it as a piece of property; but it is quite clear that in such a case a claim of damage for injury done to the property before transference takes place could never pass along with the conveyance of the subject. Now, it is quite settled that in that kind of vendition which takes place by the operation of law,—when the underwriter pays the contents of his policy upon a sunk ship,—a claim of damages against a vessel which has caused the loss of the ship by collision does pass along with the property of what remains of the vessel; and therefore it is quite obvious from that consideration alone, without going any farther, that the transference which is operated by force of law when the underwriter pays under his policy upon the lost ship is something quite different from an ordinary voluntary conveyance of a corporeal moveable.

It has been questioned whether in strictness it can be held that the property of the ship passes at all; and the difficulty has been suggested that the property of a British ship cannot pass from one owner to another except in the form provided by the Registry Act; and that, therefore, what is meant when the law says that the property of a ship passes from the owner to the underwriters is no more than this, that from that time the owner becomes trustee for the underwriters, the formal title of property remaining in him, and the beneficial interest as it were, only passing to the underwriters. That was a suggestion made by Lord Truro in the case of *Stewart v. Greenock Marine Insurance Company*, arising out of the loss of the ship "Laurel."¹ It was no part of his Lordship's judgment in disposing of these cases on appeal, and can only be taken as *obiter dictum*, and I humbly think that his Lordship proceeded upon a mistake in making that suggestion. It is quite true that the property of a registered British ship cannot pass except in the form provided by the statute. But the thing which passes in the case supposed is not the property of a British ship; it is the property of a wreck, which is no longer a ship, which may, no doubt, notwithstanding its being totally lost within the view of the law, be raised from the bottom of the sea and repaired and become a ship again, but if it be so, it will no longer be the same ship, and it will no longer be entitled to the registry of the old ship, but will require a new register of its own. And therefore I think it plainly a mistake to suppose that any difficulty arises out of the Registry Act, and that there can be no difficulty at all in holding, in the literal sense of the term, what is laid down by all the authorities, that when a vessel becomes totally lost, the underwriters upon her, when they pay the contents of their policy to the owners, acquire the property in what remains of the ship—that is to say, they acquire the property in the wreck, and they acquire with that all the rights which were incident to the ship. They also subject themselves to all the liabilities attaching to the ship and its owners. For example, they will be liable for the reward of a salvor who had performed services in the way of saving some portion of the ship, and they might be liable also, in all probability, for debts which were constituted a lien over the ship. But the one thing to be observed, and which is of the greatest importance in the present case, is that the rights which the underwriters acquire, and the

¹ *Scottish Marine Insurance Co. v. Turner*, March 3, 1853, 1 M'Q. 334, 5 Scot. Jur. 277.

liabilities to which they are subjected, are the proper rights and liabilities of the sunk ship, and of the former owner of that ship only as owner. They do not represent the owner in any proper sense. They represent him in one sense, in so far as they have in themselves the ownership of the ship, and all the rights and liabilities thence resulting; but they do not by any means represent him in the same sense in which an ordinary assignee represents his cedent. All that they take upon them, and all that they acquire under this legal transference to them, is the rights of the ship and liabilities of the ship. I apprehend that the true doctrine, as contrasted with what I have represented as the view of Lord Truro, has been extremely well stated in a late case by the present Lord Chief Justice of England,¹ and I venture to quote his words as being very weighty authority, and at the same time, I think, clearly explaining the view which I am now endeavouring to submit to your Lordships. He says that "in the case of a total loss, whatever remains of the vessel in the shape of salvage, or whatever rights accrue to the owner of the thing insured and lost, they pass to the underwriter the moment he is called upon to satisfy the exigency of the policy, and he does satisfy it. It is admitted that if this ship had been recovered from the bottom of the sea by any of the contrivances of modern skill and science available for that purpose, the body of the vessel would have passed to the underwriters. If, moreover, her value had proved to be more than the estimated value in the policy, the underwriters would still have been entitled to the vessel recovered." It is only necessary to add a single word of explanation to this statement of law, because it is quite true that the right passes to the underwriters at the time when they satisfy their obligation under the policy. But then the passing of the right has a retrospective effect; it takes effect from the time when the casualty occurred, which is the cause of the total loss, whether actual or constructive.

Now, keeping these principles in view, the first question which I put is, whether in the circumstances that have here occurred the underwriters upon the "Dunluce Castle" have a good direct claim for damages against the owner of the "Fitzmaurice!" Under ordinary circumstances there cannot be the smallest doubt they would. That is quite settled; and the only peculiarity is that the owner of the "Fitzmaurice" was the owner of the "Dunluce Castle." Is that a good reason for rejecting the claim as a claim by the underwriters upon the sunk ship against the owner of the offending ship? The right which has passed to the underwriters by the legal transference of the vessel is a right to maintain this claim against all who are liable to satisfy it; and it must be kept in mind that the owner of the offending vessel is not the only person who is liable to satisfy this claim. The persons whose actual and direct fault caused the collision would be answerable—the persons who were charged with the navigation of the offending ship. And therefore the owner is one of the persons answerable for the collision, but answerable in the strict sense only in a sort of secondary ability. The *culpa* is the *culpa* of the persons navigating the ship. The owner is answerable in the claim only because he is responsible for the persons who did navigate the ship. Then, is it to be said that when the property of the sunk vessel has passed to the underwriters with all its incidents, including the right of claim against the offending ship for the damage done by the collision—is it to be said that the owner of the offending vessel shall escape from this liability because he was also owner of the sunk ship? I confess I am quite unable to see any ground in law for holding that. It seems to me, on the contrary, to be

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¹ North of England Insurance Co. v. Armstrong, L. R. 5 Q. B. 249.

No. 29. quite clear that the operation of the legal assignment of the ship from the owner to the underwriters is to carry with it all the rights which would have belonged to any owner of that vessel, no matter who he might be ; and as soon as by that legal assignment the owner of the offending ship ceased to be owner of the "Dunluce Castle" there was no longer any identity of persons between the party who makes the claim and the party who is liable to satisfy the claim. That identity is put an end to by the operation of law, and therefore I think that the underwriters in these circumstances would have a perfectly good ground for action against the owner of the "Fitzmaurice" to make good the damage caused by the collision.

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That being so, the next question comes to be, whether as against the fund which we have now to distribute they have or have not as good a claim as the owners of the cargo ? The liability of the owner of the offending vessel, but for the statute, would be a liability to meet both of these claims in full, and apart from the statute that liability could never be satisfied except by a payment in full, unless in the case of bankruptcy of the party who was liable as the owner of the offending vessel ; and supposing such a case had occurred, that the owner of the offending vessel became bankrupt before these claims were satisfied : is there any reason to say that in a ranking in bankruptcy the one claim must be postponed to the other ? I do not see any reason for that. Now, this case which we have to deal with is what may be called a case of statutory insolvency. The statute interposes for the protection of the owners of the offending vessel, and says, we shall deal with you in this way, that you shall not be liable in debt more than a certain sum per ton of the tonnage of your vessel ; in other words we limit your liability to that ; and we thus create an insufficient fund, it may be, to meet the claims of those who are damaged by the collision. That is nothing more than a case of insolvency created by statute. And therefore it seems to me that the case is just the same here as if the owner of the offending ship had become bankrupt and these parties had been claimants in the sequestration. And if it be so, I do not see why the one party should be preferable to the other. I have said already that it does not appear to me that the underwriters represent the owner of the offending vessel in any sense. They may represent him as the former owner of the "Dunluce Castle," but they certainly do not represent him as the owner of the offending vessel ; and I do not know anything that the owners of cargo can say against them short of this—You are identified with the offending party here in some way or other, and therefore you cannot in his right be entitled to claim in competition with us. That is the nature of their argument, but it seems to me to want facts for its foundation. There is no identity between the parties ; there is no community of interest ; nay, there is no community of title. It is not the act of the owner of the "Dunluce Castle" and of the "Fitzmaurice" that has given to the underwriters the right upon which they are now claiming ; it is the act of the law that has given it to them, and they are strangers to the owner of the "Dunluce Castle" and of the "Fitzmaurice" just as much as the owners of the cargo of the "Dunluce Castle" are. The relation between the carrier and the owners of the cargo is quite as intimate as the relation between the owner and the underwriters of the ship, and it is out of the relation of the owner and underwriters upon the ship that the law has created the right upon which the underwriters of the ship are now claiming. I am therefore of opinion, upon the main question raised in this case, that the underwriters upon the ship have not only a good claim as in a ques-

with the owner of the "Fitzmaurice," but that they have also a perfectly good No. 29.
 claim to rank *pari passu* with the owners of the cargo of the "Dunluce Castle." Nov. 24, 1876.
 The claimants before us, therefore, in so far as their claims have been stated, I Burrell v.
 think must be all ranked *pari passu* upon the fund which we have to consider. Simpson & Co.

But there are one or two other points to which it is necessary to advert, which were separately raised here. There is a question raised as to what is to be taken to be the tonnage of the "Fitzmaurice" in estimating the amount of the fund. In the petition, as it was originally presented, the petitioner stated that the tonnage of the vessel was 473-65. He has since desired to amend that, and to state it as being 448-80. Now, the difference between the two is accounted for by the space occupied for the berthage of the crew, and the question is whether in estimating the tonnage of the "Fitzmaurice" for the purpose of this petition we are to take it as being 473 tons odds, or whether we are to deduct the space occupied by the berthage of the crew and reduce it to 448 tons? The "Fitzmaurice" is a steam vessel, and the provisions of the statute with regard to the measurement of steam vessels is different from that which applies to sailing vessels. In the Act of 1854, section 21, we have the rule for measuring tonnage of vessels, and in sub-section 4 there is a particular rule given for measuring or excluding poops and other enclosed spaces; and in the end of that sub-section there is the following proviso:—" (1st) That nothing shall be added for a closed-in space solely appropriated to the berthing of the crew, unless such space exceeds one-twentieth of the remaining tonnage of the ship, and in case of such excess the excess only shall be added; and (2dly) that nothing shall be added in respect of any building erected for the shelter of deck passengers."

Now, it is admitted that the space here proposed to be deducted does not exceed one-twentieth of the tonnage of the ship; and therefore in the ordinary case, measuring this ship for the purpose of registry, the space appropriated to the berthing of the crew would fall to be deducted. Then, in section 23, there is this provision with regard to steam vessels. The provision I have just read is applied to sailing ships, but in section 23 we have the 3d rule with regard to measurement:—" In every ship propelled by steam or other power requiring engine-room, an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship ascertained as aforesaid, and the remainder be deemed to be the registered tonnage of such ship, and such deduction shall be estimated as follows;" and then follow the particular rules for the mode of estimating the deduction. The point to be noticed here is that the space occupied by the propelling power is to be deducted from the gross tonnage of the ship ascertained as aforesaid. Now, I apprehend that the meaning of that phrase there is the gross tonnage of the ship ascertained under the various provisions and rules of section 21, and one of these rules is to deduct the space occupied by the berthage of the crew. It seems to me, therefore, pretty plain that under this statute of 1854, in measuring steam vessel the owners are entitled to have deduction from the gross tonnage, in the first place, for the berthage of the crew, and, in the second place, for the space occupied by the propelling power.

Now, if that be plain, let us look in the next place to the 54th section of the Act of 1862, under which this question arises. It provides that "the owners of any ship, whether British or foreign, shall not," in certain cases named, "be answerable in damages in respect of loss of life or personal injury either alone or together with loss or damage to ships, and to an aggregate amount exceeding

No. 29. £15 for each ton of their ships, nor in respect of loss or damage to ships, goods, merchandise, or other things, to an aggregate amount exceeding £8 for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of engine-room." Now, the argument which is maintained by claimants here, is, that this means that the tonnage of a steamship is to be taken without any deduction whatever, not only without deduction on account of engine-room, but also without deduction on account of berthage of seamen. That certainly seems a somewhat unreasonable view, there being no apparent ground for making a distinction between sailing ships and steamships as regards the deduction of berthage room for seamen, and it is based only, so far as I see, upon the use in this clause of the term "gross tonnage." It seems to be intended that gross tonnage without deduction on account of engine-room, necessarily means gross tonnage in the sense of tonnage without any deduction at all.

Now, comparing that with the previous statute, it appears to me that this is not a reasonable construction. What is meant here, I apprehend, by gross tonnage without deduction of engine-room, means just the actual tonnage without deduction of engine-room; or in other words, the contrast between a sailing ship in this clause and a steamship is this, that in the case of a sailing ship the registered tonnage is to be taken,—in the case of a steamship it is not to be the registered tonnage, but what is called the gross tonnage without the deduction of engine-room, which, if deducted, would make it the registered tonnage. In short, it is the want of the deduction of engine-room that makes this gross tonnage instead of being registered tonnage. And therefore I am of opinion that the petitioner is right on this point, and that he is entitled to state the tonnage of his vessel at the lower amount which is now proposed, giving effect to the deduction for the berthage of the crew.

The next question regards the interest upon the fund,—whether the petitioner is liable in interest? He maintains that the statute has so limited his liability that he never can under any circumstances be called upon to pay out of his pocket anything more than £8 a ton. But it rather appears to me that although £8 a ton is the limit of his liability, or in other words, as he has estimated it, £3950, 8s., there must be a term at which that is due and payable. Like all other debts it must be due at some particular time; and if it is not paid, it must bear interest like any other debt. I do not think the statute has provided him with any protection against that. Accordingly, I think the fund which is made for interest on this fund is well founded, and that interest must run from the time when the liability attached. That is to say, the time when the collision took place and the damage was done. No doubt under ordinary circumstances damage does not bear interest, but then the reason of that is that interest is just one of the items of damage to be taken into account by a jury in an ordinary case of assessing damages. The jury take into consideration everything that affects the position of the pursuer when he comes before them, and estimate to the best of their ability how much he has lost by reason of the fault of the defender down to the time at which they are estimating his damages, and it seems quite reasonable that there should be no interest upon that because the jury have already taken into account what he has lost in the way of interest as well as in any other way. But in the present case the sum is fixed by Act of Parliament. We are not assessing damages at all. We are distributing a limited fund, and if the statute had said that this fund should not

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interest I could have understood the reason of that enactment; but without the statute saying so, I cannot imagine that that which by the operation of the statute has become a debt, or rather a sort of composition upon a debt, should bear interest from the time that it was actually due and payable; and upon that point therefore my opinion is adverse to the petitioner. And for a similar reason I am against him also upon the question of costs. I do not know any reason why a party who is liable in damages and who finds it necessary—absolutely indispensable—to come into Court for the purpose of having the damages assessed against himself in terms of an Act of Parliament, should not be liable for the expenses of the necessary proceedings to accomplish that object. And therefore, unless it can be shewn that there was some misconduct of the petitioner under this petition on the part of the claimants, I think the petitioner is fairly liable to pay the expenses of these proceedings. To be sure, if it can be shewn that there has been any discussion between the claimants themselves for which the petitioner is not answerable, he could not justly be saddled with that expense. But I am not aware that anything of that kind has occurred here.

There still remains for consideration, however, the question regarding the costs in an English suit which was instituted by one of the claimants here,—Simpson and Company,—the owners of the cargo. All we can do in point of law as regards that is to allow the parties who are in the position of pursuers of the action in England to go on with it for the purpose of having their costs ascertained and taxed.

LORD DEAR.—This case has been repeatedly and carefully considered at consultations upon more than one occasion, and I do not think it necessary to say anything more than that I am of the same opinion with your Lordship upon all the points.

LORD MURE.—I have come to the same conclusion as your Lordship both as to the principles on which these matters are regulated, and particularly I concur in the observations which your Lordship has made with reference to the opinion of Chief-Justice Cockburn in the case of the North of England Insurance Company v. Armstrong. I feel it unnecessary to add anything to what has been said from your Lordship. It was conceded in the argument that if the delinquent vessel had belonged to a different owner the underwriters' claims were good, and that being the case I cannot see how in the case where the statutory sum of £8 per ton stands for distribution between the parties any different rule should be applied from the rule applicable where the owner of the delinquent vessel is the owner also of the sunk vessel.

Campbell, for the petitioner, claimed to be allowed the amount of freight which he had lost on cargo in the "Dunluce Castle;" and second, certain expenses for the crew.

LORD PRESIDENT.—We are in the case which is No. 4 under the 54th section of the Act 1862—"Where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship or boat." Now, in that case the provision is that the owner of the offending ship shall not be liable for more than £8 a ton upon the tonnage of his ship in respect of loss

No. 29. or damage to ship, goods, merchandise, or other things whatsoever, on board of any other ship or boat. The claim for Mr Burrell that we are now considering is a claim in the first place, for loss of freight. Now, he never can bring that claim within the operation of this clause of the statute except as loss or damage occasioned to the ship. There is nothing about freight. There is no claim against this limited fund except for losses within the meaning of that section which I have read. And, therefore, if there is to be a claim for freight, it must be a claim for freight as an incident or part of the ship. Well, but the ship with all its incidents has passed to the underwriters of the ship, and there cannot be the smallest doubt after the decision in the case of the Greenock Marine Insurance Company that if there had been freight earned notwithstanding of the total loss that freight would have belonged to the underwriters on the ship, and it is a very strange thing that another person should be entitled to come forward and say—I claim damages in respect of its not having been earned, when it would not have belonged to me if it had been earned. That seems to me to be a sufficient answer to the claim in respect of the freight. Then, with regard to the amount which Mr Burrell has expended in maintaining the crew of the “Dunluce Castle” on shore after the occurrence of the shipwreck, there can be no doubt in the words that he was bound to do that. He was bound to do that in two capacities properly—first of all as owner of the “Dunluce Castle;” but if he had made that expenditure as owner of the “Dunluce Castle” he would have had a very good claim against the offending ship for repayment; but he was also clearly bound to do so as the owner of the offending ship, because these people had been wrecked and thrown upon the world through his fault. But there is no room for saying that that is a claim which the crew of the “Dunluce Castle” could have made under the 54th section of the statute. Their board on shore, their loss of employment, is not a thing that was on board of the sunk ship; and unless it be something that was on board of the sunk ship it cannot form the subject of a claim here.

LORD DEAS.—I think this matter might have been clearer on the face of the statute, but I do not differ.

LORD MURE.—I have arrived at the same result as your Lordship. The words of Lord Moncreiff in the case of the Greenock Marine Insurance Company seem to settle the question,—“I am of opinion that the vessel stands transferred to the underwriters, with all her advantages, as at the moment when the last occurrence took place before she came from the voyage into the dock at Liverpool and therefore that the freight, however it might in fact be received by the owner, belongs of right to the underwriters.”

THIS interlocutor was pronounced:—“Find that the petitioner is liable, in respect of the collision mentioned in the petition, for the sum of £3590, 8s. sterling, with interest thereon at the rate of four per cent per annum from the 4th February 1876 till the date of consignment, and limit the liability of the petitioner as owner of the steamship ‘Fitzmaurice’ in respect of said collision accordingly: Repel the claim made by the petitioner, and rank and prefer the whole other claimants *pari passu* on said fund, and appoint a state or scheme of division of said fund to be lodged by the petitioner shewing the amount due to each claimant in respect of the above findings: Recall the restraint imposed by interlocutor of 1876.

June 1876 upon the claimants, Simpson and Company, to the effect of allowing them to proceed in the action mentioned in the petition at their instance against the petitioner: Find the petitioner liable to the claimants in the expenses of this process, except such expenses, if any, as have been solely occasioned by the discussion between the claimants, Thomas Thomson and others, and Simpson and Company and others; and with regard to said last mentioned expenses, find the said Simpson and Company, &c., all claimants, jointly and severally, liable to the said Thomas Thomson and others: Appoint accounts," &c.

WEBSTER & WILL, S.S.C.—SCOTT MONCRIEFF & WOOD, W.S.—FRASERS, STODART, & MACKENZIE, W.S.—Agents.

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ROBERT GREIG AND COMPANY, Suspenders.—*Scott.*

No. 30.

ROBERT MORISON (Alexander Conacher's Factor), Respondent.—
J. G. Smith—H. Johnston.

Nov. 28, 1876.
Greig & Co. v.
Conacher's
Factor.

Revenue—Excise—Permit—Spirits removed without permit—Incapacity of Seller to sue for price—2 Will. IV. c. 16, sec 12, and 23 and 24 Vict. c. 114, sec. 187.—Robert Morrison, judicial factor on the trust-estate of the deceased Alexander Conacher, distiller, Pitlochry, having charged Greig and Company upon a bill for the price of spirits, the buyers suspended on the ground that the spirits had been delivered without a permit, and that therefore the seller was rendered incapable of recovering the price, in terms of section 187 of 23 and 24 Vict. c. 114, which enacts,—“If a true and lawful permit or certificate shall not be sent with any spirits to the buyer thereof, such spirits shall, if the same be not seized in the transit for want of such permit or certificate, be forfeited to the buyer thereof, and the seller shall be rendered incapable of recovering the same, or the value or price thereof, in any Court of law or equity; and the seller in such case shall over and besides the loss of the said spirits forfeit double the value of or price agreed to be paid for the same, including the duty thereon.” The charger (besides stating that the spirits had been transmitted without permit by his manager without his knowledge, in pursuance of a general system of fraud upon himself and upon the Revenue, and had been received without permit by the suspenders without objection or notice of any kind to him), pleaded that the clause of the Act barring the seller from recovering the price only applied in cases where the spirits had been confiscated, and that here the spirits had not been confiscated. Plea repelled, and charge suspended.

Observed (per Lord President) that the provision in section 12 of the general Act regulating the removal of exciseable articles under permit (2 Will IV. c. 16) was not superseded in reference to spirits by the provision in section 187 of the special Act (23 and 24 Vict. c. 114) regulating the removal of spirits under permit.

ROBERT MENZIES, S.S.C.—LEBURN & HENDERSON, S.S.C.—Agents.

ERNEST SAMUEL, Complainer.—*Millie.*

No. 31.

MACKENZIE AND BELL, Respondents.—*Lorimer.*

Nov. 29, 1876.
Samuel v.
Mackenzie
and Bell.

Debts Recovery Act, 1867 (30 and 31 Vict. c. 96), sec. 17—Bankrupt.—A decree under the Debts Recovery Act was pronounced against a debtor, who hereafter was sequestrated in England. After he had been discharged by the English Bankruptcy Court under a composition contract he was served with a

No. 31. charge upon the debts recovery decree. *Held* that it was competent to try the

Nov. 29, 1876. validity of the charge thus given in a suspension, and that section 17 of the Debts Recovery Act, excluding review of the decree, did not apply to the case.

Samuel v.
Mackenzie
and Bell.

Bill-Chamber.
1st Division.
Ld. Curriehill.
M.

MACKENZIE AND BELL, of Howard Street, Glasgow, raised in the Sheriff Court of Lanarkshire an action against Ernest Samuel, jeweller, Glasgow, under the Debts Recovery Act, and obtained decree in absence for £14 16s. 4d. on 17th January 1876.* In virtue of this decree they arrested funds of Samuel in the Commercial Bank on 30th May. On 11th July Samuel was served with a charge for payment of the sum contained in the decree, and on 14th July he was served with an action of furthcoming, which was directed against him and the Commercial Bank.

Samuel brought the present suspension of the decree, and all that had followed.

He stated that he had, on 30th December 1875, presented a petition for sequestration in the London Bankruptcy Court, and had offered a composition of 4s. in the pound to his creditors, that a resolution of his creditors was passed accepting this composition on 21st January 1876. On 2d February another meeting of his creditors was held, at which it was resolved to accept the composition offered at the first meeting.

The complainer maintained that the respondents were bound by the resolution of the complainer's creditors to accept the composition of 4s. in the pound, and that therefore it was incompetent to charge on the debts recovery decree.

The respondents pleaded that under the Debts Recovery Act, section 17,* the suspension was incompetent.

The Lord Ordinary pronounced this interlocutor:—"Refuses the note as incompetent; recalls the sist and interim interdict already granted, and decerns: Finds the complainer liable in expenses to the respondents; appoints an account," &c. †

* "No interlocutor, judgment, order, or decree pronounced under the authority of this Act shall be subject to reduction, advocacy, suspension, or appeal, or any other form of review or stay of diligence, except as herein provided, on any ground whatever."

† "NOTE.—In this application, suspension is sought of a charge given to the complainer upon a decree given by the Sheriff of Lanarkshire at Glasgow, dated 17th January 1876, pronounced in an action, at the instance of the respondents, raised under the 'Debts Recovery (Scotland) Act, 1867.' The charge was given on 11th July 1876, and it has been followed by arrestment and by an action of furthcoming against further proceedings, in which interdict is also sought.

"The ground of suspension is, that in certain proceedings under the English Bankruptcy Act, which were commenced in December 1875, an offer of composition was accepted by the creditors of the complainer at meetings held on 21st January and 2d February 1876; that the respondents were bound thereby; and that the charge now sought to be suspended is incompetent. But no objection appears to be stated to the decree itself, upon which that charge proceeds, and which, although pronounced in absence of the complainer, might have been resisted by him had he chosen to appear and defend the action. Without expressing any opinion as to the effect, if any, which these English bankruptcy proceedings may have had upon the right of the respondents to sue the complainer in the Courts of Scotland, I am of opinion that the remedy of suspension which the complainer now seeks is excluded by the Debts Recovery Act, which enacts (sec. 17) that 'no interlocutor, judgment, order, or decree pronounced under the authority of this Act shall be subject to reduction, advocacy, suspension, or appeal, or any other form of review or stay of diligence, except as herein provided, on any ground whatever.' The statute refers to and incorporates in

The complainer reclaimed, and argued ;—The suspension was not excluded by the 17th section of the Debts Recovery Act. The complainer could not have opposed the decree at the time, but he was entitled to object to the charge which was given after he got his composition contract carried through.

The respondents argued ;—The suspension was incompetent. If the complainer had a remedy, it was under the English Bankruptcy Act. The only remedy he could have under the Debts Recovery Act was to apply for a rehearing.

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LORD PRESIDENT.—I think the interlocutor of the Lord Ordinary proceeds on a misunderstanding of the nature and effect of the section of the "Debts Recovery (Scotland) Act," 1867, on which the respondents rely. I am sure one of your Lordships desire to refuse the fullest effect to this provision of the statute. It is a most salutary one, and the Court will never review any judgment of an inferior Court which is fenced by such a clause. But that is not the nature of this case, and the suspender here does not bring a suspension of the decree of the Sheriff.

It is necessary to attend to the state of the facts. Judgment was pronounced in absence of the complainer upon 17th January 1876. The reason why he was absent was that he had no defence, as the debt was due, and he had nothing to say against it. He therefore abstained from appearing. It is suggested that a way to get the better of this decree is to apply for a rehearing before the Sheriff under another section of the statute. But that would be of no use, because there could be no better defence then than before the decree ; and the purpose for which a rehearing is allowed is to enable a party against whom a decree in absence has been pronounced to be heard upon the merits. The charge was not given till the 11th July, six months after the decree, and in the meantime certain proceedings had taken place in the Bankruptcy Court in England, which are the foundation of the present suspension. It is needless to go through the details of these proceedings. The 21st January and the 2d February 1876 are important dates, for it was upon these days the arrangements for a composition were carried through. It is manifest that if they were regularly conducted the effect was to discharge the complainer of all debts due by him on payment of the stipulated composition.

On the record stands, the proceedings are quite regular, except in so far as it is admitted by the respondents that they received notices of the resolutions to the creditors to accept the composition. But it is now conceded by the respondents that they are now prepared to admit that the notices were given and received. The proceedings were carried on in the Bankruptcy

If certain clauses of the Small Debt Act of 1837, and, *inter alia*, sec. 16, which enables a defender, against whom decree in absence has been pronounced, to obtain in the Sheriff Court a sist of diligence, and to be reponed under the circumstances and conditions therein expressed. Whether, and to what extent, a remedy may be now open to the complainer is a matter on which I express no opinion. But it appears to me to be not doubtful that the remedy which he seeks is excluded by the Debts Recovery Act, 1867, and that the note of suspension and interdict must therefore be refused, with expenses."

¹ Learmonth v. Darlington, Feb. 28, 1849, 1 D. 884, 21 Scot. Jur. 308 ;
² Ott v. Lethem, June 27, 1844, 6 D. 1221, 16 Scot. Jur. 533 ; Murchie v. Cairn, May 22, 1863, 1 Macph. 800, 35 Scot. Jur. 493.

No. 31. Court, and they had the effect of discharging the complainer of all debts due at the time they were instituted, on payment of the composition.

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The charge here under suspension is a charge upon a decree for payment of the whole debt, and the ground of suspension is that the debt is not due, although at the date of the decree of the Sheriff it was due. But the debt which is contained in the decree may have been extinguished on payment of part of it, and if a charge is given for the whole debt under the decree it surely would not be incompetent to suspend the charge. The composition arrangement is only another mode of discharging the debt upon payment of a restricted amount. Further diligence upon the decree is thereby suspended.

It cannot be too distinctly stated that this is not a review of the interlocutor granting decree. The decree is here assumed to be valid and final. We are now affirming that under the circumstances in which the respondents are placed they are not entitled to enforce their decree in the face of the composition contract which has been carried through.

On these grounds I think the Lord Ordinary's interlocutor must be recalled and the case must be remitted to the Lord Ordinary to pass the note.

LORD DEAS and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor, and remit to the Lord Ordinary in the Bill-Chamber to pass the note, and grant interim interdict as craved."

J. & A. HASTIE, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

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Warin and
Craven v.
Forrester.

WARIN AND CRAVEN, Pursuers.—*Balfour—Darling.*
DAVID FORRESTER, Defender.—*Trayner—Alison.*

Sale—Rescission of Contract—Reparation—Damages.—When a buyer of goods refuses to take delivery, or otherwise intimates repudiation of the contract, the measure of the sellers' damages for breach of contract is limited to the difference between the contract price and the market price at the date of repudiation.

1ST DIVISION.
Ld. Craighill.
M.

ON 17th September 1874 Warin and Craven, sugar merchants, London, sold, through a broker, James Dunn, 2000 bags of sugar to David Forrester of Glasgow. The sale-note set forth the sale of 2000 bags of beet root sugar "at 24s. 6d. per cwt. . . . free on board at Dunkirk. Antwerp . . . to be delivered at the port of shipment in about equal quantities per month during October, November, December 1874, and January 1875. The sellers will use every endeavour to engage freight room and expedite shipments, but are not liable for delay caused by war of tonnage."

The quantities to be delivered in October and November were ready at the port of shipment in these months, but the sellers were unable to get a vessel to carry them to this country until 21st November, when the "Bertha" and the "Yarrow" both sailed from Dunkirk with 500 bags of sugar on board each. These vessels arrived at Greenock about 20th November.

On 16th November Mr Forrester wrote to James Dunn, the broker the following letter:—"Please note that as you have failed to implement the contract between us, dated 17th September last, for 2000 bags sugar."

account of Messrs Warin and Craven, I now consider the said contract null and void, and shall refuse to receive any sugar under same, holding you or your principals liable for all loss and prejudice of whatever nature arising from the non-fulfilment of the terms of said contract, which please intimate to the parties interested, and oblige.”

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Mr Dunn forwarded a copy of this letter to the pursuers, and on 17th November he wrote :—“ I regret exceedingly that, in consequence of the delay in shipping Mr Forrester's beetroot sugar that gentleman now considers himself altogether free from the contract, and supplements his yesterday's letter giving notice to that effect by the original of the enclosed copy letter received to-day.

“ Please instruct me in this unfortunate affair, and, in the meantime, if the sugars are not yet shipped to Greenock I would advise you to divert them to another market, ours being exceedingly dull. Perhaps you will kindly telegraph me early to-morrow if I am to resell the sugars if shipped.”

The 1000 bags which were intended for the October and November deliveries were sold at Glasgow on the employment of the pursuers for 22s. 8d. per cwt. on 20th January 1875. The 1000 bags which were intended for the December and January deliveries were sold by the pursuers at Dunkirk for 22s. 6d. on 20th December. The difference between the contract price of the whole 2000 bags, viz. 24s. 6d. per cwt., and the prices realised by these sales, viz. 22s. 8d. and 22s. 6d. per cwt., was £436, 7s. 4d.

Warin and Craven raised an action of damages for breach of contract against Forrester.

The defence was that the pursuers had failed to implement their part of the contract, 1st, by not having the sugar for the October delivery at the port of shipment in time, and 2d, by not securing tonnage in vessels trading to this country during the month of October.

The parties lodged a minute, by which they admitted “ that, for the purpose of assessing the damages (if any) to be found due by the defender, but for that purpose only, the fair average prices for sugars of the quality in question was 23s. 6d. per cwt. in November 1874, and 22s. 6d. per cwt. in December 1874 and January 1875.”

After a proof the Lord Ordinary pronounced an interlocutor containing, *inter alia*, the following findings :—“ In the second place, finds as matter of law (1) that, according to the sound construction of the said contract between the pursuers and defender, No. 6 of process, the pursuers were not bound to ship, but were only bound to deliver at the port of shipment within the month of October 1874 the 500 bags of sugar intended for the October delivery, and consequently that the failure to ship the said quantity in October was not a breach of said contract ; (2) that the agent or representative of the pursuers at Dunkirk having, immediately on the arrival of the said 500 bags at that port, applied for and been promised freight-room for that quantity on the first steamer that could take them, and the sugars having in implement of this engagement been taken by the s.s. ‘ Yarrow,’ which left Dunkirk on the 21st November, there was on the part of the pursuers no breach of their undertaking to use every endeavour to engage freight-room and expedite shipments ; and (3) that, in the circumstances above set forth, the defender is liable to the pursuers in the consequences of his repudiation of the said contract with the pursuers : therefore repels the defences, and decerns the defender to pay to the pursuers the said sum of £436, 7s. 4d., with interest thereon at the rate of five per centum per annum from 26th February 1875, the date of the summons in the present action, until payment, in terms of the conclusions

No. 32. of the summons: Finds the pursuers entitled to expenses of process: allows an account thereof to be given in, and remits," &c.*

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The defender reclaimed, and argued;—The pursuers had not used sufficient diligence in getting a ship in October as they were bound to do. The defender was entitled to rescind the whole contract if the first delivery was not made in October.¹

The pursuers argued;—The contract was separable into its parts, and the defender was not entitled to rescind the whole contract even if it were held that the pursuers had failed to deliver the first 500 bags in time.¹

The contract bound the pursuers only to deliver at the port of shipment. The shipping was a different matter, and, as far as it was concerned, the pursuers were acting merely as agents for the defender, and they had taken all reasonable means to obtain ship-room. There was no obligation to warrant shipment.

At advising,—

LORD PRESIDENT.—This is an action of damages for breach of a contract contained in a sale-note between the parties, dated 17th September 1874. The subject is "about 2000 bags French or Belgian beetroot sugar free on board at Dunkirk or Antwerp." There is a provision that the sugar is "to be delivered at the port of shipment," according as it was French or Belgian, "in about equal quantities per month, during October, November, December 1874, and January 1875." As regards this clause I do not think its meaning very doubtful. The obligation of the sellers was to have goods at the port of delivery at the time mentioned; that is, to have 500 bags at one of the ports of delivery in each of the four months. It has been contended on the part of the defender that this imported an obligation to have the sugars on board a vessel within the month. I do not so read the contract, and to read it so, it seems to me, would be unreasonable. If the sellers had undertaken to provide vessels for the carriage of the sugar to a port in the United Kingdom there might have been an obligation to have the cargo on board in each of the months. That would have

* "NOTE.— The damages, for which decree has been pronounced are brought out as follows:—

"First 1000 bags.

"Contract price at 24s. 6d. per cwt., Nos. 112 and 113 of process, £2413 3

"These, when sold by Fraser and Company, at 22s. 8d. per cwt., realised, after deduction of charges, only 2171 4

"Loss, £240 19

"Second 1000 bags.

"Contract at 24s. 6d. per cwt., £2444 18 7

"Resale price at 22s. 6d. per cwt., 2249 10 5

"Loss, 195 8

"Total loss, £436 7

"The amount of damages, as the Lord Ordinary understood, was, on the assumption that the defender is not entitled to repudiate the contract, as point upon which there was a controversy between the parties in this litigation.

¹ Coddington v. Palcologo, Jan. 31, 1867, L. R. 2 Exch. 193; Brown v. Müller, June 8, 1872, L. R. 7 Exch. 319.

² Turnbull v. McLean, March 5, 1871, ante, vol. i. p. 730; Jones v. Young, June 24, 1863, 32 L. J. (Q. B.) 385; Simpson v. Crippin, Nov. 2, 1866, L. R. 8 Q. B. 14; Hoar v. Rennie, Nov. 14, 1859, 29 L. J. (Exch.) 72.

been a different contract. The delivery would have been at the port of discharge, for the sellers would have undertaken the carriage. If the sellers had the sugars ready to ship at the port within each of the four months in equal quantities, then I think they discharged their obligation.

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There is this further clause in the contract:—"The sellers will use every endeavour to engage freight-room and expedite shipments, but are not liable for delay caused by want of tonnage." I rather agree with the observation made by Mr Darling in opening the case for the pursuers that in endeavouring to engage freight-room the sellers were acting as agents for the buyer. But, at the same time, I am not sure that this has any great bearing on the case. I do not see that a failure in that obligation would not constitute a breach of contract.

The answer made to the action is, that if the defender has broken the contract there was a previous breach on the part of the pursuers, in two respects—(1) that they did not deliver at the port of shipment the requisite quantity of goods in the month of October; and (2) even supposing the goods were there, they failed to discharge the obligation to engage freight-room. The burden of proving a breach by the pursuers lies, in the first instance, on the defender. It lies on him to prove that the goods were not at Dunkirk timeously. It is not an easy thing for the defender to prove that, and therefore he will easily discharge the onus. If he can shew reasonable cause to think they were not there the pursuers will have to shew that they were. In regard to the other matter, the burden is more seriously on the defender.

I think, on the evidence, there can be no doubt the pursuers have proved that the goods were at the port of shipment in October, and I do not think the defender has proved his other point either.

The consequence of the non-arrival of the sugar was that on 16th November 1874 the defender wrote to Mr Dunn, the broker, in terms amounting to a positive repudiation of the contract, and this repudiation of the contract was intimated to the pursuers by Dunn. They were not left in doubt, and got good advice from Dunn, who pointed out their remedy as having suffered a breach of contract. Resale is the only proper remedy for parties in the position of the pursuers to adopt, and there was nothing to prevent the sale of the sugar before arrived in this country. It could have been sold when in transition. But the pursuers did nothing even after the two vessels arrived. Dunn wrote to them again on the 25th that the market was dull. In fact the pursuers were fully certificated, even if they were not themselves bound to know, that the contract having been broken their proper remedy was to resell the goods and claim the difference as damages against the defender. If they had sold immediately the sugars would have brought 23s. 6d. No doubt the market fell in December, and if they had sold then I cannot help thinking they would have had more to say, as the case ultimately turned out. But they did not sell till the 20th January.

A seller's right to charge against a buyer a loss upon a resale of goods cannot properly be exercised by a resale occurring three months after the breach of contract. That would be a very loose and inexpedient proceeding to sanction, and I am not aware that any such privilege of delay has been admitted. A seller is plainly not entitled to speculate either for himself or for any other party. He is not entitled to consider his own interest. He must resell whatever the state of the market, and it is only if he immediately does so that he can charge the difference between the contract and the market price against the buyer. What

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was done here in January should have been done in November, and I therefore cannot agree with the Lord Ordinary on this point. The true estimate was therefore be the difference between the contract price and what the goods would have brought if sold in November. Whatever loss has arisen by the postponement of the sale till January must be deducted from the sum of damages now due to the pursuers.

LORD DEAS.—The only question about which I have any difficulty in the case is that of the amount of damages. I entirely agree in the law as stated by your Lordship. But my hesitation has arisen from the fact of the very short period to which we are confining the seller in order to effect a resale. That is a very narrow part of the case. But, on the whole, I agree with your Lordship that it is somewhat safer and sounder to be strict than loose upon that point.

LORD MURE concurred.

THE COURT pronounced this interlocutor :—" Having heard counsel on the reclaiming note for the defender, David Forrester, against Lord Craighill's interlocutor, dated 5th June 1876, adhere to the said interlocutor except in so far as it decerns the defender to make payment to the pursuers of the sum of £436, 7s. 4d., with interest thereon at the rate of five per centum per annum from 26th February 1875, the date of the summons in the present action, and payment, in terms of the conclusions of the summons: Recall the decerniture, and in place thereof decern the defender to make payment to the pursuers of the sum of £290, 0s. 8d. sterling, with interest thereon at the rate of £5 per centum per annum from the date of citation until payment: Find the pursuers entitled to additional expenses, modified to two-thirds of the taxed amount thereof: Allow an account thereof to be given in, and remit," &c.

J. & R. D. ROSS, W.S.—WEBSTER & WILL, S.S.C.—Agents.

No. 33. EDWARD AVERIL LUCAS AND OTHERS (Beresford's Trustees), Claimants
—*Balfour*—J. P. B. Robertson.

Dec. 2, 1876.
Lucas, &c. v.
Gardner.

JAMES GARDNER, Respondent.—*Kinnear*—*Asher*.

Right in Security—Power of Sale—Interdict—Caution—Disposition absolute—Liquid and Illiquid.—An absolute disposition of lands was qualified by a minute of agreement which declared that the disposition was granted in security of £6500, and of all other sums for which the lender might become liable on account of or advance to the debtor, and that in the event of the borrower failing to pay or relieve the lender on one month's notice that he desired payment or relief he should be entitled to sell the lands by public roup or private bargain. Three years after the lender gave an account to the borrower containing a detailed statement of factory accounts and of borrowed money, and bringing out a balance of £9424 due by the debtor, and gave notice of his intention to sell. *Held* that the debtor was entitled to interdict the sale without caution, in respect that the balance was not admitted or otherwise liquidated, and that the account consisted of miscellaneous charges and factory accounts which required an accounting.

Bill-Chamber.
1st Division.
Lord Ruthven.
furd Clark.
M.

THIS was a note of suspension and interdict by Edward A. Lucas and others, trustees of the late Sir George de la Poer Beresford, praying for interdict against the respondent, James Gardner, residing at Laroeh House, Ballachulish, selling or exposing for sale the estate of Ballachulish, which he had intimated his intention to sell. The circumstances were as follows:

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In 1861 Sir George Beresford purchased the estate of Ballachulish. He never obtained possession of the estate, on account of a dispute with Mr Tennant, who had acted as his agent. He died in 1870. The complainers, his trustees, in 1873 succeeded in obtaining a decree from the Master of the Rolls in England, under which they were entitled to get possession of the estate on payment of £56,000. Mr George Gardner, on of the respondent, acted as agent for the trustees, and he borrowed two sums, one of £40,000 and the other of £8000, on the security of the state, and paid £1500 from funds belonging to the trust-estate. The remaining £6500 was advanced by the respondent, James Gardner, on the trustees granting an absolute disposition of the estate of Ballachulish in his favour. This £6500 was procured by George Gardner from the City of Glasgow Bank upon three bills signed by himself, the complainers, and James Gardner, and taken up afterwards by James Gardner. The disposition was dated 26th May 1873. On 26th May and 4th June 1873 the trustees, as first parties, and the respondent, James Gardner, as second party, executed a minute of agreement, whereby it was, *inter alia*, declared—First, that the disposition was granted in security and for repayment of the sum of £6500, interest and consequents, and of all other sums for which the second party might become liable on account of or advance to the trustees; and on the same being paid to him, or his being fully relieved thereof, and of all relative expenses, that he should reconvey the lands, quarries, and others to the complainers under burden of the existing securities thereon, viz. £40,000 and £8000. Second, that in the event of the complainers failing to pay and relieve as aforesaid, upon the respondent giving them or George Gardner, writer in Glasgow, their agent, one month's previous notice that he desired payment or relief, he should be entitled to sell the quarries and others by public roup or private bargain, in Glasgow or Edinburgh, under burden of existing securities, and should account for and pay over to the complainers the free residue of the price, after full settlement of his own claims, and the expenses of and incident to the sale. Thirdly, the whole rents, slate quarry lordships, and money produce of the lands, quarries, and others, which the complainers would be entitled to uplift upon a conveyance in their favour being executed by Mr Tennant, should be applied by them or their factors in liquidating the obligation of the respondent for the sum of £6500, and the whole future rents, lordships, and produce should be also applied in the same way, under deduction of the sum required to pay the instalments on the securities and the instalments repayable of the principal sum of £40,000, "but nothing in this article shall in any way interfere with or prejudice the stipulation in article second hereof." Fourthly, it was agreed that the accounts of intromissions of the complainers' factor should be regularly submitted to and audited by Archibald Ferguson, writer in Glasgow, the agent of the second party.

The complainers granted in 1872 a lease of the slate quarries to the respondent, and he continued to work the quarries. Disputes arose between him and the complainers as to the amount he was bound to pay to them. In March 1876 they recalled the appointment of his son George, who had up to that time acted as their agent and factor.

On 10th September 1876 James Gardner, the respondent, gave intimation to the trustees that he desired payment of £9424, 6s. 9d., and intimated that if it was not paid within one month he would proceed to sell the lands in terms of the agreement.

The trustees then presented the present petition for interdict.

The complainers stated that they were not aware of the nature of the documents which they had signed—(Stat. 20) "The complainers had from

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time to time received returns from the respondent shewing a large output of slates from the quarries, which they believed would result, and which ought to have resulted, in large profits to them; but they had never received any money from the respondent, or any statements of their accounts with him, it having been the duty of his son, George Gardner, their agent, to obtain such money or accounts. The factor appointed by the complainers upon the dismissal of George Gardner then pressed the respondent for such a statement of accounts, and after much difficulty, in the month of August 1876, obtained from the respondent an account bringing out a sum of £9424, 6s. 9d. as due by the complainers to him. The amount consists only to the extent of two sums of £2619, 13s. 3d. and £1112, 9s. 10d. of payments alleged to have been made by the respondent to the City of Glasgow Bank in respect of the said £6500 debt (the remainder of the said debt having been paid by the said George Gardner, the complainers' factor, on their behalf), and the balance of the said £9424, 6s. 9d. consisting of a great variety of miscellaneous charges and alleged payments, many of which ought to have been made, and which the complainers believe were made, by George Gardner, their agent and factor, out of monies belonging to them which came into his hands, and which will form entries to his credit in his accounts with them, but with which the respondent had no concern, unless he may have paid them acting on behalf of his son George as above mentioned, and which do not form proper items of credit in his accounts with the complainers, and were not covered by the foresaid security. . . . The complainers believe and aver that upon a just accounting, if any balance at all is due by them to the respondent, which they do not admit, it will be of very small amount. Further, the complainers are not in a position to adjust accounts with the respondent until they obtain an account of his son George's intromissions, which they have not yet succeeded in doing, and which the said George Gardner is withholding, in collusion with the respondent, for the purpose of enabling the respondent either to convert the complainers into paying sums not truly due to him, or to sell the said estate and then obtain payment of such sums."

The respondent denied the material averments.

The complainers pleaded;—(1) The complainers are entitled to have the proposed sale interdicted, in respect that the sum claimed by the respondent is not truly due, and that they have all along been, and still are, ready and willing to settle accounts with him, and pay any balance which may be found due. (2) The respondent having, in the matter above mentioned, been acting in collusion with the said George Gardner adversely to the complainers' interests, and having by the said acting created, or attempted to create, improper charges against the complainers and deprived them of the means of speedily settling accounts, they are entitled to have suspension and interdict as craved.

The respondent pleaded;—(1) The respondent being infest in the land and others described in the note of suspension under an absolute disposition, is entitled to sell and dispose of the same, under burden of the existing securities,—he being always liable to account to the complainers in terms of the minute of agreement, for the residue of the price, after full settlement of his claims against them, and under deduction of the expenses incident to the sale. (2) The complainers, being absolutely divested of the said subjects, have no right or title to interfere with the sale thereof by the respondent, except on condition of making full payment of the whole sums due to him, as set forth in the foregoing statement, and that within one month from the 16th September 1876, in terms of the said minute of agreement.

The Lord Ordinary, on caution, passed the note, and granted interdict. No. 33.
The complainers reclaimed.

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LORD PRESIDENT.—Although this is merely a question whether the note should be passed without or upon caution it involves considerations of delicacy. Where a creditor is armed with a power of sale, the Court will not interfere to prevent it, unless it can be shewn that an occasion for the exercise of it has not arisen. This is a peculiar case. No doubt here, as in every other instance, the power of sale is just a part of the security, and the security of the creditor is not so good without it. And therefore to stop it is to deprive the creditor of a part of the security he holds. On the other hand, the Court are still quite entitled to interfere if they are satisfied that the occasion for exercising the power has not fairly arisen.

The consideration of the present case seems to me to be influenced by the terms of a minute of agreement between the parties, by which the disposition in favour of the respondent was qualified. The sum advanced by the respondent was £6500, and I assume that the complainers were in straits for money, and could not borrow on the usual terms, and that they took this unfavourable form of obtaining an advance because they could not get a more favourable. They granted an absolute disposition, and it was followed by an agreement that it was to operate only as a security, and not only for the sum of £6500 then raised, but also for any other advance that might be made by the respondent to the complainers. It appears to me that the true construction of the second head of the agreement is that the respondent, when he proceeds to exercise the power of sale, shall be in a position to shew that the £6500 has not been repaid, that any other advances have been constituted so as to be immediately liquidated, and that the other sums due are in the same position. If that were the nature of the account before us it seems to me that the sum in respect of the non-payment of which the power of sale would be proposed to be exercised would be a liquid sum, or one *quod statim liquidari potest*, and that there would be relative vouchers on both sides, without need for further inquiry or accounting. If an account of that nature had been given to the complainers, and due intimation were made of the intended exercise of the power of sale, I should have been very to stop it, even upon caution.

But this case is very different. The balance in respect of the non-payment of which the respondent proposes to put his power of sale in force amounts to £242, 6s. 9d. It is clear that that balance must be brought out on an account of a peculiar kind. It is not alleged that in addition to the £6500 there are definite advances, which, with the interest, make up the debt. That is not the nature of the respondent's statement. His statement is that upon an account, which is produced, the balance I have mentioned arises.

The account begins with a certain portion of the £6500 which appears to be still outstanding, but which, it is admitted, is to a certain extent paid up. But from July 1874 to May 1876 the account proceeds in such a way as to shew that it is not a proper account between debtor and creditor under the security, but that there is something else entering into it, totally alien to such a relation. The respondent, it appears, has entered into the possession and management of the estate in respect of his son being factor, and while he charges all the expenditure made from day to day on the complainers' behalf, he credits on the other side the rents and lordships due to them, and upon the whole account brings

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out the balance of £9424, 6s. 9d. That is not at all the kind of balance contemplated by the second head of the agreement, and for that reason it is not a balance which we can test in a question of this kind.

It seems to me that under existing circumstances the respondent is not entitled to exercise the power of sale. Upon the question how soon he may be entitled I desire to give no opinion. It is quite possible that even a cursory examination, more searching only than we are able to make in a hasty discussion in the Bill-Chamber, may shew that there is a balance as between debtor and creditor upon the footing of this particular agreement, and when that so appears the respondent will be in a different position from that in which he now is. He may then apply to the Lord Ordinary for recall of this interdict. But upon the nature of this account, as at present presented to us, all that I determine is that in my opinion it is not such an account as should be followed by the exercise of a power of sale, and therefore I think the note should be passed without caution or consignation.

LORD DEAS.—I agree with all that has been said by your Lordship, and I think there are some additional grounds for granting this interdict without caution.

Where a heritable creditor is vested with a power of sale, either under a bond and disposition in security or under an absolute disposition and relative back-bond, the Court will not interfere unless it can be shewn that no prejudice is likely to arise to the creditor by delay, and that there may be prejudice to the proprietor by an immediate sale. Here the power of sale is more stringent and less qualified than I can remember ever to have seen before. The sale may be either by public roup or private bargain, and one month's notice only is required to be given. Usually the premonition required is three months, and the power of sale is not allowed to be exercised without certain advertisements. The usual stringency of the provisions against the debtor in the present case is rather a reason for than against judicial interference to prevent probable injustice from being done.

Now, I do not see that any prejudice is likely to arise to the creditor by delaying the proposed sale in the meantime, whereas, if the sale is allowed to proceed, it may bring ruin on the complainers. This is one of a class of high land estates which we know may be thrown away if sold at one time, and may bring a very large price if sold at another. It is matter of notoriety that the present depressed state of trade has greatly diminished (it may be hoped temporarily only) the competition for such properties, where sport and amenity are material inducements in the eyes of a purchaser.

These considerations go to support the view taken by your Lordship, and I am clearly of opinion that we ought to pass the note without caution or consignation.

LORD MURE.—I agree with your Lordship in the chair that the account produced is *ex facie* not an account falling under the terms of the second head of the agreement between the parties. It is a factorial account between the complainers and the son of the respondent. It is distinctly averred by the complainers that the account partly consists of "a great variety of miscellaneous charges and alleged payments, many of which ought to have been made, and which the complainers believe were made, by George Gardner, their agent and factor, out of monies belonging to them." If that is true, the account will be

cut down to a very large extent. It will be necessary for the respondent to instruct the Lord Ordinary that the account falls within the second head of the agreement before he can have the interdict recalled.

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THE COURT pronounced this interlocutor:—"Recall the interlocutor, and remit to the Lord Ordinary in the Bill-Chamber to pass the note and continue the interim interdict without caution or consignation."

TODD, MURRAY, & JAMIESON, W.S.—ADAMSON & GULLAND, W.S.—Agents.

THE LORD ADVOCATE, First Party.—*Lord Adv. Watson—Rutherford.*
EARL OF ZETLAND, Second Party.—*Balfour—Moncreiff.*

No. 34.

Dec. 5, 1876.
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Succession-Duty Act, 1853, 16 and 17 Vict. c. 51, sec. 2—Entail—Disposition—Devolution of Law.—Under a destination to the heirs-male of A, an entailed estate passed from one of A's heirs-male, who died without issue, to his nephew, the next heir-male, who was a great-great-grandson of the entailor. Held (by seven Judges) that in the sense of the Succession-Duty Act the nephew did not succeed by "disposition" to the entailor as his predecessor, but that his predecessor was his uncle, from whom he took "by devolution of law."

ON the death of Thomas, second Earl of Zetland in 1873, the succession to certain lands opened under the destination of two deeds of entail mentioned to Lawrence, the third Earl. The present question arose as to the succession-duty payable by the Earl.

1ST DIVISION,
with four
consulted
Judges.
Lord Shand.
B.

The Lord Advocate maintained that the property held under the entails were taken by the Earl by devolution from his uncle the last Earl of Zetland, as his predecessor, and that, being a descendant of a brother of the predecessor, he was liable to pay succession-duty at the rate of three per cent.

The Earl of Zetland maintained that the estates were not derived by him from the last Earl as predecessor in the sense of the Succession-Duty Act, but that the predecessors from whom they were derived were the makers of the two entails, both of whom were his lineal ancestors, and that he was consequently liable in succession-duty only at the rate of one per cent.

The first of the two deeds of entail was executed on 25th May 1768 by Lawrence Dundas of Kerse, and contained the following destination,—"To the said Thomas Dundas (afterwards Thomas Lord Dundas), my son, in liferent, for his liferent use only, during all the days of his natural life after my death, and to the heirs-male lawfully procreated or to be procreated of his body, in fee, whom failing," to certain substituted heirs in their order, as specified in the said deed of entail.

Thomas Dundas, who had succeeded to his liferent under the first deed, was empowered by a private Act of Parliament to disentail certain lands upon entailing other lands of a similar value, and he executed in 1813 a second deed of entail which contained a destination to the same effect as the deed of 1768.

Upon the death of Thomas, Lord Dundas, in the year 1820, his eldest son Lawrence Lord Dundas, afterwards first Earl of Zetland, succeeded to the estates as the institute under the destinations to Thomas Lord Dundas, in liferent, and the heirs-male of his body in fee.

Lawrence, first Earl of Zetland, died in the year 1839, and was succeeded in the entailed estates by his eldest son Thomas, second Earl of Zetland, as heir-male of tailzie and provision under the above-mentioned destinations.

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Thomas, second Earl of Zetland, died in 1873, without leaving issue. The present, the third Earl of Zetland, was his nephew, being the eldest son of the late Honourable John Charles Dundas, the younger brother of the last Earl, and succeeded to the estates contained in both of the entails.

A special case under 19 and 20 Vict. c. 56, was adjusted between the Lord Advocate and the Earl, in which the following question was submitted for the opinion and judgment of the Court:—"Who is to be regarded, in the sense of the Succession-Duty Act, as the predecessor of the said Lawrence Dundas, the present Earl of Zetland (1) in regard to the lands and estates held under the entails of 1768 and 1813?"

The Lord Ordinary pronounced this interlocutor:—"Finds that the deceased Thomas, second Earl of Zetland, the heir of entail last in possession of the estates in question, is to be regarded in the sense of the Succession-Duty Act as the predecessor of Lawrence, third and present Earl of Zetland, in the whole lands and estates which are the subject of the special case, and that the rate of duty to which the said Lawrence Earl of Zetland is liable in respect of his succession to the said lands and estates is three per cent, and decerns: Finds the said Lawrence Earl of Zetland liable in expenses, and remits the account thereof," &c.*

* "NOTE.— . . . It has been repeatedly said in the cases of this kind that have occurred, that the answer to the question, Who is the predecessor of the person who has succeeded? depends on the answer to be given to the other question, Has the person who has succeeded obtained his right by disposition or by devolution within the meaning of the Succession-Duty Act? If the present Earl has derived his right by disposition, the entailor was his predecessor. If he has derived his right by devolution then his predecessor was his uncle, the last heir in possession.

"I am of opinion, both on principle and on the authorities, that the latter of these views is the sound one. The whole subject has undergone a very full discussion in the cases of Lord Saltoun, 16th December 1858, 21 D. 124, 31 Scot. Jur. 76, and 7th July 1860, House of Lords, 3 Macqueen, 659, 2 Scot. Jur. 641, and Gordon, 19th July 1872, 10 Macph. 1015, 44 Scot. Jur. 571. In the former of these cases it was expressly decided that an heir under a deed of entail, called by name, and taking up the estate as a new *stirpe*, or the first of a new series of heirs after the exhaustion of a previous branch or branches of the destination, takes the estate—laying out of view the particular mode of making up his title in accordance with Scotch law—by disposition or conveyance directly to himself, and not by devolution, and that consequently the entailor is to be regarded as his predecessor. The opinion of the minority of the Judges in this Court, which ultimately received effect, as well as those of the learned Judges in the Court of appeal, in almost every instance contain expressions shewing that, while the head of a new branch of the destination called *nominatim* takes from the entailor as his predecessor, his heirs, taking as such under that description, ought severally to be regarded as taking by devolution, not by disposition—the result being that the last heir in possession, by whose death the estate devolves, and not the entailor, is in the case the predecessor. In the succeeding case of Gordon that view was adopted. The case is a direct decision to that effect. The result is, that in the great majority of instances in the case of entailed estates the predecessor of the succeeding heir in the sense of the Act is the immediately preceding possessor to whom the succeeding heir stands in relationship by blood, more or less near, and the succeeding heir has thus the advantage of this relation in fixing the rate of succession-duty.

"The counsel for Lord Zetland did not dispute that the case of Gordon was decisive of the present question, but stated that it was intended to submit the point for reconsideration. Of course this can only be done before the Court in review. I can only give effect, as I have done, to the rule already laid down. But I may at the same time say, that even if the question were open, I should

The Earl of Zetland having reclaimed, the Court ordered the case to be argued before the Judges of the First Division, with the assistance of four Judges of the Second Division.

The Earl of Zetland then argued;—The Judges in the case of Lord

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ascertain no difficulty in deciding this case in accordance with the view given effect to in the case of Gordon.

"If it be suggested that the distinction drawn in the statute between succession by disposition and by devolution is intended to mark the distinction between intestate succession and succession by deed of any kind, and that consequently every one who takes a beneficial interest by deed throughout any course of succession, however long, takes by disposition from the grantor as his predecessor, the answer is, this view has been practically negatived after full consideration by the Court of last resort in the case of Lord Saltoun; for in that case the ground of decision was, not that Lord Saltoun took the estate as an heir called by a deed, but that there was a direct conveyance to him *nominatim* as the head of a new branch of the destination. The idea that the line was drawn between intestate succession on the one hand and succession anyhow by virtue of a deed, received no countenance from any of the Judges, and would have been subversive of the rule which has been applied to succession in entailed estates in England, where the donee or remainder-man who takes by purchase is the successor, and the entailor the predecessor; while 'with respect to the heirs of the body the donee in tail is the ancestor, and the heir of the body is the successor'—(*per* Lord Wensleydale, 3 Macqueen, 685).

"If then a narrower rule is to be adopted, it appears to me that the rule indicated throughout most of the opinions in the case of Lord Saltoun, and which received effect in the case of Gordon, is the only practical one, and is probably the best fitted to do justice in the great majority of cases, leading generally to liability for a smaller succession-duty where the immediately preceding possessor of an estate is an ancestor or near relative, than in the case where he was a stranger to the person next succeeding. It was suggested in the argument that where a son immediately followed his father in the possession of an entailed estate the Court should hold the father to have been the predecessor, but that if the degree of relationship was greater the heirs succeeding should be regarded as taking from the entailor. There appears to be no principle for this view. And even if it received effect, the result would probably be that though it appears that in this case Lord Zetland, as a descendant of the entailor would benefit, in the great majority of cases it would be a misfortune for the heir succeeding that he should be held to take by disposition from the entailor, often a stranger in blood to him, and at least not a lineal ancestor. If it be assumed in the present case that the entailor was a stranger in blood to the persons called under the branch of the destination which still regulates the estate, then, according to the argument submitted for Lord Zetland, each succeeding heir would have to pay ten per cent as succession-duty. The only exception suggested was that of a son following his father in the estates, in which case it was said the rule ought to be different. I am unable to see any principle for the difference, for a person directly succeeding his uncle has in the general case the same reason for claiming that his uncle should be regarded as his predecessor, as to limit the duty to three per cent instead of ten, where the entailor is a stranger to him, as a son succeeding to his father would have in maintaining that his father was his predecessor, so as to limit the duty to one per cent in similar circumstances. It appears to me that the practical and sound rule in the interpretation of the statute is that which has received effect by the judgments of the Court and the practice which has resulted, viz., that in a destination to a person named and his heirs, or in a series of similar substitutions, the head of each separate branch should be held to take by the disposition in his favour from the grantor of the deed as his predecessor, while the others take by devolution, and have thus the benefit, in a question as to the succession-duty, of the relationship which subsists between the person named and those called as his heirs."

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Saltoun had made a distinction between persons named as substitutes and those unnamed; but, although this might be a good distinction in an English deed of entail it was not so in a Scotch deed, because all substitutes in a Scotch deed were in the same position, whether named or not. The case of Gordon (*supra cit.*) was wrongly decided, because the Judges founded their judgment on mere *obiter dicta* in the case of Saltoun, and disregarded the difference between the heir of the body in an English deed and in a Scotch deed. As long as the descent was within the issue of the entail, the heirs took by devolution of law. When a new *stirps* came in under the entail then the heir took by disposition.¹

The Lord Advocate argued;—The cases of Saltoun and Gordon were well decided, and ruled the present question.

At advising,—

LORD PRESIDENT.—My Lords, when this reclaiming note came before us in the First Division on the 4th of November last the counsel for the Earl of Zetland admitted that the judgment in the Second Division in the case of Gordon was directly adverse to the pleas he was about to maintain. But he intimated at the same time that the special case had been adjusted between Lord Zetland and the Lord Advocate for the purpose of obtaining the judgment of the Court of last resort on the question raised and decided in the case of Gordon and that he was prepared to contend that the question had been determined by the Second Division on principles inconsistent with those adopted by the House of Lords in Lord Saltoun's case. In these circumstances, the Judges of the First Division thought it desirable, and consistent with practice in the like cases, to appoint a hearing before the Judges of both Divisions, with a view to a deliberate reconsideration of the question before pronouncing the judgment to be carried to appeal. We have now heard a full and able argument on the question in all its bearings.

The facts of the case may be very shortly stated. In 1768 Sir Lawrence Dundas made an entail of certain lands in favour of "Thomas Dundas, my son, in liferent for his liferent use only during all the days of his natural life and to the heirs-male procreated or to be procreated of his body in fee," whom failing, to certain other substituted heirs. The entailor died in 1774, and his son Thomas, who was created Lord Dundas, succeeded to the liferent of the estate. He was empowered by a private Act of Parliament to disentail a portion of the entailed lands upon condition of entailing other lands of equivalent value. This power he exercised, and the lands substituted for the disentailed lands were settled by him by deed of entail in 1813, which destined the land in conformity with the previous entail, "to myself in liferent for my liferent use only during all the days of my natural life, and to the heirs-male lawfully procreated or to be procreated of my body," whom failing, to the other heirs substitute called in the previous entail. On the death of Thomas Lord Dundas in 1820, his son Lawrence, the first Earl of Zetland, entered into possession of the estate as full fiar under both the deeds of entail. The first Earl of Zetland dying in 1839, was succeeded by his son Thomas, the second Earl, who died without issue in 1873. The present Earl, being the eldest son of the immediate younger brother of the second Earl, was thus the nearest existing heir-male of the body of Thomas Lord Dundas, the entailor's son, and as such was duly

¹ Craig, i. 10, 13; Forbes v. Lord Clinton, June 6, 1868, 6 Macph. 900. 4 Scot. Jur. 514, June 17, 1873, 11 Macph., H.L., 44, 45 Scot. Jur. 388.

erved and returned as nearest heir-male of tailzie and provision to his uncle, his immediate predecessor in the estate. No. 34.

The question for decision is, whether, under the operation of the statute 16 Dec. 5, 1876. Lord Advocate v. Earl of Zetland. and 17 Vict. c. 51, the present Earl's succession is to be taxed on the footing of his being the successor of the last Earl, his uncle, or of his being the successor of the entail. If I were called upon to decide the question before us on scientific legal principles I should adopt without qualification the opinion of my brother Lord Deas in Lord Saltoun's case. According to legal principle every substitute of tailzie takes the entailed estate as the heir of the immediately preceding substitute—no doubt as heir of provision, but not the less on that account as his heir in the proper legal acceptance of the term.

But scientific principles are in the present question displaced, to some extent at least, by statutory rule, and the statute which introduces the disturbing rule is intended to apply equally to the two different and somewhat inconsistent systems of succession to heritable property which prevail in England and Scotland respectively. Therefore, as Lord Chancellor Campbell says, the technicalities of both systems must be disregarded, and the language of the Legislature must be taken in its popular sense.

What, then, according to this canon of construction, does the Legislature mean when it distinguishes between a disposition of property by reason of which a person becomes beneficially entitled thereto on the death of another, and a devolution by law of such beneficial interest to one person on the death of another? In both cases there is a succession in the statutory sense; in the former case the predecessor is the settler or disponer; in the latter the predecessor is the ancestor of the person taking the succession.

The inquiry is, who is the predecessor of the present Earl of Zetland? But the answer depends on the solution of another question—does the present Earl take the estate by disposition or by devolution of law? If he takes it by force of the disposition of the entail, contained in the deed of entail, then the entailor is his predecessor. If he takes it by devolution of law from the heir last entailed and seized as of fee in the entailed lands, then his uncle, the last proprietor, is his predecessor. It appears to me that the judgment in the House of Lords in Lord Saltoun's case has established, in the construction and application of the statute, a distinction between two classes of heirs of entail—between an heir who succeeds by virtue of his being individually named or circumstantially described in the entail, and who may therefore be fairly said to take *per formam doni*, and an heir who takes as one of a class of heirs described, *exempli gratia*, as the heirs of a body of one individually named or circumstantially described. Now, it is quite clear that the present Earl of Zetland does not belong to the former category, and it is equally clear, I think, that he does belong to the latter. But it is contended that a further distinction may be introduced consistently with the judgment and with the rule of the statute among heirs who take, not because they are individually named or described, but because they belong to a class of heirs who are appointed to succeed one generation after another until the class is exhausted. The distinction sought to be introduced is between an heir who succeeds by force of the entail, who would not succeed to the last proprietor according to the law of intestate succession, and an heir who, being the heir entitled under the destination, is also the heir *aliiquei successurus*.

I confess I do not see how this distinction can avail Lord Zetland, for in point of fact he combines the character of heir of tailzie and that of heir of line of his

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uncle the last Earl. But I think it right to say that I am not prepared to admit the proposed distinction, and I agree in the opinions of the Judges of the Second Division who decided the case of Gordon, in which the party succeeding was a heir-male of the body of a *nominatim* substitute, but was not the heir of line of the last heir in possession. I think that when upon the death of a *nominatim* substitute the estates devolve on the heirs-male of his body in their order, the succession is, according to the true construction of the statute, a devolution by law. The entailor has selected the class he wishes to favour—heirs-male of the body—but he has left it to the law to say what shall be the order of succession of the individuals within that class. The law on the death of the eldest son of the *nominatim* substitute prescribes that the son of that eldest son, and not his immediate younger brother, shall take as the next heir-male of the body of the *nominatim* substitute. But if the law of succession were altered, and an immediate younger brother were preferred to the eldest son of a deceased proprietor, then a destination to heirs-male of the body would suffer a corresponding change of meaning. In short, the will of the entailor when he calls a class of heirs-male of the body is, that the law shall determine within that class who is the person to take on every occasion on which a death occurs among the class, causing a devolution of the estate; and from this it seems to follow that on every such occasion the transmission of the estate from the dead to the living is a devolution by law. For the same reasons I reject another suggestion made in the course of the argument, that a devolution by law may be held to occur only as the descent of the estate among the heirs-male of the body is direct from father to son, but not when it diverges to collaterals and their descendants, as in the present case of succession by a nephew to an uncle. If the above reasoning be sound, this is a merely fanciful distinction not contemplated by the statute, and plainly not justified by that popular sense of the words used, which it has been settled affords the true rule of construction.

Lastly, it was contended that succession among a class of heirs prescribed by the entailor cannot be devolution by law unless the class of heirs prescribed by the entailor be the same class of heirs to whom the estate would devolve in intestate succession. If this argument is to have any meaning or consistency, it must go the length of maintaining that the order of succession among a class of heirs of entail can never be by devolution of law unless the destination of the tailzie be to the heirs of line, or the heirs at law, or the heirs whatsoever of the entailor, or of some person named or circumstantially described, so that the order of intestate succession may come into operation as soon as the entailor or party first named or described fails. But it is well settled in many cases, and notably in the cases of Leny of Dalswinton, June 28, 1860, 22 D. 1272, 32 Scot. Jur. 587, and of Gordon of Cluny, March 2, 1866, 4 Macph. 501, 38 Scot. Jur. 232, that as soon as the estate, in terms of the destination, devolves on heirs of line or heirs at law, or heirs whatsoever, there is an end of the tailzie, and such heirs are not heirs of entail. The success of this argument, therefore, would lead to the conclusion that there can never be within the meaning of the statute a devolution by law from one heir of entail to another, which I apprehend to be quite inconsistent with the principle of the judgment in Lord Saltoun's case.

After the fullest consideration, therefore, I have found no reason to doubt the soundness of the judgment pronounced in the case of Gordon.

LORD JUSTICE-CLERK.—The question presented in this case is precisely similar

that which we had to consider in the case of Gordon in the Second Division ; No. 34.
 and as in that case I had occasion to express pretty fully the views which I
 entertain on the subjects that have been discussed before us, I think it quite un-
 necessary, especially after the very clear and satisfactory opinion that we have
 listened to, to enter upon the subject at all. The opinion which I had
 formed at that time, and which I still retain, is that the doctrine of Lord Sal-
 toun's case substantially, if not identically, runs along the same lines as the
 English doctrine of purchase and descent, and that in construing this statute we
 shall not go far wrong if in considering the signification of the terms devolution
 of law and disposition we follow the analogy which I think has been provided
 for our guidance. The result of that, as I expressed in my opinion in the case
 of Gordon, is that wherever a party takes under an entail according to the forms
 of the law of Scotland, either as the institute, or as a *nominatim* substitute, or
 as the head of a new or fresh *stirps* or class of heirs, he is held to take by gift
 or disposition ; on the other hand, that any one who takes simply as the member
 of a *stirps* or class takes by devolution of law.

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In the present case that rule is quite sufficiently applied by coming to the
 result that your Lordship has expressed, and thus every one within the class,
 whether the succession go directly in the line of descent among the members of
 the class or deviate, it may be, to collaterals, or ascend to a former generation,
 still all these constitute the *stirps*, and will take by descent, by inheritance, by
 devolution of law. I do not think it necessary to say more. I had intended to
 make one remark upon Mr Balfour's most ingenious argument, that this rule is
 only applicable as long as the line of succession continues in the line of descent,
 and that even within a *stirps* where a succession goes to a brother or an uncle it
 ceases to be inheritance and becomes disposition. But your Lordship has already
 expressed what I think is a very sufficient answer to that view. On the whole
 matter I remain of the opinion which I expressed in the case of Gordon.

LORD DEAR.—I am entirely of the opinion which has been expressed by your
 Lordship in the chair. I am very glad that, adopting the analogy of the law of
 England which was discussed in the correspondence between Lord Hardwicke
 and Lord Kames, and by reading the statute exceptionally in a popular sense,
 the House of Lords found themselves in a position to arrive at the result which
 they did in the case of Lord Saltoun ; because I think it a much more reason-
 able and equitable result than that to which, by a majority, we held ourselves
 compelled to come in this Court, having regard to the principles of feudal law
 and conveyancing applicable to heritable rights in Scotland.

LORD NEAVE.—I am of the same opinion, upon the grounds stated by your
 Lordship. This matter was fully considered in the case of Saltoun here and in
 the House of Lords, as well as in the case of Gordon ; and I think the judgment
 in Saltoun's case, which ruled the case of Gordon, ought also to rule the present
 case. A *stirps* once begun, the party takes by devolution of law from his pre-
 decessor. There is a good deal in the remark which has been made that there
 is a certain equity in the different amount of tax imposed in the one case and
 the other. A person succeeding to a father or uncle has fair reason to look for-
 ward to the estate becoming his ; but the matter is different in the case of a
 comparative stranger. The question, however, is what is the interpretation of
 the statute ; and I agree in the view stated by your Lordship on that subject.

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LORD ORMIDALE.—I pronounced the judgment as Lord Ordinary in the case of Gordon, which was afterwards affirmed by the Second Division of the Court. In the note to my judgment in that case I explained fully the grounds on which I proceeded, and I stated that these were in conformity, as I thought, with the principles given effect to in the case of Saltoun. I have not heard anything of the argument addressed to us here to induce me to think that I went wrong in the case of Gordon, or that the unanimous decision of that case by the Second Division was in any respect ill-founded. And as it was acknowledged that that decision was directly in point, I therefore concur in the result that your Lordships have arrived at.

LORD MURE.—I have come to the same conclusion. The case of Gordon, which is admitted to rule this if rightly decided, proceeded, I think, upon a sound construction of the statute which we are here called on to interpret. I shall simply add this—that after having heard the matter fully argued, and having considered the opinions in the case of Gordon, and those delivered by the House of Lords in the case of Lord Saltoun, I do not very well see how the Second Division of the Court could have come to any other conclusion. But I find that Lord Chancellor Campbell in the case of Lord Saltoun, after stating that he considered the appellant was a party who took directly under the entail, says—“I consider it equally clear that if the appellant were to die leaving a son, the son would take by devolution, the appellant being considered the predecessor, and so it would go on by devolution from generation to generation, till the *stirps* came in under the entail.” That was the opinion of the Lord Chancellor, as to what the general rule of law was with regard to such questions, and Lord Wensleydale uses very similar expressions. He says—“The donee or remainderman who takes by purchase is the successor to the entailor, the predecessor with respect to the heirs of the body, the donee is the ancestor, and the heirs of the body are the successors.” Now, these are said to be *obiter dicta*. I do not think that they are. I think they were the distinct expression and explanation of the grounds on which the learned Judges arrived at the conclusion they came to. And applying these observations, and in particular that of Lord Wensleydale, to the pedigree in the present case, I have come to the same conclusion, that which your Lordship has arrived at; for I find that the first *stirps* was Lawrence, the first Earl of Zetland, and that the party whose case we have now under consideration is an heir of the body of that first *stirps*.

LORD GIFFORD.—I concur with your Lordship in the chair, and I have nothing more to add.

THE COURT pronounced the following interlocutor:—“The Lord Ordinary, having resumed consideration of this cause, with the assistance of the four Judges of the Second Division, and heard counsel on the reclaiming note for the Earl of Zetland against Lord Shand's interlocutor of 17th July 1876, after consultation with the said four Judges, and in conformity with the opinion of all the seven Judges present at the said hearing, recall the said interlocutor: I find that the deceased Thomas, second Earl of Zetland, is, within the meaning of the Succession-Duty Act (16 and 17 Vict. cap. 67), the predecessor of the present Earl of Zetland in the lands contained in the two deeds of entail, dated respectively in 1768 and 1813, and that the rate of duty to which the Earl of Zetland is entitled is one-tenth of the value of the lands so contained.”

liable in respect of his succession to the said lands is three per cent, and decern : Find the Earl of Zetland liable in expenses," &c.

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SOLICITOR OF INLAND REVENUE—H. G. & S. DICKSON, W.S.—Agents.

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JAMES A. WEST AND OTHERS, Complainers.—*Trayner—Keir.*

THE ABERDEEN HARBOUR COMMISSIONERS, Respondents.

—*Lord-Adv. Watson—Kinnear.*

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River—Upper and Lower Heritors—Salmon-Fishing.—Harbour commissioners under Acts of Parliament diverted the channel of a tidal river, having purchased the salmon-fishings at that part of the river. When the diversion was completed there was a steep embankment on one bank of the altered channel, which prevented fishing from that side, and the take of the fishings was reduced to less than half its previous amount. After three years they proceeded to reduce the slope of the embankment by laying stones and gravel at the foot of it, extending into the bed of the river. The effect of these operations was to diminish the depth of water at that part of the channel, and to enable the proprietors of the fishing to catch more fish, but not to obstruct the passage of fish up the river.

An application for interdict, at the instance of the proprietors of the immediately superior fishings, on the ground that the harbour commissioners had no right to use their statutory powers for the benefit of the salmon-fishings, and that, as proprietors of the salmon-fishings, they had no right to execute any operations (except repairs) on the bed of the river, *refused*.

Is 1868 the Aberdeen Harbour Commissioners obtained an Act of Parliament empowering them to divert the channel of the river Dee for a considerable distance below the Wellington Suspension Bridge. For this purpose the Act gave them power, which they exercised, to acquire the banks of the river immediately below the bridge, the proprietors of which had a salmon-fishing called the Midchingle fishings, the commissioners being taken bound to provide new shots and fishing stations in the altered channel. This condition was never insisted in, but in 1871 the fishings themselves were sold to the commissioners under an agreement confirmed by another Act of Parliament. The Act of 1868 also gave power to the commissioners to make deviations within certain limits from the deposited plans with the sanction of the Board of Trade.

The commissioners completed their works in 1873, and at first made a steep embankment on the north side of the altered channel that it was impossible to fish from it. But in 1876, with the sanction of the Board of Trade, they reduced the slope of the embankment partly by depositing stones and gravel at the bottom of it, so that a gradual slope extended into the bed of the river.

Lieut.-Col. West and others, proprietors of the Pot and Fords fishings, which were immediately above the bridge, and adjoined the Midchingle fishings, presented this note of suspension and interdict, craving interdict against the commissioners depositing sand, mud, and stones, or carrying on any operations or constructions in the *alveus* of the river, or at least against their doing so, so as materially to obstruct the free passage of salmon, or to enable them to fish where they could not previously fish, more advantageously than before; and also from altering the bed or bank within the lines shewn on the plans deposited with reference to the Act of 1868.

They pleaded;—(3) The respondents are not entitled to use their powers as commissioners except for the statutory purposes connected with the harbour; and, in particular, they are not entitled to use these

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powers to promote their interests as proprietors of salmon-fishings. The respondents, as salmon-fishing proprietors, are not entitled to execute any operations in the bed and on the banks of the river, except such as are necessary to repair any injuries caused thereto by floods or otherwise, and to restore the said *alveus* and banks to the condition in which they were at the completion of the diversion on 1st March 1873.

The note was passed and interim interdict granted. A proof being answer was led, from which it appeared, in addition to the foregoing facts, that the Fords, Pot, and Midchingle fishings had been fished under a joint arrangement from 1834 to 1872, when the channel was diverted. For the four years previous to the diversion the share of the catch accounted for to the proprietors of Midchingle was 9700 lbs., whereas the quantity taken by the respondents during the four following years was only 4100 lbs. The river was about 300 feet wide at low water, its least depth being about three feet at the south side and centre, and its greatest present depth at the north bank, where it is about five or six feet deep. The effect of altering the slope of the embankment, and of depositing gravel along the foot of that slope, would be to reduce the depth of the current there, and might tend to divert the fish nearer to the centre of the river or even to the south side altogether; but the gravel bed would still be covered at low water with about three feet of stream, and the operations would not obstruct the passage of salmon, although the respondents might catch more fish than before.

The Lord Ordinary recalled the interim interdict, and refused the suspension.

The complainers reclaimed.

At advising,—

LORD DEAS.—In this case the complainers are proprietors of certain salmon fishings on both banks of the river Dee higher up the river than the suspension bridge mentioned in the proceedings. The respondents, the harbour commissioners, are proprietors of certain fishings on both banks below the bridge, extending to the sea. A portion of these last fishings is what is called the Midchingle fishings, lying immediately below the complainers' fishings. The harbour commissioners have recently been performing certain operations on the north bank of the Midchingle fishings, where they are proprietors of the land as well as of the fishings. The complainers seek to interdict the respondents from proceeding with these operations, which consist mainly of changing the shape of the north bank in a way to which I shall more particularly advert immediately.

The question which arises between the two parties is not what may be called the general question between upper and lower heritors of fishings; it arises in very special circumstances. The commissioners have two characters—commissioners of the harbour, and proprietors of the fishings. It is only in the latter character that they are here. As regulating the navigation they have to deal with the Board of Trade, whose sanction to their operations they have already got. But the fishings stand in a peculiar position. By the Aberdeen Harbour Act of 1868 the commissioners were authorised to divert and thereby shorten the course of the river Dee, and were authorised to purchase land by compulsion for that purpose, on condition of forming new shots or stations for the Midchingle, Raik, and Stell fishings, which did not then belong to the commissioners. But in place of this an agreement was entered into to purchase these fishings at a price to be fixed by arbitration, and an Act was passed in 1871 confirming that agreement. Section 4 of that Act, after setting forth the former Act and the agreement, provides “that the commissioners may hold at

enjoy the whole sea and river salmon-fishings mentioned in the said agreement, and exercise all the rights for fishing for salmon belonging thereto, with all the necessary facilities therefor, in like manner and to the same extent as the proprietors thereof could have done before such purchase." Then it goes on to say that the commissioners by the acquisition of these fishings shall "acquire and take, and may hold and enjoy, the right of fishing for salmon within and along the new channel of that part of the river Dee which is by the recited Act authorised to be diverted, with all the necessary facilities therefor, in like manner and to the same extent as the right of fishing for salmon in the present channel between the points of commencement and termination of the diversion as or may be held and enjoyed by the proprietors of salmon-fishing therein." And then, further, it says that the rights of salmon-fishing in the new channel shall "for all purposes of title be held to be the same as such rights of fishing for salmon in the present channel."

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These sales were carried out; the price of the fishings was fixed by Mr Leslie, and was paid. Then the diversion was made with the approval of the Board of Trade in 1872 and 1873—one effect of which was to make the channel of the river 200 yards shorter than it had been before. The commissioners in making this diversion found it expedient to build an embankment on the north side of the river, the pitch of the embankment being 1 in 3. The effect of this was found to be to make it impossible to have a shot for fishing on the north side at all, and thereby largely to diminish the produce of the fishings. The operations now in course of execution are intended to reduce the steepness from 1 in 3 to 1 in 7, and thus give an opportunity for having a shot there. With this view the commissioners proceeded to deposit stones and gravel outside the piles to the distance of 48 feet from the bottom of the original slope, making a gradual slope to the centre of the river, and reducing the depth on the north side to about 3 feet at low water. The depth of water in the centre was increased. It was admitted at the bar that there will be at low water a depth of 7 feet in the centre.

It is now necessary, for obvious reasons, to go back to the history of these fishings to ascertain what was their state prior to the execution of any of these operations. Before 1834 there were four shots; in that year an agreement was made between the proprietors of the "Midchingle" fishings and the proprietors of the "Pet" and "Ford" fishings, by which these three fishings were to be worked as one, and a proportion of the fish to be accounted for to the proprietor of the Midchingle fishings. This agreement was acted on till 1872,—that is to say, from 1834 to 1872 these fishings were fished in common, and the produce was divided between the parties according to what was understood to be their share.

Certain states of the produce have been made up, from which it appears, as stated in the Lord Ordinary's note, that for four years preceding the diversion of the channel the quantity of fish accounted for to the proprietors of the Midchingle fishings was more than double the quantity they themselves caught in these fishings during the four years following the diversion.

In these circumstances, the commissioners proceeded to execute the operations now complained of. It is contended on the other side that after having made this embankment they had no right to touch it. It did occur to me that owing to the lapse of time it might have been prudent to have applied to the Lord Ordinary for leave to execute these operations; but that omission cannot

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affect the matter of right which it is the avowed object of both parties in this action to have settled.

Now, in the state of matters I have mentioned, I cannot doubt that if the commissioners had made the embankment at first as it has now been made they would have been doing a thing authorised by the Act of Parliament.

As regards the matter of right, it was contended that no lower heritors were entitled to make an alteration in the river, whether it affects the upper heritors or not; but here the commissioners were specially authorised to make the alterations, and therefore the question does not arise whether the proprietors of the lower fishings is entitled at common law to perform such operations. That is not the question here; it is—Were the commissioners doing anything not authorised to be done by them by the Act of Parliament?

At the same time, if we are to compare the results expected to be attained by this additional shot with the state of matters previously it is very difficult to say that there is injury at common law. Since 1834 the fishings have been in commotion. But prior to that date the Midchingle fisheries had four shots, which produced much more than double what these fisheries now produce. It is said fish will be turned back. The only reason given for that suggestion is that fish prefer deep water. It is admitted that fish can come up in three feet of water, the depth of the bank at low water. It is said that they are more easily frightened in shallow water. All the witnesses agree that should this be so the fish will turn into the deeper water. If so, they will find it in the middle of the river. The objection resolves, in short, into no more than this, that the commissioners will get more fish by having a shot on the north side of the river than they would do without that shot.

I am of opinion that the respondents are legally entitled to do what they are doing here.

LORD MURE concurred.

LORD PRESIDENT.—The peculiarity of this case is that the respondents combine the characters of proprietors of salmon-fishings and harbour commissioners. If this were not so the case would have been even clearer than it is. Prior to 1868 they did not combine these characters, and were laid under an obligation by the Aberdeen Harbour Act of that year to the proprietors of certain salmon fishings in the river Dea. When the river was diverted it was provided by the 82d section that they should “make out and provide on lands belonging to them, or to be acquired by them for the purposes of this Act, such number of new shots or stations for fishings, and in such situations on either side of the new channel of the river, and with such extent of servitude or privileges on the banks thereof, and such access thereto, as shall be requisite for the proper fishings of the river when so diverted.” This was found likely to cause difficulty in reconciling the interests of navigation and salmon-fishing, and therefore the respondents decided to obtain an Act of Parliament confirming an agreement that they had made with the proprietors of these fishings for their purchase.

Now, I cannot doubt that the commissioners, having become proprietors of these fishings, were entitled to have such facilities as they were bound to provide for the former proprietors under the Act of 1868. The question is, whether they have been carrying out their operations as licensed by the statute and the agreement. They are said to have made these fishings more valuable.

not say that they would not be entitled to do so if they did not thereby interfere with the rights of others. The circumstance that in attending to the supreme interest of navigation the commissioners lost sight of the salmon-fishing interests is of no moment. The leading object of the commissioners is to provide for navigation, and that they had to consider first of all; but as proprietors of salmon-fishings they also represented the interests of the public. Their revenues are to be applied to the furtherance of navigation, and the rents of the salmon-fishings are as much public property as the harbour rents.

(After narrating the nature of the operations carried out by the commissioners on the north bank, his Lordship continued)—Now, when they found the bank too steep I cannot doubt that they were entitled to alter it so as to obtain more convenient shots. How they did this is immaterial; the result is that the deepest part of the river is thrown into the centre of the channel instead of being immediately below the north bank. The complainers say that what the respondents have done or are doing injures their upper fishings by obstructing the passage of salmon, and if that statement were well founded they are entitled to what they ask. But what is an obstruction in the legal sense? An improvement in the means of fishing, by which the lower heritor increases the produce of his fishings, is no obstruction, unless there is something illegal or objectionable in the mode by which he effects it. There is in one sense no more fatal obstruction to the passage of a fish than catching it, because it certainly can go no further; but it is no legal obstruction if the lower heritor catches double what he did before, provided there is nothing objectionable in the mode by which he does so. There must be an obstruction that will prevent the passage of the fish that escape the lower heritor. Now, here there is nothing in the nature of a weir or fixed obstruction. The objection is that the depth has been diminished and that fish will be easily frightened. Assuming that to be well proved, which I think it is not, that is quite a visionary grievance. For these reasons I agree with the Lord Ordinary.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Repel the reasons of suspension: Recall the interim interdict granted on 21st March 1876: Refuse the interdict, and decern: Find the complainers liable in expenses," &c.

MEY-CRAIG, DALZIEL, & BRODIES, W.S.—MORTON, NEILSON, & SMART, W.S.—Agents.

WILLIAM AULD (Mabon's Judicial Factor), Pursuer and Nominal Raiser. No. 36.
—*Kinnear*.

AGNES MABON OR ANDERSON AND WILLIAM MABON, Claimants.—
M'Laren—Lorimer.

CHARLES MABON, Claimant.—*Scott—Mackintosh*.

DAVID COWIE, Claimant.—*Lord-Adv. Watson—Kinnear*.

Dec. 8, 1876.
Auld v.
Anderson, &c.

Succession—Heritable and Moveable—Conversion—Power of Sale—Trust—Mentary Provision.—A testatrix conveyed her whole heritable and moveable estate to trustees, "with full power to my said trustees to sell and dispose of subjects above conveyed as they may think proper, and convert the same to cash, or to borrow money on the security of said subjects, or apportion and divide the same among my children after named as they may think proper or advised." The concluding trust purpose was to hold the residue of the test-estate for the six children of the trustor equally, share and share alike, and in case of any of the said children dying before majority or marriage, then the

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share of such child or children predeceasing should accrue to the survivors equally, with a declaration that the shares were to be strictly alimentary, and not assignable or attachable by creditors. No sale took place until after the children had attained majority. *Held* (1) that the declaration that the shares should be alimentary only applied to the period before the children attained majority; and that the trustees were then bound to convey to the beneficiaries; (2) that the fact of the residue consisting of heritage which could not be divided corporeally into the requisite number of shares did not render a sale of the heritage necessary, as the division might be made by granting *pro indiviso* rights or by exercising the power to borrow; and therefore (3) that the right of each beneficiary was heritable, being a *jus crediti* to heritage.

1st Division.

Ld. Craighill.

M.

MRS AGNES BALLANTYNE or MABON died in 1837, leaving a trust-disposition and settlement conveying her whole estate, heritable and moveable, to trustees. The deed conferred on the trustees power "to sell and dispose of the subjects above conveyed as they may think proper, and convert the same into cash, or to borrow money on the security of the said subjects, or to apportion and divide the same among my children afternamed as they may think proper or be advised." The deed provided for the payment of debts and certain legacies and annuities. By the fourth purpose the trustees were directed "to hold the whole residue and remainder of my said whole subjects and estate in trust for my children David Mabon, John Mabon, Thomas Mabon, William Mabon, Agnes Mabon, and Charles Mabon equally, and in case of any of my said children dying before majority or marriage then the share of such child or children predeceasing shall accrue to the survivors equally, share and share alike; declaring always it is hereby expressly provided and declared, that the said several provisions shall be strictly alimentary, and shall not be assignable or liable to be attached in any way by any of the creditors of my said husband and children respectively."

Mrs Mabon was survived by all her children named in the trust-disposition. Of these, three, Thomas, William, and Charles, were alive at the date of the action aftermentioned. David died about 1856, leaving one daughter, Mrs Gibson. John died about 1858, leaving three children James Mabon, his eldest son, and a daughter, Mrs Agnes Mabon nee Anderson, and another son, William. Agnes Mabon married Alexander Cowie, and died in 1850, leaving five children, of whom David Cowie was the eldest.

The trust-disposition was lost sight of and was not found again till 1871. In 1861 Thomas Neilson was appointed judicial factor on the intestate estate of Mrs Mabon, and on the discovery of the deed in 1871 he was appointed judicial factor on the trust-estate, the trustees under the deed having failed to accept, and on Mr Neilson's death in 1871 William Auld was appointed judicial factor.

The estate consisted of house property in Glasgow, and in 1869 part of it was taken from the judicial factor under compulsory powers by the prison board of the northern division of Lanark, under the Prisons (Scotland) Amendment Act, 1869 and the Lands Clauses (Scotland) Act of 1845, and in 1870 the trustees under the Glasgow Improvement Act of 1866 took the remainder of the estate, also under compulsory powers. The amount paid for these subjects was deposited in bank by the judicial factor, and amounted, with interest, to nearly £7000.

The judicial factor brought the present multipiepinding to determine what were the rights of the beneficiaries.

David Mabon's only child, Mrs Gibson, was entitled to one-sixth share of the trust-estate, whether it was heritable or moveable.

There was no question as to the right of Thomas, William, and Charles to their shares, but the judicial factor pleaded ;—On a sound construction of the trust-deed the trustees are required to hold the shares of the said Charles Thomas, and William Mabon in trust for them during their lives, and to pay the annual income arising therefrom to them respectively as an alimentary provision. No. 36.
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Among the representatives of John and Agnes, who had died after their shares vested, the question was whether their shares were to be regarded as heritable or moveable succession in their persons.

The Lord Ordinary pronounced this interlocutor :—" In the first place, and as regards the character of the truster's succession, Finds as matters of fact (1) that the estate left by the truster consisted at her death of sundry houses and plots of ground, partly on the north side and partly on the south side of the Drygate of Glasgow ; (2) that, though by the trust-deed there was conferred on the trustees full power to sell and dispose of the subjects thereby conveyed as the trustees might think proper and convert the same into cash, these were not sold and disposed of and converted into cash by the trustees ; (3) that there was nothing in the trust administration, as provided for by the truster, or in the purposes of the trust, which rendered indispensable the conversion into cash of the heritages composing the trust-estate as left by the truster ; and (4) that these heritages have recently been taken under compulsory powers from the judicial factor, by whom, for want of trustees, necessary trust administration has for years been carried on, partly by the prison board of the northern district of the county of Lanark, and partly by the trustees under 'The Glasgow Improvement Act, 1866,' and the prices received constitute the fund *in medio* in the present action : Finds as matters of law (1) that the taking by the public bodies above specified was not a sale and disposal of the trust-estate, and conversion of the same into cash in the exercise of the powers conferred upon the trustees, and that the character of the truster's succession, as heritable or moveable, must be determined as it would have been if the trust-estate had still consisted of the heritages left by the truster ; and (2) that the other facts being as above set forth, the trust-estate must be regarded and dealt with as heritable and not as moveable succession : In the second place, and as regards the right of the truster's children, among whom the residue and remainder of the trust-estate was to be apportioned and divided, or for whom it was to be held by the trustees, finds that, according to the sound interpretation of the trust-deed, each of these beneficiaries, on attaining majority, or being married, acquired a vested right in his or her share, and was entitled to delivery thereof, free from any burden or condition by which the free use or disposal of the same would or might be affected, so soon thereafter as, in the circumstances of the trust, this could be conveniently accomplished : In the third place, appoints the cause to be enrolled, that parties may be heard as to the application of the foregoing findings to the several claims in the competition, and an interlocutor disposing of these claims accordingly be pronounced, reserving meantime all questions of expenses."

Mrs Agnes Mabon or Anderson and William Mabon, heirs *in mobilibus* of John, reclaimed, and argued ;—When a sale was necessary to carry out the directions of the testator, and the trustees had a power of sale, the character of the succession was changed from heritable to moveable succession. In judging whether such a sale was necessary the whole terms of the deed required to be examined. No division could have taken place here until there was a sale of the heritage. A sale was therefore neces-

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Argued for Charles Mabon and David Cowie;—The trustees had merely a power of sale, and as this power was not exercised the character of the succession was heritable. The conversion which actually took place was long after the date of vesting, and besides, was under compulsory powers, and therefore could have no effect in altering the nature of the succession.²

The judicial factor argued;—The truster's intention was that the provisions should be alimentary, and he was directed to hold the capital of the trust-estate, and therefore was not entitled to pay it over. All the beneficiaries were entitled to was their shares of the income.

At advising,—

LORD PRESIDENT.—In this case the question is, how is the succession of the estate of David Mabon to be regulated in terms of the trust-disposition? She left her estate to her six children, and directed her trustees to hold “in trust for my children, David Mabon, John Mabon, Thomas Mabon, William Mabon, Agnes Mabon, and Charles Mabon equally; and in case of any of my said children dying before majority or marriage then the share of such child or children predeceased shall accrue to the survivors equally, share and share alike; declaring also as it is hereby expressly provided and declared, that the said several provisions shall be strictly alimentary, and shall not be assignable or liable to be attached in any way by any of the creditors of my said husband and children respectively. This is the operative part of the trust-disposition; it is the only part of it which expresses the will of the testatrix as to the division among her children. There is a clause in a former part of the deed which has been said to do so, but I do not deal with that presently. The estate consisted entirely of heritable property at the date of her death, and, till a recent period, continued in the same form. The conversion of it was made by either of the factors, who could not have done so without obtaining special powers from this Court.

The Lord Ordinary has found that the trust-estate must be regarded as heritable and not as moveable succession, and “that, according to the sound interpretation of the trust-deed, each of these beneficiaries, on attaining majority or being married, acquired a vested right in his or her share, and was entitled to the delivery thereof free from any burden or condition by which the free use or disposal of the same would or might be affected, so soon thereafter as, in the circumstances of the trust, this could be conveniently accomplished.”

Now, upon the matters to which these findings refer three points of difficulty have arisen and have been discussed. First, it has been maintained by

¹ Buchanan v. Angus, March 13, 1860, 22 D. 979, 32 Scot. Jur. 418, May 1862, 4 Macph. 374, 34 Scot. Jur. 502; Weir v. Lord Advocate, June 22, 1863, 3 Macph. 1006, 37 Scot. Jur. 522; Fotheringham's Trustees v. Paterson, &c., 2, 1873, 11 Macph. 848, 45 Scot. Jur. 519; Boag v. Walkinshaw, June 1872, 10 Macph. 872; Advocate-General v. Blackburn's Trustees, Nov. 1847, 10 D. 166.

² Lady Massey v. Cunningham, Dec. 5, 1872, 11 Macph. 173, 45 Scot. Jur. 127; Gardner v. Ogilvie, Nov. 25, 1857, 20 D. 105, 30 Scot. Jur. 65; Allan v. Allan's Trustees, Dec. 12, 1872, 11 Macph. 216, 45 Scot. Jur. 144; Hay v. Espie, June 3, 1856, 18 D. 917, 28 Scot. Jur. 420.

judicial factor that he is bound to hold these shares and not to divide them No. 36.
 so that the provisions of the trust-deed may receive effect; that he must reserve
 the capital during the lifetime of the children, and pay the annual income to ^{Dec. 8, 1876.}
 them respectively as an alimentary provision. That, I think, is inadmissible ^{Auld v.}
 under the trust-deed. I think that the plain meaning of its provision is that ^{Anderson, &c.}
 the trustees, so long as they held the shares, were to consider them as alimentary,
 but that so soon as they vested in the children they should be entitled to pay
 over the capital sum to them. In the second place, it cannot, in my opinion, be
 contended that no share vested till all the children had either attained majority
 or been married. It is of very little consequence whether that was the meaning
 or not, for the period at which that happened is long past; but I may say that I
 agree with the Lord Ordinary on that point too.

Then the only question that really remains is, what was the character of the
 succession? Now, the interest of the parties in this question is a good deal
 limited. As regards three of the children they are alive, and are each entitled
 to one-sixth of the estate, whatever its character may be. Another, again, died
 in 1856, leaving only one child. That child will take his share whether the
 estate be heritable or moveable. It is with regard to the families of John, who
 died in 1858, leaving three children, and of Agnes, who died in 1850, leaving
 five children, that the question does arise—was this succession heritable or move-
 able? If it be heritable, one-sixth will fall to the eldest son of John, and one-
 sixth to the eldest son of Agnes. If it be moveable, each sixth part will be
 divided among the families of John and Agnes.

Now, the Lord Ordinary, it appears to me, has taken the right view here
 also.

The clause I read to your Lordships from the deed does not suggest any inten-
 tion to convert the estate before it is assigned to the children. The only other
 part of the deed that is said to suggest this is that occurring immediately after the
 conveyance to the trustees. She conveys to them "as trustees, for the ends, uses,
 and purposes after-mentioned, all and sundry lands and heritages, of whatever
 kind or denomination, as also my whole moveable or personal means and estate,"
 "with full power to my said trustees to sell and dispose of the subjects above
 conveyed as they may think proper, and convert the same into cash, or to borrow
 money on the security of the said subjects." There is undoubtedly a power of
 sale conferred on them, and as a concomitant of that power a power of borrowing
 money on the security of the property. One easily understands why a testator,
 having nothing but real estate such as this, should give a power of sale and
 borrowing. It would be very inconvenient in many cases that might arise in
 the management of the estate if no such provision had been made. For in-
 stance, if the testatrix had left debts behind her which must be discharged so as
 to extricate the trust the subjects would have to be sold in part or money
 borrowed on their security.

Then the other alternative is put before them. If they do not sell they are
 to "apportion and divide the same among my children after named as they think
 proper or be advised." It is quite plain to me what was in the mind of the
 testatrix here. The heritable property shall be apportioned or divided as the
 trustees may think proper or be advised. It has been maintained that the only
 way of dividing it was to find as many subjects, all of equal value, as there are
 parties, and give one to each party. But that contention is quite a false and

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mistaken one. If the trustees were to proceed to a division they would find many better ways than that. They might frame a scheme of division, or they might convey the whole estate *pro indiviso* to the whole parties. But I find words of very great importance in the deed in solving this difficulty. The trustees are to divide the estate "as they may think proper or be advised." That cannot be meant to affect the amount of the share that each child is to receive, for afterwards it is provided that they are to have equal shares. It must therefore mean the manner of division. I think, then, it is left to the trustees to apportion and divide the estate *in forma specifica*. How this is to be done is left to their discretion.

The question that arises is this, Is it a natural consequence of these provisions that the estate should be converted into money? or is it not rather merely that the trustees shall have power in a case of difficulty occurring in the administration of the estate to sell? It is quite consistent with the authorities that the existence of a power of sale will not affect the nature of the estate if no sale has taken place and the administration has been in conformity with the expressed wish of the testator. I am of opinion, then, that each child acquired as he came of age a *jus crediti* in a heritable estate. What has actually taken place is that the properties have been acquired under statutory powers by certain public bodies. But as the compulsory powers under which that was done were exercised long subsequent to the date of vesting that fact can have no effect.

LORD DEAS.—I am of the same opinion. The whole estate consisted of heritable subjects, and the succession must be ruled by the law of heritable property, unless the opposing party can make out one of two things, either that the testator intended the estate to be converted, or that the purposes of the trust are inexecutable unless that be done. Unless it be the power of sale there is no indication of such an intention. There is no direction to sell which would have had the effect of conversion. But a mere power to sell will not convert unless the power be exercised. It is maintained, however, that the purposes of the trust cannot be carried out in any other way. I am not satisfied of that. There might be two other ways open. The provision giving power to borrow is unqualified, and I am disposed to think that the trustees might have borrowed money and used it to equalise the children's shares of the heritable estate, or, if that was not found practicable, they might have conveyed the estate to the children *pro indiviso*, as your Lordship has suggested. The result of such a conveyance would have been very much the same as if money had been borrowed to equalise the shares, and any one of the *pro indiviso* proprietors might thereafter have insisted upon the property being divided, or, if that could not be done, upon its being sold and the price divided. I am therefore of opinion, with your Lordship and the Lord Ordinary, that the succession here is heritable. Your Lordship has already pointed out that this will only make a difference as to two of the shares, those of Agnes and John.

As to the alimentary clause, I agree that it has no effect on the present question. The truster meant that the capital estate, as well as the income, should be alimentary. That might affect the rights of a husband and his creditors, but it did not make the daughter a liferenter.

I agree also in what your Lordship has said in regard to the conversion which has actually taken place. It took place long after the period of vesting of the provisions, and so can have no effect on the present question.

LORD MURE concurred.

No. 36.

LORD SHAND, not having been present at the argument, gave no opinion.

Dec. 8, 1876.
Auld v.
Anderson, &c.

THE COURT adhered.

HAMILTON, KINNEAR, & BEATSON, W.S.—D. R. GRUBB, L.A.—
GEORGE BEGG, S.S.C.—Agents.

JOHN M'DERMOTT, Complainer.—*M'Kechnie*.
JAMES RAMSAY, Respondent.—*Alison*.

No. 37.

Dec. 9, 1876.
M'Dermott v.
Ramsay.

Master and Servant—*Sheriff Courts Act*, 1876, 39 and 40 Vict. c. 70, sec. 6—*Meditatione Fugæ Warrant*—*Process*.—Held that a petition presented under sec. 6 of the Sheriff Courts Act for the apprehension of an apprentice *in meditatione fugæ*, and for his detention till he should find caution *de judicio sisti* in an action to be brought by his master to have him ordained to return to his service or to pay the penalty of £20 named in the indenture, was competent.

JAMES RAMSAY, smith and cartwright, Glasgow, presented a petition in the Sheriff Court of Glasgow against John M'Dermott, his apprentice. The petition prayed for the apprehension of the apprentice and his detention until he found caution *de judicio sisti*—in any action at the instance of the petitioner which might be brought against him within six months, to have him ordained to return to and continue in his master's service during the term of his apprenticeship, and to find caution to that effect, or otherwise to pay £20, being the penalty stipulated in the indenture of apprenticeship.

1ST DIVISION.
Lord Rutherford
Clark.
M.

Ramsay stated in a condescendence annexed to his petition that he believed M'Dermott was *in meditatione fugæ*, and was about to leave Scotland and proceed to America, and that he (Ramsay) was about to raise an action of the nature above described.

M'Dermott was apprehended on warrant of the Sheriff-substitute Lees. He was afterwards examined, and having admitted that he intended to leave the country the Sheriff-substitute pronounced an interlocutor finding that he was *in meditatione fugæ*, and granting warrant for his incarceration till he should find caution.

M'Dermott brought a note of suspension and liberation.

The Lord Ordinary pronounced this interlocutor:—"Passes the note, and refuses *hoc statu* to grant liberation."

M'Dermott reclaimed, and argued;—The master's proper remedy was under "The Employers and Workmen Act, 1875," sec. 6. It was not competent to apprehend on a *meditatione fugæ* warrant when the action to be raised was not for a sum of money. The petitioner was not entitled to the new form of petition prescribed by the "Sheriff Courts Act, 1876," because an application for a *meditatione fugæ* warrant was not a civil proceeding in the ordinary Sheriff Court, to which the new form of petition was limited. If caution was wanted the Court might accept the respondent's own bond.¹

Argued for Ramsay;—No doubt proceedings under the Employers and Workmen Act might have been taken against the complainer, but then might have gone off to America. Any one who was under an obligation *ad factum præstandum* like the apprentice or to pay a sum of money might be arrested on such a warrant as the present.

¹ Cameron v. Murray and Hepburn (opinion of Lord Deas), March 8, 1866, Macph. 547, 38 Scot. Jur. 281.

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LORD PRESIDENT.—This is a kind of question in which one is extremely anxious to hear everything that can be said in favour of the apprentice, but I am sorry to say I can see no ground whatever for his liberation.

With regard to the objection to the form of proceedings, it is difficult to say on what that is founded. In the Sheriff Courts Act of this year one form is prescribed for the forms ordinarily in use previously, and it is intimated that this is to apply to every case whether it would have originated by summons or petition under the old forms. The 6th section provides "that every action in the ordinary Sheriff Court shall be commenced by a petition." In the interpretation clause the term "action" is defined to include "every civil proceeding competent in the ordinary Sheriff Court." Now, in the former proceedings there were two classes of proceedings, the one beginning with the summons called "actions," the other beginning with a petition, and called "summons proceedings." The term "action" in this statute is made to include every one and therefore this new form is applicable to this case as to every other.

With regard to the nature of the remedy adopted here I see no reason why an application to apprehend a person *in meditatione fugæ* should be incompetent where the action proposed to be instituted against him is one *ad faciendum præstandum*. I see no reason, and I know of no authority, for holding that it is incompetent. The action to be brought here is for the fulfilment of the indenture entered into by the complainer. There will also, of course, be a conclusion for a penalty to the amount of the damage suffered by the master, but that does not alter the nature of the case, and therefore I see no reason for doubting that an application to imprison a person *in meditatione fugæ* to answer in an action of this kind is competent.

But one is unwilling to shut the door against the possibility of an amendment, and after what Mr Alison has told us of the proposals made by the master I venture to suggest to your Lordships that the case should be allowed to stand over for a week.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT, on 16th December 1876, pronounced this interlocutor:—"In respect of no offer of caution *de judicio sisti* adhere to the said interlocutor, and refuse the reclaiming note."

WALLS & SUTHERLAND, S.S.C.—ADAMSON & GULLAND, W.S.—Agents.

No. 38.

Dec. 12, 1876.
Robertson v.
Player.

ANDREW ROBERTSON, Pursuer.—*Nevay*—*J. A. Reid*.
JOHN PLAYER, Defender.—*Sol.-Gen. Macdonald*—*Rhind*.

Lease.—A sub-lessee of a piece of building ground had the option under his lease of demanding a renewal if the tenant himself obtained a renewal from the landlord. Under a deed of agreement to which the principal tenant was a party, and in which he undertook certain obligations in regard to granting access, the sub-lessee sublet a portion of his holding to a second sub-lessee. The deed contained no assignation of the clause of option. The principal tenant obtained a renewal of his lease from the landlord. In an action against the second sub-lessee by the last sub-lessee, held (*diss.* Lord Deas) that the pursuer was not entitled to a renewal of his sub-lease.

1ST DIVISION.
Ld. Craighill.
M.

THIS was an action by Andrew Robertson, Edinburgh, against John Player, coach-hirer there, for declarator that the defender was bound to grant him a renewal of his sub-lease.

ant the pursuer a lease for twelve years from Whitsunday 1876 of a No. 38.
 ece of ground in Pitt Street at £2, 5s. per annum.

The pursuer averred as follows:—In 1862 Mr Little Gilmour of Dec. 12, 1876.
 erton let two stances of building ground to John Player for fifteen Robertson v.
 ars. On 14th March 1862 Player sub-let a portion of the ground, Player.
 easuring forty-five feet of frontage, to John Dunn, for fourteen and a-
 lf years from Martinmas 1861. The sub-lease contained a declaration
 at in the event of Player obtaining a renewal of his lease he should, in
 e option of Dunn, grant him a renewal of the sub-lease. By a second
 b-lease of the same date, "to which Player was a party," Dunn let to
 ndrew Robertson a piece of the ground, measuring twenty feet of front-
 ge, for fourteen years and two months from 8th March 1862.

The terms of this deed, so far as material, were as follows:—"It is
 ontracted, agreed, and ended between the parties following—John Dunn,
 . . . and John Player, . . . on the one part, and Andrew
 Robertson, . . . in manner following, that is to say, the said John
 Dunn, in consideration, &c., lets to the said Andrew Robertson, his heirs,
 ssignees, and sub-tenants, all and whole that piece of ground, measuring
 twenty feet or thereby, . . . the said piece of ground being part
 and portion of that piece of ground at Pitt Street aforesaid set and in
 act and assedation let by Robert Pringle, W.S., as factor for W. J.
 ittle Gilmour, . . . to and in favour of the said John
 layer, conform to tack entered into between them, dated the 9th and
 th days of January 1862, to which lease reference is hereby ex-
 emely made, and the conditions and stipulations therein, in so far as
 applicable to this sub-tack, are hereby specially referred to and held as
 epeated *brevitatis causa*,—in the peaceable possession of which piece of
 round and subjects hereby sub-set the said John Dunn binds and obliges
 himself, his heirs and successors, to maintain and defend the said Andrew
 Robertson and his foresaids at all hands, and against all deadly as law
 ill,—for which causes and on the other part the said Andrew Robertson
 inds and obliges himself, his heirs and executors, to pay to the said John
 Dunn, his heirs or assignees, or to the said John Player, the sum of £2,
 sterling, being the one-half of the rent payable by him to the said John
 ayer by the sub-lease entered into between them, dated the 14th day of
 arch current, for the whole of the ground thereby made over: . . .
 urther, the said Andrew Robertson shall have the exclusive right of pro-
 perty in the ground behind the said building now erecting by me, the
 id John Dunn, and reaching to John Player's stables: And I, the said
 Player, hereby give the said Andrew Robertson, and his foresaids
 tenants, full right of the use of the stair leading from the pavement
 to the ground part of the building, on their paying a proportion of
 e expense of upholding the same, along with himself and any parties
 o may build on the stance belonging to him on the north of said stair,
 ould they require to use the same, the expense of repair being to be
 ided rateably according to the rental of the several properties using
 same by themselves or tenants, it being understood that Mr Player
 ll not give authority for the stair being used for any other purpose
 an for foot passengers only."

The deed was signed by Dunn, Robertson, and Player.

Player had obtained a renewal of his lease, but declined to grant a re-
 wal of the second sub-lease to Robertson.

It was not alleged that Dunn had obtained or been called on by the
 rsuer to demand a renewal of his sub-lease from Player.

The defender pleaded (1) that the averments were not relevant.

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The Lord Ordinary sustained this plea, and dismissed the action.*

The pursuer reclaimed.

The case was heard before the Lord Probationer (Adam), who was of opinion that the interlocutor should be adhered to.

At advising,—

LORD PRESIDENT.—Under Player's sub-lease to Dunn, in the event of Player obtaining a renewal of his lease, Dunn was entitled to demand a renewal of sub-lease, but not of anything but that sub-lease of the same subject, and at the same rent, unless there was a change in the rent which Player himself had to pay; and further, nobody but Dunn had any right to exercise the option.

Then Dunn proceeded to grant a sub-lease of a portion of the subject to Robertson. It is Dunn who sub-lets. Player is not the lessor, and is not in the position of a landlord as regards Robertson. Dunn is the party who receives the rent, and is bound in the usual warrandice. But Player is not a party to the deed because he comes under an obligation with regard to a certain stair.

Then Dunn does not assign to Robertson either expressly or implicitly an obligation to grant a renewal on demand. It would have been anomalous had he done so, because it would have given the sub-lessee of a portion of the subject the right to demand either a renewal of the lease of the entire subject in favour of Dunn against Dunn's will, or a renewal of only a portion, which was not an obligation undertaken by Player to Dunn.

But it is needless to speculate what would have been the result if the option had been done, because I think it was not done. If Dunn had been in the position of a landlord, Robertson had acquired no right to compel him to ask Player for a renewal, still less is he entitled to go against Player, between whom and himself no relation of lessor and lessee ever existed.

It is further obvious that the demand on Player is quite unreasonable. Player may have been willing and even anxious to grant a renewal of the lease of the whole subject to Dunn, and that is what he bound himself to do. But he was not willing, and he is not bound, to sub-let a fragment of the subject to a party who is not his lessee.

I am therefore disposed to adopt the Lord Ordinary's interlocutor.

LORD DEAS.—The case is this:—In January 1862 Mr Little Gilmour let a building ground described in the first article of the condensation for 15 years after Whitsunday 1861, that is to say, until Whitsunday 1876, to the defender Player, the purpose of the lease being the erection on the ground of buildings of a temporary description. The proprietor reserved right to put an

* "NOTE.—As the sub-lease by Dunn, with the consent of the defender, the pursuer is read by the Lord Ordinary, it involves no obligation on the defender or on Dunn to renew that contract at or before its expiry, this sub-lease in so far being in marked contrast to the sub-lease by the defender to Robertson. The fact that Player, for a reason not explained, was a consentor to the sub-lease by Dunn to the pursuer, could not import into that sub-lease an obligation that sought here to be declared, which otherwise could not have been enforced. This being so, a new or separate contract, entitling the pursuer to sue from the defender the sub-lease sued for, behoved to be averred. But no such contract has been set forth, and in fact it was not suggested at the debate that any such contract ever was concluded. For these reasons the plea of the defender against the relevancy of the summons has been sustained."

he lease at any time after Whitsunday 1866, on giving a year's notice, in case No. 38.
his selling or feuing for permanent buildings, or himself desiring to erect such

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On 14th March 1862 Player, on the narrative that Dunn was then erecting a
house and shop on a portion of the said ground, sub-let that portion of it to
Dunn for 14½ years after Martinmas 1861, "with and under the several condi-
tions and declarations particularly specified and contained in the lease" between
Mr Little Gilmour, the proprietor, and Player, which were specially referred to
the sub-lessee, and held as repeated, "declaring that in the event of the
said John Player obtaining a renewal of his lease he shall, in the option of the
said John Dunn, grant a renewal of the present sub-lease to him and his fore-
suits, and, in case of any change of the rent of the said whole subjects, on pay-
ment of a proportional part thereof effecting to the subjects hereby sub-let."

On the same occasion Dunn and Player, by sub-lease dated 14th and 15th
March 1862, sub-let to the pursuer Robertson a portion of the ground held by
Player under Mr Little Gilmour. This sub-lease commences in these terms:—

"It is contracted, agreed, and ended between the parties following, John Dunn,
mason, presently residing in 39 Bristo Street, Edinburgh, and John Player,
coach-hirer, Northumberland Street, Edinburgh, on the one part, and Andrew
Robertson, residing in 3 Howard Place, secretary of the Scottish Provincial
Insurance Company, on the other part, in manner following." The contract then
states that Dunn sub-lets to Robertson, his heirs, assignees, and successors, that
piece of ground on which Dunn was then erecting a brick tenement, consisting
of a shop and two dwelling-houses, and that for the space of fourteen years and
two months from 8th March 1862, "when Robertson had entered into possession,
which piece of ground is described as part of the ground let by Mr Little Gilmour
to Player, by lease dated 9th and 20th January 1862, "to which lease reference
is hereby expressly made, and the conditions and stipulations therein, in so far
as applicable to this sub-tack, are hereby specially referred to and held as
expressed." For which causes, and on the other part, Robertson bound himself
to pay to the said John Dunn and his heirs or assignees, or to the said John
Player, the sum of £2, 5s. sterling, being the one-half of the rent payable by
him to the said John Player" for the whole ground sub-let by Player to Dunn
on 14th March then current, "declaring that this lease shall only be put an end
at any term of Whitsunday or Martinmas after Whitsunday 1866, as pro-
vided for in the said lease" by Mr Little Gilmour to Player, and declaring
further that the building then erecting by Dunn should be finished in a trades-
man-like manner (meaning, obviously, by Robertson), and that certain specified
particulars with regard to the gables should be observed, Dunn reserving a
certain privilege of the south gable if he should build on the adjoining stance,
the gable itself to be the property of Robertson, and to be taken away by
him at his removal.

In December 1874 or July 1875 the defender Player did obtain from the pro-
prietor a renewal of his lease for twelve years after Whitsunday 1876, with a
tack in favour of the proprietor at Martinmas 1879, or any subsequent Whit-
sunday or Martinmas, on a similar condition as before, of one year's notice of
his intention himself to build thereon; and the question now is whether the
pursuer Robertson is in right of the option which was conferred on Dunn to
demand corresponding renewal of his sub-lease from the defender Player. The
Ordinary finds that there are no relevant statements to infer that conclu-

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sion, and therefore dismisses the action. From that judgment I am disposed to differ. By the sub-lease to Robertson Dunn divested himself of all interest under his own sub-lease and its conditions so far as regarded the ground now in dispute. He thereby, I think, made over to Robertson to that extent the option which he had to demand a renewal of that sub-lease from Player. So certainly, would have been the result if the whole ground which Dunn tenanted had been sub-let to Robertson. It is true that the clause conferring the option is not expressly assigned to Robertson. But I take it to be clear that a sub-lease operates as an assignment to all effects, except that the grantor remains bound to the landlord. That leaves merely the difficulty arising from Robertson being sub-lessee of part of the ground only. But that difficulty is, I think, removed by Player having become a party to the sub-lease in favour of Robertson. He did so in the strongest of all forms, by describing himself as continuing along with Dunn on the one part and with Robertson on the other part. But the result would not have been varied although Player had been described as a consenter to what bore to be done by Dunn, or Dunn had been described as a consenter to what bore to be done by Player, for it has been ruled that even in a disposition, consent carries to the disponee all the consenter's rights and interests in the estate as well as those of the direct disponer.

Looking to the object and terms of these leases and sub-leases, and to the way they have been acted on, I think the equitable as well as the legal result must be to entitle Robertson to obtain from Player the extension of his sub-lease as concluded for in the summons, unless there are disputed facts to the proof which does not appear to be alleged; and in any view I am of opinion that the action ought not to have been dismissed as irrelevant.

LORD MURE and LORD SHAND concurred with the Lord President.

THE COURT adhered.

RICHARDSON & JOHNSTON, W.S.—ROBERT MENZIES, S.S.C.—Agents.

No. 39. ROBERT BRUCE DALZELL, Pursuer and Respondent.—*Balfour—Lord Robertson DENNISTON AND OTHERS, Defenders and Reclaimers.—Lord-Adv. Watson—Mackintosh.*
Dec. 12, 1876.
Dalzell v.
Denniston, &c. JAMES PARNIE (Dalzell's Trustee) AND OTHERS, Defenders.—*M'Lennan*

Bankrupt—Stat. 19 and 20 Vict. cap. 79 (Bankruptcy (Scotland) Act, 1856, secs. 115 and 176—Trustee and Commissioners—Compromise—Transaction. Sec. 176 of the Bankruptcy Act enacts that in a sequestration "the trustee with consent of the commissioners, compound and transact or refer to arbiters any question which may arise in the course of the sequestration regarding the estate, or any demand or claim made thereon."

Held that a transaction by which the trustee and commissioners in a sequestration gave up a portion of the bankrupt's heritable estate to a heritable creditor in lieu of his claims against the estate was not subject to challenge, on ground that the statutory conditions attaching to a private sale of heritable property had not been complied with—the transaction being a *bona fide* compromise, and not a sale.

2D DIVISION. BY missive offer, dated 2d October 1862, Robert Dempster, mason in Glasgow, and Robert Bruce Dalzell, joiner and builder, Glasgow, agreed to chase from Robert Denniston, merchant, Glasgow, a steading of ground fronting Argyle, Main, and Holm Streets, Glasgow, containing 1580 square yards or thereby, at the price of £6500, over and above a feu-duty of £100 or thereby, the price to be converted into a yearly ground-rent at two

ears' purchase, to be allocated over certain buildings which they thereby undertook to erect. Denniston accepted the offer of the same date, and agreed to make temporary advances to Dempster and Dalzell at the completion of each story of the tenements, and on the roofing-in of them. Dempster and Dalzell further bound themselves to have two tenements fronting Argyle Street erected and finished by the 1st day of July 1863, and the remaining tenements by 15th May 1864, it being, *inter alia*, declared and agreed that should they make a stoppage during the course of erection of any building for more than one month, unless from the state of the weather precluding building operations, then the whole buildings should immediately revert to and become Denniston's property in consideration of his advances, and he should have power, without any process of law whatever, to enter into possession, and either finish the buildings or sell them, as he might deem most advisable. This steading of ground belonged in different portions to two sets of trustees, for whom Mr Denniston acted in the matter.

Dempster and Dalzell entered into possession of the steading of ground in or about the month of November 1862, and erected on a plot or area thereof, extending to 664 square yards or thereby fronting Argyle Street and Main Street the two tenements referred to in the missive, on or about 1st July 1863. When these two tenements were approaching completion Denniston conveyed to Dempster and Dalzell, and the survivor of them, and the heirs of the survivor, as trustees, and in trust for behoof of themselves and their respective heirs and successors, the plot or area of ground containing 664 square yards or thereby, with the whole houses or buildings erected or to be erected upon the same. This disposition was recorded in the Particular Register of Sasines for Renfrewshire on 15th May 1863. Denniston, during the erection of these two tenements, made certain advances to Dempster and Dalzell in terms of the missive offer, and these advances, excepting a balance of £1063, 18s. 7d., were repaid to him out of a sum of £8000 borrowed by Dempster and Dalzell upon the security of a bond and disposition in security over the 664 square yards, houses and buildings thereon, dated and recorded in the Particular Register of Sasines on 15th May 1863. In security of his balance, and for farther implement of the missive offer of purchase, Dempster and Dalzell reconveyed the plot or area of ground, containing 664 square yards or thereby, and houses and buildings thereon, to Denniston, by disposition *ex facie* absolute, dated the 15th and recorded in the Particular Register of Sasines 18th May 1863. A back-letter was written by Denniston to Dempster and Dalzell, dated 15th May and recorded in the Particular Register of Sasines 3d October 1863, by which Denniston acknowledged that he held the *ex facie* absolute disposition as security for the sum of £1063, 18s. 7d. and interest thereon, and also implement of the fulfilment of the obligation undertaken by Dempster and Dalzell in the missive offer of purchase and acceptance. Upon the remainder of the 1580 yards, being the part of the original steading of ground contained in the missive offer of purchase and acceptance which fronted Main Street and Holm Street, Dempster and Dalzell, during the summer of 1863, began to erect the three tenements stipulated in the missive; but before these tenements were completed Dempster and Dalzell both became embarrassed in their circumstances, and the estates of the firm of R. and J. Dalzell, of which R. B. Dalzell was a partner, and of R. B. Dalzell and James Dalzell as the individual partners of the company and as individuals, were sequestrated on 27th February 1864, and the estates of Dempster were sequestrated on 9th March 1864. Before 27th February 1864 a stoppage took place in the course of the erec-

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tion of the three tenements fronting Main Street and Holm Street, and that not in consequence of unfavourable weather, and it continued for more than one month. The trustees and creditors on none of the sequestrated estates proceeded to complete the erection of these tenements, and neither they nor the bankrupts had funds to enable them to do so. Denniston had, during the progress of the work, made to Dempster and Dalzell the temporary advances stipulated in the missive; and in the month of April 1864, after the stoppage had continued for more than a month, Denniston, after repeated intimations to the trustee on the sequestrated estate of R. B. Dalzell, entered into possession of the ground and unfinished tenements, and finished the same at his own expense, and also entered into possession of the 664 square yards, and houses and buildings thereon, all on the footing that the whole ground and subjects reverted to him as his own property in terms of the missive. Mr Sinclair, accountant at Glasgow, then the trustee on the sequestrated estates of Dalzell and his firm, intimated to Denniston that he disputed the right of the latter to enter into possession of the property under the missive, but he took steps to prevent Denniston from entering into possession, and Denniston continued in possession of, and exercised all ordinary acts of ownership upon the subjects, without interference or objection on the part of any subsequent trustees in the sequestration, or on the part of Dalzell, until the present action was raised. The creditors on the sequestrated estate of Dalzell and his firm, at the third general meeting on 25th April 1864, resolved and instructed the trustee to dispose of the whole heritable estate forming part of the sequestrated estates, or in which the trustee was interested, by public sale, and to take all necessary steps for that purpose, but no public sale of any part of these subjects was ever advertised or took place. In 1867 Denniston offered to abandon all claims ranking against the estates of Dalzell and his firm on the trustee and commissioners abandoning all claim to the property in Argyle, Main, and Holm Streets, being the whole steading of ground containing 1580 square yards, with the whole buildings and houses thereon; and Dempster, whose sequestration had come to an end by a discharge on a composition contract, but who had not paid the composition due by him to Denniston, then agreed to an arrangement to the like effect, so far as he was interested in that property. At a meeting held on 15th August 1867 the trustee and commissioners on the estates of Dalzell and his firm, after considering Denniston's offer, passed a resolution to the effect that, as there was no the most remote chance of the properties ever yielding anything to the estates, it would be advisable to abandon them on the terms proposed by Denniston, and they instructed the trustee accordingly. At a meeting of the creditors on the sequestrated estates of Dalzell and his firm, held on 16th April 1868, the meeting passed a resolution by which they approved of the minute of the trustee and commissioners, dated 15th August 1867, and instructed the trustee, with consent of the commissioners, to join with Denniston in discharging the missive offer of purchase dated 2d October 1862, and the back-letter dated 15th May 1864, and, farther, to join with Dempster in executing the necessary deed in favour of Denniston, or the trustees for whom he acted, vesting them with the absolute right and title of the property, upon their discharging the sequestrated estates of all claims they might have of ranking thereon and on the understanding that Denniston should relieve the estates of the whole expense of the discharge and deeds. In pursuance of the resolutions a disposition, renunciation, and discharge, dated 26th and 27th August 1868, was executed by Dempster, Mr Sinclair (now deceased), as trustee on the sequestrated estates of Dalzell and his firm.

with the special advice and concurrence of the commissioners on the sequestrated estates, and Denniston, and by the two sets of trustees already mentioned, whereby Denniston, as an individual, and the trustees, renounced and discharged the missive offer of purchase, and acceptance thereof, and discharged Dempster of the composition due by him on their claims against him in connection with the properties, and discharged the sequestrated estates of Dalzell and his firm of all claims by them against these estates, and generally discharged Dempster and the sequestrated estates of all claims and demands whatsoever against them relating in any way to the standing of ground and buildings thereon, and also freed and relieved Dempster and Dalzell of certain claims connected with the titles of the property, and of the personal obligation contained in the bond and disposition in security for £8000 over the tenements fronting Argyle Street, and Denniston, and Sinclair as Dalzell's and his firm's trustee, with consent of the commissioners, renounced and discharged the missive offer of purchase and acceptance thereof and back-letter, and declared that the subjects and buildings thereon should thenceforth be the absolute property of the trustees for whom Denniston acted.

Dalzell was discharged under his sequestration without composition on 12th June 1866; and after the death of Mr Sinclair a Mr Parnie was, on 1st March 1874, appointed trustee upon the sequestrated estates of Dalzell and of his firm.

On 15th October 1875 Dalzell raised an action against Denniston and the trustees for whom he acted, and also against Parnie, the trustee on his sequestrated estates, in which he concluded for reduction of the minute of the commissioners on the sequestrated estates of himself and his firm, dated 5th August 1867, of the minute of meeting of the creditors on the same estates of 16th April 1868, and of the disposition, renunciation, and discharge which followed thereon, along with the minute to register the same and certificate of registration. There were also declaratory and other conclusions to establish the pursuer's right and complete his title to the subjects.

It was averred that the value of property in Glasgow had risen greatly between the date of the pursuer's sequestration in 1864 and the time when the properties were abandoned to Denniston in 1868, and since, so much so, that if they had been sold a large reversion would have been gained for the creditors and bankrupt.

Dalzell pleaded;—(1) The pursuer having the radical right and title to the half *pro indiviso* of the said subjects, is entitled to decree of declaration to that effect, and to have the said *pro indiviso* half of said subjects set up or made over to him upon the terms condescended on. (2) The transaction and arrangement with Mr Denniston and his trustees concluded on having been altogether illegal, incompetent, and unauthorised, the pursuer is entitled to have the documents constituting and following upon the said transaction reduced, or to have the defenders bound to dispose and convey the said *pro indiviso* half of the said subjects to him, as concluded for.

On 28th March 1876 the Lord Ordinary, after having considered a report, pronounced an interlocutor, whereby, after numerous findings in fact, which have been embodied in the preceding narrative, he continued as follows:—"Finds that the pursuer has not established that the said transaction was unfair, or that it was gratuitous on the part of the trustee and commissioners, or that it was not to the advantage of the creditors of the sequestrated estates of himself or his firm, or that the value of the subjects exceeded the amount of the advances of Mr Denniston and his trustees: Finds, on the other hand, that the defenders have not proved

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that the pursuer, in the knowledge of the facts, homologated or acquiesced in the said transaction : Finds that, in so far as regards the just and equal half *pro indiviso* of the subjects in Main Street and Holm Street (being the whole of the original steading of ground contained in the missive offer of purchase and acceptance, excepting therefrom the said plot of area of ground containing 664 square yards, and the tenements thereon in Argyle Street and Main Street), the full right of property therein having reverted to the said Robert Denniston in 1864 in the manner above mentioned, the said transaction was not a sale of the heritable estate belonging to the bankrupt, and was not *ultra vires* of the trustee and commissioners on the sequestrated estates of the pursuer and his said firm : Therefore assails the defenders from the whole conclusions of the action, in so far as the same may extend or relate to the said subjects in Main Street and Holm Street ; and, *quoad ultra*, finds, as regards the just and equal *pro indiviso* half of the said plot or area of ground, consisting of 664 square yards or thereby, that in respect the same formed part of the date of the sequestration, and also in 1867-1868, part of the heritable estate of the pursuer falling under the sequestration of the estates of himself and his said firm, the foresaid transaction was a sale of the said heritable estate, and that the same not having been a public sale, and the requirements of the Bankruptcy Acts in the case of a private sale not having been complied with, the said transaction was *ultra vires* of the creditors and of the trustee and commissioners on said sequestrated estates, and is reducible, and that the pursuer, on paying to the defender Robert Denniston, or the foresaid trustees for whom he acts, any balance which, upon a just accounting, shall appear to be due to him or them by the pursuer, or by the trustee on the sequestrated estates of the pursuer and his said firm, and upon the pursuer farther making payment to the trustee in the said sequestration of whatever sum may be necessary to satisfy and pay in full the whole liabilities of the pursuer, in so far as the same have not been already paid by dividends from the said sequestrated estates, and upon paying or providing for the charges for recovering and distributing the said estates, the pursuer will be entitled to decree of reduction and declarator in terms of the conclusions of the summons, in so far as the same are applicable to his *pro indiviso* half of the said plot or area of ground, consisting of 664 square yards, with the houses thereon, and to obtain a valid and effectual disposition thereof from the defenders : He appoints the cause to be enrolled for farther procedure, reserving in the meantime all questions of expenses ; and grants leave to all parties to reclaim."

Denniston and his trustees reclaimed, and argued ;—The trustee and commissioners had, with the concurrence of the creditors, entered into this transaction with Denniston ; and as there really were claims which Denniston had against the sequestrated estates, and in which he was entitled to succeed, they were entitled, under the 176th section of the Bankruptcy Act, 1856, to make a compromise with him.* The bargain under the original missive offer and acceptance related to the whole subjects, and when the purchasers failed to implement the conditions of the contract, Denniston was in a position to enforce his rights under the contract in respect to the whole subjects.

* The 176th section provides—"The trustee may, with the consent of the commissioners, compound and transact or refer to arbitration any question which may arise in the course of the sequestration regarding the estate, or demand or claim made thereon, and the compromise, transaction, or decision arbitral shall be binding on the creditors and the bankrupt."

Argued for Dalzell;—It was *ultra vires* of the trustee and commissioners to enter into the transaction complained of, which amounted in effect to a private sale of the whole subjects to Denniston, and by the 115th section of the Bankrupt Act, 1856, such a sale could only be effected with the concurrence of the Accountant in Bankruptcy,* which had not been obtained. At the worst, supposing that Denniston had a right to resume the Holm Street and Main Street subjects, the Argyle Street subjects could never revert to him in virtue of the missives, and the transaction, far as it affected these subjects, fell to be reduced.

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LORD NEAVE.—It is of importance that trustees on sequestrated estates should have this power of compromise which has been conferred on them by statute. If there really does exist a dispute between the trustee and a third party it is quite proper that, upon both parties giving up something which they believed to be their rights, a compromise should be come to. We have nothing to do with the merits of the compromise as it has turned out. It is enough that there were conflicting claims and a real dispute, and that in order to come to a settlement this compromise was entered into.

I cannot agree with the Lord Ordinary in holding that what was done here was a sale of the Argyle Street subjects. It was not a sale at all. The matter was a proper one for a compromise, and a compromise was accordingly effected.

LORD ORMDALE.—I am of the same opinion. I cannot see any difference between the positions in which the two properties in question stood. There was a compromise as regarded each of them. Nor have I been able to see any evidence of such bad faith on the part of Mr Denniston as would suffice to be a ground of action for reducing the compromise. A trustee in a sequestration has always power, with the concurrence of the commissioners, to compromise claims made against the estate, whether heritable or moveable. Of course it is necessary that there should be conflicting claims to be compromised, and I am satisfied that in this case there were such claims as made it advisable that they should be compromised. There does not seem to be any doubt that these claims were serious, and in no respect fictitious. It is not necessary that an action should be raised to enforce it to make a claim serious. It is sufficient that a dispute exists, and such a dispute we have here.

LORD GIFFORD.—I concur. The whole question is whether the arrangement, entered into and acted upon between the trustee in Dalzell's sequestration and Denniston is valid and effectual under the bankruptcy statute.

The Bankrupt Act, sec. 176, empowers the trustee, "with consent of the commissioners, to compound and transact or refer to arbitration any questions which arise in the course of the sequestration regarding the estate," and such compromise is declared binding on the creditors and on the bankrupt.

The defender pleads that the agreement between him and the trustee and commissioners is valid under this clause, and cannot now be challenged by the charged bankrupt. On the other hand, the bankrupt maintains that the

* Sec. 115 enacts—"It shall be competent for the trustee, with the concurrence of a majority of the creditors in number and value, and of the heritable creditors, if any, and of the Accountant, to sell the heritable estate by private gain, on such terms and conditions regarding price and otherwise as the trustee, with concurrence of these parties, may fix."

No. 39. agreement was not a compromise at all, but a virtual sale of the bankrupt's heritance, and not being by public roup, or in the mode prescribed by the Act, it is null and void.

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Now, to decide this question it is necessary to look to Denniston's position as regards these properties. He was originally the proprietor of the ground, and sold it to the bankrupt under certain conditions as to building on it and the like. I think there is no real or substantial distinction between the two portions of the property. The back-letter granted by Mr Denniston to Mr Dalzell bears that on implement of the whole obligations in the missive offer he is to reconvey the whole subjects—that is, the tenement already completed as well as those only commenced, and that to Mr Dalzell or his disponees. The position of Mr Denniston, then, was this: He had been the original proprietor of the ground, and he had agreed to feu it on certain conditions. He had divested himself temporarily, but that was only in order to validate the bonds for borrowed money, and then the whole subjects were reconveyed to him (Mr Denniston), to be held in terms of the back-letter till the conditions as to building were fulfilled. Now, these conditions never were fulfilled, and were not fulfilled when Mr Dalzell was sequestrated. What, then, was Mr Denniston's position? He was *ex facie* absolute proprietor, subject only to the personal obligations of the back-letter, and it might be fairly maintained that if the conditions of the back-letter were not fulfilled he was entitled to resume the absolute property, and the trustee or bankrupt would not do what was necessary under the back-letter.

Now, there was a real dispute between the parties as to the subjects. Denniston was, in the worst possible view, a creditor, with a right to irritate and forfeit the interest of Dalzell, if either he, or the trustee on his sequestration, did not pay the sums stipulated for in the agreement. The trustee could not or could not pay the sums due, or fulfil the conditions of the back-letter, and Denniston held the property, and claimed to rank for his loss. In this way a dispute arose between Mr Denniston and the trustee, and the trustee was entitled to transact under the 176th section of the Bankrupt Act. The pursuer says the trustee should have sold the property. But what could he sell? Simply a law-plea! He had no title to the property, and no power to give and could give neither title nor possession to any purchaser. The subjects were in the possession of a heritable creditor, assuming that to be Mr Denniston's position. Even if Mr Denniston had said no more than "pay me my advance or give me the property," that would have been a dispute, according to my understanding of the statute. The power to compromise does not depend on raising of an action, but on the fact that there is a dispute, or a subject in controversy, about which an action may be raised. The word "estate" of the bankrupt comprehends heritable as well as moveable property, and a dispute or interference as to the right to an heritable subject is just one of the disputes which the trustee, with consent of the commissioners, may transact or compromise. Suppose Mr Denniston had raised an action of declarator that in consequence of the failure to build, &c. he was absolute proprietor of the subjects, free from obligation contained in the back-letter, surely this action might have been promoted. I think it can make no difference that the compromise proceeded without the formality of raising an action.

It is to be kept in view, also, that here the compromise had reference to the very subjects in regard to which the dispute arose, and to nothing else.

the part of the bankrupt's estate was involved. Had it been otherwise, we might have had a very different and a much more difficult question to deal with.

The trustee and commissioners have under the statute the power to enter into such a compromise as this by themselves; but here, not content with that power, they called a special meeting of the creditors to consider what was proposed, and at that meeting their proposed arrangement was deliberately approved of. There was no allegation of fraud, and no pretence for saying that the trustee and commissioners did not do the best they could for behoof of the creditors, and of the bankrupt, who had the reversionary interest in the estate. I am of opinion, therefore, that the compromise which was carried through by the trustee, and which has been acted on ever since, is binding upon the pursuer, and that the pursuer is not entitled to set the same aside.

The Lord Justice-Clerk concurred in holding that the transaction was valid under the 15th section of the Bankruptcy Act.

THE COURT pronounced this interlocutor:—"Adhere to said interlocutor, in so far as it assoilzies the defenders from the conclusions of the summons relating to the subjects in Main Street and Holm Street: *Quoad ultra* alter the interlocutor, and assoilzie the defenders from the remaining conclusions of the summons, and recall the findings of the interlocutor so far as inconsistent with this judgment: Find the pursuer liable in expenses to both defenders, and remit," &c.

DALE, RITCHIE, & ELLIS, W.S.—GIBSON-CRAIG, DALZIEL, & BRODIE, W.S.—
T. J. GORDON, W.S.—Agents.

WALTER M. SCOTT, Pursuer.—*Lord-Adv. Watson—Kinnear.*
J. C. J. ROBERTS OR SCOTT AND OTHERS (Scott's Trustees), Defenders.
—R. Johnstone—Jameson.

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Trustees.

Question—Term of Payment—Residue.—A proprietor of an entailed estate, making provisions of specific amount to his younger children, payable at his death or marriage, directed his trustees, after the purposes of the trust "have been fully satisfied by the succession to the lands of P . . . opening to them," to pay the residue to his eldest son under burden of an annuity to his mother. This was a property to which the testator had succeeded, subject to a liferent, and a very large portion of the estate at his own disposal. The liferenter was the testator. Sums having been set aside to satisfy the provisions of the trust for the younger children, of which the term of payment had not arrived, the eldest son called on the trustees to convey the residue to him. *Held* that, irrespective of the question whether the younger children's portion had vested or not, the residue was entitled to a conveyance.

Decision (per Lord Shand) on the vesting of residue.

There was an action of declarator and payment by W. M. Scott of 1st Division against the trustees under his father's trust-disposition and settlement, concluding that the residue of the estate was vested in him, and that he was entitled to payment of it. Lord Young. B.

Walter M. Scott, the pursuer's father, died in 1862. By his deed of settlement he directed his trustees after payment of debts to hold the residue of the estate for his children, other than the heir of entail of Wauchope, to share alike, the provisions to be paid after his death on their marriage, "or as soon thereafter as my trustees may be enabled to

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divide the residue by the death of the liferentrix of the lands of Pinnaclehill" (an estate to which the testator had succeeded, subject to a liferent). By a codicil the provisions to younger children were altered. The testator directed the trustees under the trust-disposition to pay to each of his daughters "in manner therein-mentioned" a sum which, together with what they would receive under their parents' marriage-contract and a bond of provision, would make £4000, the second son in like manner £10,000, other sons £6000, and the codicil proceeded as follows:—"And I also further direct that my said trustees shall, after the above and the other purposes of my said trust-disposition and settlement have been fully satisfied (by the succession to the lands of Pinnaclehill and other subjects forming the residue of the trust-estate of the late James Dickson, opening to my said trustees), convey the residue of my means and estate to my eldest son Walter, but that under the burden of an annuity of £200 to his mother, if she is then and while she continues to be my widow only."

The liferentrix of Pinnaclehill predeceased the testator by a few months. The testator was survived by five children,—the pursuer, who succeeded to the estate of Wauchope as heir of entail; a daughter, who was married in 1871, and received her portion; a second son, who attained majority in 1875, and received his portion; and two other unmarried daughters in minority, of whom the younger would attain majority in 1880.

Sums were invested to meet the provisions of the daughters in minority, and there was a considerable residue.

The Lord Ordinary assolizied the defenders.

The pursuer reclaimed.

At advising,—

LORD PRESIDENT.—The claim of the pursuer is for a conveyance of the residue of his father's estate, in terms of the direction contained in the codicil to the father's trust-disposition and settlement.

The only question raised by the defenders is whether the trust-estate is in the situation contemplated by the truster.

The original settlement divided the entire general estate of the truster among his younger children. It is not quite accurate to say that it deals with the residue at all. The entire estate is to be divided *deductis debitis et impensis*. There are no legacies. The codicil, on the other hand, provides legacies to the younger children to a definite amount, and then disposes of the residue in favor of the eldest son.

The original deed also appointed a time at which the shares were to vest. The eldest child was to take a vested interest till majority, or, in the case of daughter, till marriage. And another condition which operated a postponement of the payment of payment, which was also declared to be the term of vesting, was that the payment was not to be made till a certain expected succession should fall in. There was also a clause of survivorship.

In the codicil this is all much altered. Specific sums are directed to be paid to the younger children. To each of the daughters a sum which, together with the provisions contained in their parents' marriage-contract, and a bond of provision will make £4000, to his second son £10,000, and to other sons, if he should have any, £6000. The interest until the term of payment mentioned in the trust-disposition is to be paid to the widow for the children's maintenance.

Then comes this direction:—"And I also further direct that my said trustees shall, after the above and the other purposes of my said trust-disposition and settlement have been fully satisfied (by the succession to the lands of Pinnaclehill and other subjects forming the residue of the trust-estate of the late James Dickson, opening to my said trustees), convey the residue of my means and estate to my eldest son Walter, but that under the burden of an annuity of £200 to his mother, if she is then and while she continues to be my widow only."

will and other subjects, forming the residue of the trust-estate of the late James Jackson, opening to my said trustees), convey the residue of my means and estate to my eldest son Walter, but that under the burden of an annuity of £200 to his mother, if she is then and while she continues to be my widow only." No. 40.
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Now, the question is whether the above purposes, that is, the provision of certain sums to the younger children, and the other purposes of the trust-disposition and settlement, have been fully satisfied by the succession to Pinnaclehill being opened to the trust. If so, the trustees are not only empowered but directed to convey the residue to the pursuer.

A question may arise whether the provisions in favour of younger children did not vest *a morte testatoris*, the direction as to vesting not being repeated in the codicil. For the decision of the present question I do not think it is necessary to determine that point, because whether these shares have vested or not I think the words of the direction to convey the residue are so clear that its construction is free from all ambiguity.

It is well to notice in passing that whereas the children entitled to two shares were attained majority and received payment, other two children are still in minority and unmarried, and their shares, at least according to the view of the court, will be necessarily retained for their behoof.

In these circumstances I am of opinion that the purposes of the trust within the meaning of this codicil have been fully satisfied by the succession to Pinnaclehill having fallen in.

The testator appears to have looked to this succession (which was not a mere *successionis* but a succession which had actually opened, the beneficial interest being withheld during the survivance of a liferenter) as the means of enabling him to satisfy the provisions of his trust-disposition and afterwards of the codicil. He plainly did not consider himself in a position to make such provisions unless he had had the expectation of this succession when he says that the conveyance of residue is to be made as soon as the purposes of the trust satisfied by that succession opening. I can read the words in no other sense than that as soon as the succession comes in, and the trustees are in ample funds, the residue beyond the fixed provisions is to be conveyed to the eldest son, subject to an annuity in favour of his mother. On that simple view, I think, we are on safe ground of judgment without determining whether the shares of the younger children have vested.

There is another consideration which goes a long way to support the same opinion. The codicil provides an additional annuity of £200 to the testator's widow, not from his death, but as soon as the succession to Pinnaclehill should fall in. Now, how did the truster provide for that annuity? He did not direct his trustees to pay it, and they have no power under the trust-deed or the codicil to pay it. But they are to convey the residue to the eldest son, subject to the burden of his paying the annuity, and therefore it is plain that the widow's annuity cannot commence until the conveyance of the residue to the son. If the construction contended for by the trustees were correct, the widow could not have the enjoyment of her annuity till the youngest daughter attains majority, which will not be till 1880, or is married. That would be a startling result, and it suggests doubts of the soundness of such a construction. It seems to me that the truster's intention was that so soon as the Pinnaclehill succession became available the widow should have her annuity. She cannot do so, as the trust is framed, till the son gets the residue, and therefore I think that

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What the terms of the conveyance ought to be is another matter. I think the best course will be to pronounce a finding that the pursuer is entitled to the residue of the estate. What the sum is to be or the terms of the conveyance is a matter for adjustment.

LORD DEAS.—The original deed disposed of the whole general estate of the trustor to his younger children; and it is plain that vesting was to take place on their respectively attaining majority or being married if the Pinnaclehill succession had then fallen in.

The codicil provides certain specific sums to each; and it was plausibly contended that the direction it contains "to pay to each of my daughters in manner therein-mentioned" (that is to say, in manner mentioned in the trust-deed) being in the necessity of majority or marriage as well as the opening of the Pinnaclehill succession as conditions of vesting, so far as regards the provisions of the daughters. Now, assuming, although not deciding, that to be so, there still remains to be considered the effect upon the present question of the clause directing the conveyance of the residue. I agree with your Lordship that the decision of that question turns entirely upon that clause; and nothing could well be clearer or more explicit than its terms. It imports, I think, that, in the view of the testator, all the other purposes of the trust would be fully satisfied by the succession to Pinnaclehill opening (as it has now done) to the trustees, and consequently he directs the trustees on the occurrence of that event to convey the residue of his means and estate to his eldest son Walter (the pursuer of the action); whom failing, to his second son; whom failing, among his other children, share and share alike, burdened in each case with an annuity of £300 to their mother during her viduity.

Some questions of detail may remain behind connected with the terms of the conveyance to be granted, which the parties may probably be able to adjust. But I am of opinion that the time for granting the conveyance has come, and that is the leading question to be decided.

I may add that the provision in the codicil of an annuity of £200 to the widow as a burden on the residue, points strongly in the same direction. The parties are agreed that it is not in lieu of any former annuity, but additional, and the words "if she is then and while she continues my widow," in the collocation in which they are used, indicate, I think, that it was to commence immediately. The absence of any direction as to interest on the residue strengthens the same view.

For these reasons I cannot come to the same result as the Lord Ordinary.

LORD MURE concurred.

LORD SHAND.—I concur. Only two purposes of the trust remain to be fulfilled—the payment of the shares provided to two younger children, and payment of the residue. As to funds, the trustees are in possession of heritable estate (Pinnaclehill) worth £800 a-year, equal to, say £24,000, and £30,000 of money, in all an estate of £27,000, or, at least, of large amount beyond what is required for payment of the two shares.

As regards the law to be applied in these circumstances I entertain no doubt.

According to the leading case of *Carleton v. Thomson* (July 30, 1867, 5 Macph. H. L. 151), and many other authorities, there is a clear presumption in favour of the vesting of residue, and against accumulation where that is not expressly directed. This presumption will be displaced where there are one or more trust purposes to be fulfilled, which require or necessarily infer postponement of vesting; where there is some antecedent condition to be fulfilled by the legatee—that is to say, a contingency personal to the legatee, inferring a postponed term of vesting; or where there is an event of some other nature contemplated by the testator which infers a postponed date of payment of residue, with a destination over in favour of others applicable to that time.

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But here there is no trust purpose the fulfilment of which must be waited for, the trustees having ample funds to provide for the younger children's provisions; and there is no condition to be complied with by the legatee. There remains, then, only the question whether there is any event contemplated by the truster which infers a postponement of the date of payment with a destination over applicable to the time when that event shall happen.

I agree with your Lordship that the clause of direction to convey the residue must be read as referring to an event which after the testator's death was still in the future. The truster directs that the residue is to be paid, not when the portions are all paid, but when the purposes of the trust "are satisfied," and that by the succession to Pinnaclehill "falling in"—that is, as soon as by the occurrence of that event the trustees are put in ample funds to "satisfy" the provisions. As the succession having fallen in before the truster died, the trustees were then put in funds for that purpose, and there was, therefore, no future event antecedent to the vesting of the residue. On the contrary, the event referred to in the deed having happened before the truster's death the residue was then to have vested *a morte testatoris*.

But if that view were open to doubt, I think it would be removed by the effect of the provision of the annuity of £200 to the widow, which is payable after the conveyance of the residue. The youngest daughter will not be entitled till 1880. The testator died in 1862; and I do not think it could have been his intention that the enjoyment of the annuity should be delayed for eighteen years (or, indeed, for any period) after not only his own death, but the fund for payment became available by the estate of Pinnaclehill falling in.

I arrive at this conclusion without reference to the question whether the portions of the younger children have also vested *a morte testatoris*, in which case the whole provisions in the deed vested at one date. There is a great deal to be said in favour of the view that the younger children's provisions did so vest. I do not consider that material, because the trustees may retain enough to "satisfy" the provisions, and are yet in a position to pay over a large residue.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Find that the pursuer is now entitled to demand a conveyance of the residue of his father's trust-estate, in terms of the direction to that effect contained in the codicil dated 6th September 1861 appended to the trust-disposition and settlement dated 21st December 1859," &c.

DAVIDSON & SYME, W.S.—SCOTT, BRUCE, & GLOVER, W.S.—Agents.

No. 41. ARCHIBALD REID, Pursuer and Respondent.—*Balfour*—*J. P. B. Robertson*.
DAVID BAIRD, Defender and Appellant.—*Fraser*—*Brand*.

Dec. 13, 1876.
Reid v. Baird.

Lease—Reparation—Landlord and Tenant—Damnum fatale.—Held that a landlord of a house and shop was liable in damages sustained by his tenant through the sudden melting of an extraordinary accumulation of snow on the roof, in respect that the injury would not have been sustained if the construction of the roof had not been defective.

2D DIVISION.
Sheriff of Mid-
lothian and
Haddington.
1.

ON 15th January 1876 Archibald Reid, clothier at Longridge, raised an action in the Sheriff Court of Edinburgh against David Baird, proprietor of a house and shop in West Calder of which the pursuer was tenant, and concluded (1) for £40 as damages suffered by him in consequence of the flooding of the premises in January 1875, and (2) for £6, being the amount he had to pay a sub-tenant of part of the premises. The ground of the action was that the damage had been sustained in consequence of a flow of water which had "been caused by the defective construction of the roof of the premises, or because the defender had "failed to keep the same in a proper and efficient state of repair, and by which flow of water the stock and effects of the pursuer in the said premises were damaged to the above extent, and for which the defender is liable, having been bound to keep the said premises wind and water tight during the pursuer's tenancy."

Baird defended the action, and stated that "the roof was of proper construction, and was in a complete state of repair." Whatever damage had occurred, he said, was caused by stress of weather, and was a *damnum fatale*.

A proof was allowed to both parties. From the evidence led it appeared that the roof was so constructed that instead of the ends of the slates projecting over the front wall of the house, this front wall was carried up in the form of a parapet or blocking course, behind which there was a gutter lined with lead to receive the water off the slope of the roof. This gutter terminated in a rhone or pipe which conducted the water to the ground. At the west end of this gutter the lead with which it was lined rose on the side next the roof to a height of 1½ inches above the edge of the parapet opposite, but at the east end, where the rhone was, the lead did not rise to within 1½ inches of the height of the top of the parapet opposite. The consequence was that when the gutter got too full, owing to the rhone being stopped up, or from any other cause, the water instead of escaping over the parapet rose over the lead on the roof and soaking in under the slates got inside the house. On the occasion in question there had been a heavy fall of snow on Friday, 1st January followed, on Saturday, the 2d, by a sudden and rapid thaw, and as most of the snow had been removed from the gutter the rhone was insufficient to carry off the melted snow, and the water accordingly overflowed the lead at the east end of the gutter, and so flooded the house. On Monday, 4th January, Reid had employed some men to clear the gutter of ice and snow.

It also appeared that a somewhat similar accident, but on a much smaller scale, had occurred in December 1873, and Reid had not explained to Baird of it, or informed him that anything of the sort had happened.

Reid, in his evidence, stated that the mode in which he arrived at the sum claimed as damages was by going over the stock in the shop at the time of the flooding and noting the amount of depreciation in value of the several articles in a pass-book. A copy of these notes was produced.

On 12th January 1875 Reid had written Baird, claiming £18, 10s, the amount of damage caused to his stock and furniture by the overflood.

With regard to this demand he stated—"I asked £18, 10s. as the amount of damage at that time; but a good number of my goods became subsequently damaged through the dampness and mildew produced by the overflow above mentioned."

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On 15th March 1876 the Sheriff-substitute (Hallard) pronounced decree in terms of the conclusions of the summons.

Baird appealed to the Court of Session.

Argued for the defender;—The overflow was obviously the result of the tenant's neglecting to clear the unusual quantity of snow from the roof. A tenant was bound to use a reasonable degree of diligence to protect his house from harm.¹ He was bound to do his best to obviate any great or manifest injury.² The snowstorm was quite apparent, and so was the thaw, and yet nothing was done until too late. There was therefore a failure of duty.³ The tenant now said that there had been a previous snow, but he had not told the landlord of it, and so by his own neglect had prevented any defect being put right. The landlord had fulfilled his duty if the house could resist ordinary weather. No house could be made absolutely secure against abnormal circumstances. In any case the amount of damages was excessive. In January 1875 the tenant himself fixed it at £18, 10s., and he now asked for £40 odds.

Argued for the pursuer;—It had been proved that there was a serious defect in the construction of this roof, and the landlord was liable therefor. He was bound to give his tenant a wind and water tight house. As regarded alleged neglect on the part of the tenant, he was not bound to be always suspecting his roof. Snow was one of the ordinary incidents of this climate, as also was thaw, and a landlord was bound to provide against it. The landlord had had an opportunity of checking the amount of snow if he had chosen, but he never availed himself of it. -
Advising,—

THE JUSTICE-CLERK.—This case is certainly a narrow one in all its aspects, and is unfortunate that we ever had to deal with it. An appeal to the Sheriff would have been the most reasonable course to have followed.

For the whole I am not disposed to alter the Sheriff-substitute's judgment on the merits. In the first place, there is no doubt that the flooding of this ground and shop was caused by the faulty construction of the roof. That seems to be admitted on both sides. The roof was so constructed as not to slope right down over the house, but to terminate in a parapet, and the lead which was used to line the inner portion of the parapet did not extend sufficiently to one place, and when the snow got piled up between the parapet and the house, and a thaw set in, and the snow melted, the water soaked in through the work of the roof under the slates, and so produced the damage now sought to be recovered. The defence is, that the damage was caused by an unusual or exceptional snowstorm, and no doubt that seems to have been the case, but snowstorms must be calculated for in building houses in this climate, and cannot be said that a house is properly built if it will not resist even an exceptional snowstorm.

Another point was attempted to be made for the defender, that if the tenant

¹ Esq. ii., 6, 43.

² Chitty on Contracts, 10th ed. p. 308.

³ Gaskirk and Son v. Edinburgh Railway Station Access Co., Dec. 19, 1863, Macph. 383; Laurent v. Lord Advocate, March 6, 1869, 7 Macph. 607, 41 Jur. 329.

No. 41. had been at home at the time the damage might have been prevented. That

Dec. 13, 1876. cannot, however, throw the loss on him, even although he might have obtained
Reid v. Baird. some of the damage if he had been on the spot.

There is some evidence of previous warning of this risk of flooding, but it does not appear to what extent or when this had occurred. On the whole matter, although this is a narrow case, and if the Sheriff-substitute's judgment had been the other way I should have had great difficulty in overturning it, I think we should adhere upon the merits.

The damages, however, seem to be excessive, and without going into details I would suggest that we should modify the sum awarded to £25, and *quoad ultra* adhere.

LORD NEAVES, LORD ORMDALE, and LORD GIFFORD concurred.

THIS interlocutor was pronounced :—"Find that the roof of the house in question was defectively constructed, and that the flooding of the house, which is the ground of this action, was directly caused by such defective construction; but find that damage was sustained only to the extent of £25, and to that extent sustain the appeal and alter the judgment appealed from: *Quoad ultra* dismiss the appeal, and affirm the judgment appealed from, and decern: Find the respondent (pursuer) entitled to expenses in this Court as well as in the Sheriff Court, and remit."

GEORGE M. WOOD, S.L.—DANIEL TURNER, S.L.—Agents.

No. 42.

THOMAS STODART, Pursuer.—*J. C. Lorimer.*

JOHN BROWN DALZELL AND ANOTHER, Defenders.—*Asher—Darling.*

Dec. 16, 1876.
Stodart v.
Dalzell, &c.

Property—Title—Superior and Vassal—Constitution of Feu-right—Writ of Superior—Rei interventus.—A proprietor of land entered into a verbal contract to feu, and upon receiving the first term's feu-duty granted a holograph receipt which contained a note of the extent of the ground feued, and the amount of the feu-duty. The vassal entered into possession of the ground, and built certain erections on a part of it, and continued to pay feu-duty to the proprietor and his representatives, for which he obtained receipts as for "feu-duty," but these subsequent receipts were not holograph. *Held* that a contract of feu had been constituted, effectual against the superior and his representatives.

Property—Singular Successor—Bona Fides—Private knowledge of prior right.—Circumstances in which the purchaser of a piece of ground, a part of which had been, to his knowledge, occupied by a person other than the seller for a long period of years, and who admitted that he knew that the occupier had some sort of right, and had erected buildings on the ground, was *held* to have been put upon his inquiry as to the nature of the occupier's right, and to be barred from founding on his completed title to the lands as excluding a personal right held by the occupier to the *dominium utile* of the portion possessed by him.

2D DIVISION.
Lord Shand.
I.

THOMAS STODART, innkeeper in Lesmahagow, raised this action of declarator and removing against John Brown Dalzell, draper there, and his brother, on 4th January 1876. He averred that he had purchased, conform to disposition in his favour, dated 15th June, and recorded 6th July 1874, from a certain Janet Taylor, a triangular piece of ground in Lesmahagow, measuring eleven falls or thereby, but that Dalzell had taken possession of, and refused to remove from, a portion of that ground extending to one fall and fifteen ells. Dalzell defended the action, and alleged that in 1849 William Taylor, Janet Taylor's brother and author, had agreed to c...

vey in feu to Gavin Dalzell, his father, for an annual feu-duty of 4s. 11½d., a portion of the ground in dispute, and afterwards in 1859 this piece of ground was enlarged by several yards, and the feu-duty raised to 6s. He also stated that, on the faith of this promise to feu, Gavin Dalzell, who possessed buildings erected on ground adjoining held by him on long lease, entered into possession of the ground in 1849, and constructed sunk cellarage under part of the ground, and erected a retaining wall, and performed other acts of proprietorship; and the subjects had since been possessed by him and his family, and the feu-duty duly paid to William Taylor and his sister. He further averred that Stodart, who had been for long a resident in Lesmahagow, and was intimately acquainted with William Taylor, was before the purchase in full knowledge of Gavin Dalzell's feu-right, and of the amount of feu-duty payable therefor, and that he was not a *bona fide* purchaser of the subjects in dispute, and that there was an obligation on him now to grant a title to him as representing Gavin Dalzell.

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Dalzell pleaded;—(1) The pursuer's authors were under a binding agreement to grant a feu of the ground in question to the late Gavin Dalzell, and his heirs and successors. (2) The pursuer, when he purchased the property belonging to Janet Taylor, having been informed, or at least being well aware, that Gavin Dalzell's heirs held and possessed a portion thereof as a feu, the pursuer's title is subject to the feu-right so agreed to be granted by his authors. (3) The pursuer not being a *bona fide* purchaser of the subjects described in the summons, and his title being subject to the feu-right agreed to be granted by his authors, he is not entitled to decree as concluded for, but is bound to implement and fulfil the said agreement.

On 15th February 1876 the Lord Ordinary allowed the defenders a proof of their averments, and the pursuer a conjunct proof. The facts, as they appeared from the proof and documents, were as follows:—

Dalzell produced a document in these terms:—"The following is statement of the measurement of ground as feued by Mr Gavin Dalzell, merchant in Abbey Green, being part of the feu at the north end of the feu the property of Mr William Taylor, surveyor in Abbey Green, upon the lands of Peasehill, the property of J. Woodman Linning, Esq., lying in the village of Abbey Green, parish of Lesmahagow and county of Ayr, amounts to one fall fifteen ells Scots measure, bounded as follows:—On the south by the feu the property of the said William Taylor, on the west and north by the public road, on the east by the feu the property of the said Gavin Dalzell.

WILLIAM HILSTON.*

"Abbey Green, the 26 May 1849."

Appended to this was a diagram of a triangular piece of ground. Stodart admitted that when he purchased the whole subjects he received, among other papers, a duplicate of the above document. Dalzell also produced a number of receipts for feu-duty, commencing in 1849 and continuing down 1874. The first of these receipts was holograph of William Taylor, and in the following terms:—"Received from Mr Gavin Dalzell the sum of 2/6 sterling, as a half year's feu-duty, for one fall and fifteen ells Scotch measure of ground, feued of me, being payment, Whitsunday 1849 to Martmes 1849, at the rate of 3/6 per fall yearly.

"WM. TAYLOR."

None of the subsequent receipts were holograph, but up to November 1863 they were all signed by William Taylor, and from and after 1859 the feu-duty was increased to 6s. owing to Gavin Dalzell having then

* Hilston was a land-measurer.

No. 42. "got a few yards more ground," as appeared from the receipt in November 1859. William Taylor died in 1864, and the receipts "for feu-duty" after that time were for periods of five years; the one signed by a man Gibb, and the other by James M'Morran, the son of Janet Taylor, William Taylor's sister, on behalf of Janet Taylor, as heir-at-law of William Taylor.

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Stodart admitted in his evidence that he knew that Dalzell had a right to a portion of the subjects which he had purchased, but he explained that he believed it was only as a yearly tenant. He said he had been told by M'Morran—with whom he had made the bargain for the purchase of the ground—that Dalzell paid 6s. per annum. He also stated that William Taylor had told him that "the Dalzells paid him a rent." The only persons who were present when Taylor made the purchase, besides himself, were M'Morran, and a Mr Hamilton, a bank agent.

Mr Hamilton deponed that before the bargain was made Dalzell's name was mentioned to Stodart as having a portion of the ground, and that Stodart said that part of Dalzell's house was built on the ground. At the time the purchase was made M'Morran handed Stodart the titles to the ground, and among them the measurement above quoted. M'Morran stated that he had told Stodart that that referred to the bit Dalzell had. He added—"I told him that was the bit Dalzell had. He asked what he paid per annum, and I replied '6s.' He said it should have been marked on the bit of paper what Mr Dalzell paid, but he remarked that William Taylor had not wanted to let the man who drew out the plan know what he was receiving from Dalzell." The receipt for the money granted by M'Morran bore to be for the price of lands "as possessed by my late uncle, William Taylor . . . with the existing burdens thereon," but no such limiting words were inserted in the disposition.

On 23d March 1876 the Lord Ordinary pronounced this interlocutor:—"Having considered the cause, Finds that on 15th June 1874, when the pursuer obtained a title to the ground, consisting of eleven falls or thereby part of the lands of Peasehill, in the parish of Lesmahagow, mentioned in article 1st of the condescendence, and also on 2d February 1874, when he purchased the said ground from James M'Morran, acting on behalf of Janet Taylor, the proprietor thereof, the defender James Dalzell had right as feuwar thereof, to one fall and thirteen ells or thereby of said ground, being the subjects in dispute, and with reference to which the pursuer concludes for decree of removing against the defenders in the present action, and was entitled to demand and obtain from the said Janet Taylor, as his superior, a feu-charter of the said one fall and thirteen ells or thereby of said ground at the feu-duty of six shillings a year: Finds that on said dates respectively when the pursuer obtained said title and made the said purchase, he had notice of facts and circumstances sufficient to inform him that the defender had right, as feuwar, to the property of the ground in dispute, or at least that the pursuer had notice of facts and circumstances sufficient to impose on him the duty of inquiring as to the defenders' right, and that he designedly abstained from making such inquiry as would readily have informed him thereof: Finds that in the circumstances, while the pursuer has right to the ground embraced in the title produced and founded on by him, he is barred from maintaining against the defenders any right to the ground in dispute beyond the right of superiority, and is not entitled to decree of removing as concluded for. Assolziez the defenders from the conclusion for decree of removing, and decerns: Finds the defenders entitled to expenses, and remits," &c.*

* "NOTE.—The pursuer on 2d February 1874 purchased from James M'Morran, acting on behalf of Janet Taylor, his mother, a piece of ground in the town of . . .

Stodart reclaimed, and argued;—(1) With regard to the alleged obligation on Taylor to grant a feu-right, the writ of the superior in a receipt

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arish of Leamnahagow of about eleven falls in extent, at the price of £25, and the present dispute refers to one fall thirteen ells of this ground situated at its northern boundary. Taking the price paid by the pursuer as the criterion of the value of the disputed ground it is worth somewhere about £3, and it is certainly to be regretted that a litigation like the present should have been carried on about so trifling a subject. The repeated suggestions made to the parties to come to an amicable settlement of the case have been met by the difficulty that the expenses of the litigation are now so much greater than the value of the objects in dispute as to have become really the material question in the case, and the parties having been unable to settle their mutual claims on this account the case must be disposed of on its merits.

"The defenders claim right to retain possession of the disputed ground in virtue of an agreement of feu which they allege was entered into between their late father and the late William Taylor a number of years ago. They do not dispute the pursuer's right to the ground within his title from Janet Taylor, William Taylor's sister, but they maintain that the pursuer is bound to recognise their agreement of feu of the small portion in dispute in respect of the knowledge which he had when he obtained his title, and separately, when he made his purchase.

"It is clear that in a question between the defenders and their father, their predecessor, on the one hand, and Janet Taylor, the seller, and her late brother on the other, there was a binding contract of feu entered into so far back as 1849. The measurement or diagram of the ground prepared and exchanged between Taylor and the defender's father bore expressly to be a 'measurement of ground as feued by Mr Gavin Dalzell.' Possession was given in 1849, and the ground was thereafter used in connection with the adjoining property belonging to Mr Dalzell. Buildings, consisting of walls, staircases, and outhouses, were erected within the ground, and payment of feu-duty was made year after year, in return for which receipts were granted as for feu-duty at first by Taylor, and after his death on behalf of his sister. In an extension of Dalzell's building beyond the boundary of his former property part of it was erected on the ground in dispute. It is thus clear that a contract of feu existed in a question with Janet Taylor, and that its existence is proved by the writings and actings of the parties.

"When the pursuer purchased Taylor's property, consisting, as already stated, of thirteen falls, the land purchased was described in the receipt for the price, dated by M'Morran, and which embodied the contract entered into as 'part of the lands of Peasehill as possessed by my late uncle William Taylor . . . with the existing burdens thereon.' It is clear that this purchase gave the pursuer title to the disputed ground only, under the burden of the feu-right. The ground sold was described by the possession, and the only possession which William Taylor had for many years was that of superior. The *dominium* had been in the possession of Dalzell, and the right to a feu was an existing burden on the property in a question with Taylor. The seller was, I think, obliged to require words of similar limitation to be inserted in the conveyance to the pursuer's favour, and if that had been done the pursuer could not have created the right which he now maintains. The pursuer, however, got the conveyance prepared himself. It contained no qualification of the description of the subjects or reference to the state of possession, nor to the existing burdens, and it was signed by Janet Taylor without having been revised by any professional man qualified or professing to be qualified for that duty.

"In these circumstances the question has arisen whether, notwithstanding the contract of feu which subsisted between the defenders and Janet Taylor, the pursuer is entitled to eject the defenders from the disputed ground, and to vindicate the property as exclusively his own because the defenders have not a completed registered title. I am of opinion that he is not so entitled, but that he had knowledge of such facts and circumstances at the date when he obtained his

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was not sufficient to set up a disposition of heritage. Before such an obligation could be set up both parties must be bound. Here there was

title, and even at the earlier date, when he made his purchase, as imposes upon him the obligation of recognising the feu-right.

"The case is distinguishable from those which have generally occurred hitherto for decision in this country, and of which *Petrie v. Forsyth*, 16th Decemr 1874, 2 *Rettie*, 214, is an instance, in two respects (1) that the dispute is one in which each of the parties claims right to the whole subject of purchase, for the defenders maintain only that the pursuer is bound to recognise the burden affecting his right to a small part of the property; and (2) that the defenders and their author had been in open peaceable possession of the subjects for many years. Without going in detail into the proof I am of opinion that when the pursuer completed his title he was quite aware of the existence of the defenders' claim, and of facts sufficient in law to give the defender *James Dalzell* right to the feu. It was at this date only that the pursuer acquired right by the force of his title to dispute the defenders' right, for by the contract entered into in February he was bound, as already stated, to recognise the defenders' right. Even, however, in February I am of opinion the pursuer had knowledge of facts sufficient to preclude him from maintaining that he was not bound to recognise the contract of feu. He had been on terms of great intimacy with *William Taylor*. He knew not only that the defenders were in possession of a small corner of the ground in question, but had been so for many years, that a part of the defenders' property was built on the ground, and that walls and a staircase existed and had existed for many years for the purpose of permanently enclosing the ground and connecting it with the defenders' other property. At the same time a copy of the measurement already referred to was given to him, and part of that measurement, viz., the triangular diagram, was, I am satisfied, directly brought under his notice. The pursuer says he thought all this indicated to him the existence of a yearly tenancy only, but I cannot accept this statement as correct. It was not reasonable to suppose that a careful measurement and diagram would be prepared for a yearly tenancy. Unfortunately *Mr Hamilton* has very little recollection as to what occurred when the bargain was made, but *Mr Moncrieff*, though evidently a person quite uneducated and unacquainted with business, states a fact of much significance on the question of the pursuer's knowledge, viz., that when the bargain was entered into the pursuer remarked that the annual payment was not entered in the measurement, because *Taylor* had not wanted to let the measurer know the amount. This observation shewed that the pursuer's attention had been pointedly called to the measurement, and that he seemed to have some previous knowledge about it. The existence and terms of the measurement itself and the pursuer's knowledge of the long possession of the ground are, I think, sufficient to shew that he was made aware that the defenders were in possession under a permanent right, or a contract for a permanent right. The truth appears to be that he thought the contract, however it might affect *Taylor* or his sister, was not binding in law on him as a purchaser,—that is, that as there was no completed and registered formal title he would not be bound. Before the title was completed I am satisfied he was fully informed by the defender *Mr John Brown Dalzell* that he maintained his brother's right to a feu, and there is no doubt that by that time he was fully acquainted with the terms of the measurement.

"In this state of the facts I am of opinion that the pursuer was aware that the defenders were and had been in possession under an agreement to feu; but even this knowledge is not, I think, essential to the defenders' success in this case. If the pursuer was made aware of facts and circumstances which indicated the existence of a right on the defenders' part, he was in fairness bound to make full inquiry, and cannot plead the fact of his having wilfully abstained from making such inquiry, as enabling him now to disregard the defenders' right. At this point of view the length of the defenders' possession in connection with the adjoining property, a feature which has not occurred in the previous reported cases in this country, is of peculiar importance. He was not entitled with

nothing to bind the vassal if he had wished to get rid of his feu—there was no writ of his to bind him.¹ There was no evidence of *rei interventus* sufficient to set up such a right as was here claimed. Nothing had been done which could not be referred to yearly tenancy.² (2) With regard to Stodart's private knowledge of a prior right, there was nothing to put him on his inquiry. He had been told that Dalzell paid rent; he had never heard of its being a feu-duty.

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Argued for Dalzell;—The holograph receipt by Taylor and the subsequent possession and actings of Dalzell constituted an obligation on Taylor and his representatives to grant a feu-right to Dalzell.³ There was sufficient evidence to shew that Stodart was aware that Dalzell had a right of some sort, and he should have inquired into its nature before purchasing, or else he took the risk.⁴

LORD JUSTICE-CLERK.—I think both questions are very narrow, and but for the long and decided *rei interventus* I should have thought it doubtful that a holograph receipt by the granter for one single half years' feu-duty should of itself be sufficient writing to establish a permanent right of the nature claimed.

Here, however, in the first place, the succession of consecutive receipts for feu-duty following on the holograph one to which I have referred, and the nature of the possession, would have been sufficient to establish this feuwar's right against the granter. The right had been constituted, and could have been proved against him. In the second place, I am quite satisfied that the purchaser knew enough to put him on his inquiry. I am quite satisfied from the evidence of Hamilton and M'Morran that they and the purchaser knew that Dalzell had some sort of right. The pursuer asked the question before the purchase, and was told that Dalzell was in possession of a portion of the ground. This was quite sufficient to create an obligation to inquire, and I am inclined to think that he omitted to inquire on purpose. M'Morran had himself granted a receipt for this sum to Dalzell, in name of feu-duty, and must have known the nature of the right. I am not inclined to alter the Lord Ordinary's interlocutor.

LORD NEAVES concurred.

et, had it stood alone before him, to assume the possession to have been precarious. In the case of *Marshall v. Hynd*, 18th January 1828, 6 S. 384, Lord Murray recognises the duty of a purchaser in many circumstances making inquiry as to the rights of third parties, and the same view was supported by the law in the recent case of *Petrie*. In England the law is clear, and based on the principles of equity, equally applicable in this country.—See *Holmes v. Howell*, 8 De G. M. & G. 572, and the authorities cited in *White and Tudor's Leading Cases in Equity*, ii., p. 37, *et seq.*, and particularly p. 64."

¹ *Colquhoun v. Wilson's Trustees*, March 6, 1860, 22 D. 1035, 32 Scot. Jur. 38; *Gowan's Trustees v. Carstairs*, July 18, 1862, 24 D. 1382, 34 Scot. Jur. 10.

² *Walker v. Flint*, Feb. 20, 1863, 1 Macph. 417, 35 Scot. Jur. 253; *Emalie Duff*, June 2, 1865, 3 Macph. 854, 37 Scot. Jur. 457.

³ *Smith v. Marshall*, June 8, 1860, 22 D. 1158, 32 Scot. Jur. 525; *Bathie v. Wharuchliffe*, March 6, 1873, 11 Macph. 490, 45 Scot. Jur. 318; *Sellar v. Brown*, Jan. 26, 1875, *ante*, vol. ii. 381.

⁴ *Lang v. Dixon*, June 29, 1813, F. C.; *Marshall v. Hynd*, Jan. 18, 1828, 6 S. 384; *Morrison v. Somerville and Others*, Dec. 21, 1860, 23 D. 232, 33 Scot. Jur. 87; *Petrie v. Forsyth*, Dec. 16, 1874, *ante*, vol. ii. 214; *White and Tudor's Cases* (4th ed.), *Leading Case Le Neve*, pp. 35–77.

No. 42. LORD ORMDALE.—I am of the same opinion, and very much on the same grounds.

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It would be unfortunate if the idea were to prevail that the public records, looked at by themselves, can in all circumstances be held as conclusive. The case of *Lang v. Dixon* settled that point otherwise, and many other cases to the same effect have subsequently followed. It would be most inequitable if a man in the full knowledge of a prior right, by merely having his title put first upon record could be in a position to ignore the prior right because it was not a record before his own. It would be allowing him to take advantage of his own fraud.

In this case the first holograph receipt contains enough to constitute a permanent right in the person of the feuar. The right is described as a feu-right, and the payment as a half-yearly one, and that writing is holograph of the superior and subscribed by him. It is true the other and subsequent half-yearly receipts are not holograph, but there can be no doubt they were granted in good faith, and were so received by the feuar, and they followed upon a holograph receipt containing particulars sufficient to constitute a feu-right. Parole evidence is therefore admissible to prove *rei interventus* following on the right so constituted; and we have abundance of evidence of *rei interventus*.

If all this had been known to Stodart, how could he have honestly refused to give a title to the feuar? I do not think, however, that there is sufficient evidence to establish that Stodart knew positively how things stood. I do not think he had seen the receipts or knew exactly the position of matters. I do not therefore go so far as the Lord Ordinary on that point. I concur, however, in finding that he was aware of sufficient facts and circumstances to put him on inquiry, and if he had made inquiry he could not fail to have ascertained how matters really stood, and that is sufficient. It is unnecessary to go into the details of the evidence as to this, as the case is so special as to prevent it being a precedent.

LORD GIFFORD.—I am of the same opinion, but I agree with your Lordship in the chair that the present is a narrow case in both its branches.

A very important principle of law is involved, which must be preserved entire, and to which, when fairly raised by the evidence in each case, effect must always be given. That principle is, that a singular successor is entitled to be free from the personal obligations of his predecessor, and to take the subject unaffected by any burden not appearing on the title or on the records. But the singular successor has only this right if he was in ignorance of the existence of any obligations or deeds granted by the seller relative to the subject, and if he was in all respects a *bona fide* purchaser, without notice of any right in a third party or of any circumstances imposing a duty of inquiry.

In this case I think the pursuer was bound to make inquiry. Dalzell was in possession of this ground, and part of his house was even built upon it. The pursuer knew this perfectly; indeed he knew the exact extent to which Dalzell's house was built upon the ground which he was purchasing, and he explains that he knew that it was only a very small part of the house which was built on the ground in question.

But whatever was the exact state of the knowledge of the pursuer, and whatever was the opinion which he might have formed as to the legal right of Dalzell, I think that there is enough proved in this case to bar the pursuer from pleading

that he is a *bona fide* singular successor, and in no way concerned with the mere personal obligations of his author. I think there is enough to make Stodart liable in the obligations of his author, so far as relates to the subject in question. If that be so, then Taylor was certainly under an obligation to grant a feu-right. The receipts and *rei interventus* proved are sufficient to establish that. The first receipt, which is holograph of Taylor, contains quite enough to define the nature and extent of the feu-right, and the terms on which it was to be held. I think, as in a question between Taylor and Dalzell, Taylor might have been compelled to grant a formal feu-right to Dalzell, and then I think the present pursuer knew enough about the matter to exclude him from now saying that he is a *bona fide* successor, and has no concern with the bargain between Taylor and Dalzell.

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THIS interlocutor was pronounced :—" Recall the said interlocutor in so far as it is therein found that the pursuer had notice of facts and circumstances sufficient to inform him that the defenders had right as feuars to the property of the ground in dispute : *Quoad ultra* adhere to the said interlocutor with additional expenses, and remit," &c.

ALEX. MORRISON, S.S.C.—D. J. MACBRAIR, S.S.C.—Agents.

JOHN GRAY AND OTHERS (Trustees of the late John Ramsay), Pursuers and Real Raisers. No. 43.

ALEXANDER CULBERT RAMSAY AND OTHERS, Claimants.—*M'Laren—Mackintosh.*

Dec. 21, 1876.

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JOHN RAMSAY BISHOP and his father J. T. F. BISHOP as his Administrator-in-Law, Claimants.—*Fraser—J. A. Crichton.*

CHRISTINA MARGARET DUNCAN AND OTHERS, Claimants.—*Rutherford.*

Succession—Vesting—"Survivors or Survivor" equivalent to "Others or Other."—A truster directed his trustees to pay the free income of his estate, after deducting an annuity to his widow, in equal portions to his brother and four sisters, and failing them without issue, to the survivors and survivor. He further directed his trustees, on the death of any of his brother or sisters leaving issue, to pay to such issue (and the issue of any predeceasers) the capital sum bequeathed by their parents, so far as that could be done consistently with retaining enough to secure the widow's annuity; and, on the death of his widow, "to take over and settle my whole heritable and moveable means and estate . . . in that in equal shares, upon my said brother and sisters in liferent for their joint use alienably, and the issue of their bodies respectively, whom failing, to the issue of the survivors or survivor in fee." The truster was survived by a widow and his brother and four sisters. His brother and three sisters predeceased the widow, the brother and two of the sisters leaving issue. The remaining sister survived the widow, and died without issue. In a competition for the fee of the share liferented by the surviving sister, it (1) that, although the fee of the shares liferented by the brother and sisters who left issue vested in such issue *a morte testatoris*, or as soon thereafter as they came into existence, the fee of the share of the last surviving sister, who died without leaving issue, vested only on her death in the issue of her brother and sisters, or their descendants who survived her, as if the words "survivors or survivor" had been "others or other," and that, therefore, as regards this share of the fee, intestacy was excluded; and (2) (*diss.* Lord Gifford) that the share was vested in such surviving issue *per stirpes*.

JOHN RAMSAY died in 1843 leaving a trust-disposition and settlement, 2^d Division, which he directed his trustees to pay to his widow, Mrs Elizabeth Craighill. 1.

No. 43. Bromfield or Ramsay, a certain annuity, and also to pay certain special legacies. The remaining purposes of his trust-settlement were expressed as follows:—

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"Fifthly. I hereby direct and appoint my said trustees to pay the free annual interest and proceeds of my means and estate (under deduction of the annuity and other provisions hereinbefore settled, and the necessary expense of this trust) in equal portions to the said James Ramsay, my brother, Mrs Catherine Ramsay or Finlay, Mrs Jess Ramsay or Young, Mrs Sylvester Ramsay or Duncan, and Isabella Ramsay, my sisters, and that during all the days of their respective lives, whom failing without issue, to the survivors and survivor; declaring always, as it is hereby specially provided and declared, that the said proceeds and annual interest shall not be assignable or affectable by the diligence of creditors, nor subject to the *jus mariti* of husbands, but it is of an alimentary nature, and shall be payable to my said brother and sisters on their own respective receipts allienarly.

"Sixthly. I hereby further direct and appoint my said trustees or trustee acting for the time, upon the death of any one or other of my brother or sisters hereinbefore named, to pay to the child or children of such deceased brother or sister in equal portions the capital sum liferent by the parent so deceasing (the issue of such children being entitled to the share of their parent if also predeceased), and that in so far as the same can be done with a due regard to the foregoing purposes of this trust, of which my said trustees shall be the sole judges: And at the death of the said Mrs Elizabeth Bromfield or Ramsay my said trustees shall make over and settle my whole heritable and moveable means and estate, . . . and that in equal shares, upon my said brother and sisters in liferent for their liferent use allienarly, in terms and under the conditions before specified, and the issue of their bodies respectively whom failing, to the issue of the survivors or survivor in fee."

The truster's sister, Mrs Jess Ramsay or Young, died in 1851 without issue.

His brother, James Ramsay, died in 1861, leaving issue.

His sister, Mrs Sylvester Ramsay or Duncan, died in 1863, leaving issue.

His sister, Mrs Catherine Ramsay or Finlay, died in January 1865, leaving issue.

His widow, Mrs Elizabeth Bromfield or Ramsay, died in May 1865.

His sister, Isabella Ramsay, the last survivor of the liferenters, died in 1873, unmarried.

The trustees divided the free annual proceeds of the residue among the liferenters, in terms of the fifth purposes of the trust-deed, first in the proportion of one-fifth to each, and afterwards, on Mrs Young's death, one-fourth to each. On the respective deaths of James Ramsay, Mrs Duncan, and Mrs Finlay, they made payment, in terms of the sixth purpose of the trust-deed, to the children of each of the share of the capital liferented by the deceasing parent, so far as not required to secure the widow's annuity. On the death of the widow they either paid or added the balance of the shares belonging to the families of James Ramsay, Mrs Young, and Mrs Finlay.

On the death, in 1873, of Isabella Ramsay without issue, a question arose as to the disposal of the capital of the one-fourth share of the residue which had been liferented by her.

This multiplepointing was accordingly raised by the trustees.

The first set of claimants were Alexander Culbert Ramsay and others, certain of the children of James Ramsay, Mrs Sylvester Ramsay or Young,

an, and Mrs Catherine Ramsay or Finlay, the truster's brother and two sisters who left issue. They contended that vesting had taken place at the death of Mrs Elizabeth Bromfield or Ramsay, the truster's widow, and claimed that the fund *in medio* should be divided accordingly among the nephews and nieces of the truster who had survived his widow, the issue of those predeceasing the widow succeeding to their parents' shares.

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The second claimant was John Ramsay Bishop, great-grandson of the truster, and his heir-at-law, who contended that the destination of the share of the truster's estate liferented by the truster's sister, Isabella Ramsay, had failed with regard to the fee, and, therefore, that the fund *in medio* must be held to have fallen into intestacy. Accordingly he claimed so much of the fund *in medio* as consisted of heritage.

The last set of claimants were Christina Margaret Duncan and others, certain of the grandchildren of Mrs Sylvester Ramsay or Duncan, one of the truster's sisters whose parents had survived the truster's widow but predeceased the liferentrix, Isabella Ramsay. They contended that vesting had been postponed till the death of the liferentrix, and claimed a share in the fund *in medio* as vesting in them in their own right and not in their parents.

The Lord Ordinary, on 25th March 1876, pronounced an interlocutor finding "that, according to the sound interpretation of the fifth and sixth purposes of the testamentary trust-deed of the late John Ramsay the parties who are entitled to the fee of the share of the trust-estate liferented by the late Miss Isabella Ramsay are the issue of the truster's brother and sisters who survived the truster and afterwards died leaving issue," and appointed the cause to be enrolled for further procedure.*

The claimant, John Ramsay Bishop, reclaimed, and argued;—The destination was, in the event, which occurred, to the issue of the brother and sisters of the testator, who survived the liferentrix, Isabella Ramsay. As the testator's brother and sisters all predeceased Isabella Ramsay it necessarily followed that the destination lapsed, and that the share in question fell into intestacy.¹

Argued for the claimants, Alexander Culbert Ramsay and others;—The presumption was against intestacy. "Survivors or survivor" was undoubtedly an inaccurate description requiring construction or explanation. But it clearly meant, according to the intention of the testator, to include the brother and the other sisters who should leave issue, and was

* NOTE.—According to the conception of the fifth and sixth purposes of the trust-deed there might be two periods at which the fee of the estate should be divided among the heirs. The last of these is the death of the truster's widow, which event the burden of her annuity was extinguished, and the estate so as undivided was left free for distribution. But, as the Lord Ordinary reads the clauses referred to, the vesting was not postponed till that period. On the contrary, that took place at the death of the truster; and consequently 'the issue the survivors or survivor,' who are referred to at the close of the sixth purpose of the deed, are the issue of the brother and sisters by whom the truster survived. This view of the destination, which appears to the Lord Ordinary to be a reasonable view upon the words of the deed, not only prevents the intestacy contended for by the claimants John Ramsay Bishop and another, but also avoids the difficulty inseparable from the construction, which, on the assumption that the death of the widow should be found to be the period of vesting, was presented by the other claimants as the true interpretation."

¹ Authorities.—Cooper v. Palmer, 1845, 1 Collyer, 665; Watson v. England, 45, 9 Jur. (English), 648.

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therefore equivalent to "others or other." There was therefore no intestacy, and the fund *in medio* vested at the death of the widow.¹

The claimants, Christina Margaret Duncan and others, adopted so far the argument of the claimants, Alexander Culbert Ramsay and others, but contended that the fund *in medio* did not vest until the death of the liferentrix, Isabella Ramsay, because then only could it be ascertained that she died without issue.

At advising,—

LORD ORMIDALE.—In this case the Lord Ordinary has found that the issue of the truster's brother and sisters who survived the truster and afterwards died leaving issue are entitled to the fund in dispute; and he explains in the note to his interlocutor that he has come to this conclusion on the assumption that the vesting must be held to have taken place *a morte testatoris*.

I cannot concur with the Lord Ordinary in holding that the period of vesting was the death of the truster. I am unable to see how this can be held consistently with the truster's directions. He directs in the fifth purpose of his settlement that the income of his estate, after meeting his widow's annuity, shall be enjoyed in equal portions by his brother and four sisters; and in the sixth purpose he directs that on the death of his brother or any of his sisters the capital of the sum or sums the income of which had been liferented by the deceased deceasers shall be paid in equal portions to their issue. In this way the truster disposes of the sums—capital as well as income—so far as pertaining to his brother and sisters, who died before his widow, leaving issue.

He then goes on to dispose of what might remain of his estate at the death of his widow by directing his trustees to make over and settle the same upon his brother and sisters—meaning, of course, such of them as had not previously died—in liferent for their liferent use alienably, and "the issue of their bodies respectively, whom failing, to the issue of the survivors or survivor in fee." Now although this direction is awkwardly expressed I think the intention of the truster may be fairly held to have been, that while his brother and sisters surviving his widow were to enjoy the liferent of that part of his estate not disposed of prior to his widow's death, the capital of their respective shares was to go to their issue (including grandchildren by that expression, as I understand it) surviving the longest liver of them,—that is, as the event happened, surviving his sister Miss Isabella Ramsay.

The result is that, in the view now explained, the capital liferented by Miss Isabella Ramsay must be held to belong to the truster's brother's and sisters' issue *per stirpes*, and not *per capita*, who survived Miss Isabella Ramsay.

I have come to this conclusion on the assumption that vesting of the trust estate, so far as it is here in question, did not take place either at his own death or at the death of his widow, but on the death of Miss Isabella Ramsay, the last survivor of his brother and sisters, as till that event it could not be known whether there would be then alive any issue of the truster's brother and sisters, and neither could it be known till that event whether Miss Isabella Ramsay might not herself leave issue.

I have only to add that the conclusion I have come to is the only one which, in my opinion, could be reached consistently with the terms of the trust.

¹ *Authorities*.—*Browne v. Rainsford*, 1867, 1 Irish Eq. Rep. 384—opinion of the Master of Rolls, Walsh, p. 392.

directions without inferring intestacy, which is not only not to be presumed, No. 43.
at which I am satisfied was neither contemplated nor intended by the testator.

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LORD GIFFORD.—The Lord Ordinary by the interlocutor under review has disposed of only one point arising in the case. He has found that the share of the trust-estate liferented by the late Miss Isabella Ramsay belongs in fee to the issue of her brother and sisters who survived the trustor and died leaving issue, but he has not determined by the interlocutor whether the whole of the said issue are entitled to participate, or at what date such issue are to be sought, or in what proportions the division is to take place. In particular, he has not determined whether issue who may happen to have predeceased either the widow, Mrs Ramsay, or the liferentrix, Miss Isabella Ramsay, have taken any vested right in the fee of what is called Isabella Ramsay's share.

In these circumstances we thought that it would not be a satisfactory course simply to affirm the Lord Ordinary's interlocutor (assuming we agreed with him so far), but that it was necessary, or at least expedient, to consider and determine more precisely than the Lord Ordinary has done the exact nature of the rights created by Mr Ramsay's settlement, and to fix precisely the parties in whom the said rights are now beneficially vested, and with this view we had an additional argument from the parties.

In his note the Lord Ordinary has indicated an opinion that the whole residue of the trust-estate vested *a morte testatoris* in the issue of the testator's brother and sisters, but he has not made any finding to this effect in the interlocutor beyond the general finding that such issue are entitled to the fee of Isabella Ramsay's share.

I am not prepared to affirm with the Lord Ordinary that the whole residue of the trust-estate vested *a morte testatoris*. On the contrary, I am of opinion that upon a sound construction of the trust-deed and codicil different periods of vesting are fixed for the different shares into which the residue of the trust-estate is divided, and that it is necessary in determining the question of vesting to consider the precise position of each share.

The testator was survived by his widow, Mrs Ramsay, by one brother, James Ramsay, and by four sisters, Mrs Jess Ramsay or Young, Mrs Sylvester Ramsay or Duncan, Mrs Catherine Ramsay or Finlay, and Miss Isabella Ramsay. By the trust-deed the interests of the widow and of the testator's brother and sisters were all limited to mere liferents—to liferents alienably. Neither the widow nor the brother and sisters were to have any share of the fee of the trust-estate, and it appears to me that in determining the questions regarding the vesting of the different shares of the fee the mere liferents, that is, the liferents alienably, and most of which are declared alimentary and not assignable, may be set entirely out of view. In particular, I think even the widow's liferent may be disregarded, for besides her liferent of the house in Blacket Place and of the annuity, she was really merely an annuitant, and the mere existence of an annuitant, apart from any special provisions in the trust-deed, does not prevent vesting. Of course while annuitants or liferenters survived this might prevent the final division of the estate, but the period of vesting must be determined by the terms of the deed, and will not be necessarily postponed by the existence of liferenters or annuitants.

The provision in the trust-deed upon which the vesting of the fee depends is the sixth purpose, which is in these terms,—“Sixthly, I hereby further direct

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and appoint my said trustees or trustee acting for the time, upon the death of any one or other of my brother or sisters hereinbefore named, to pay to the child or children of such deceased brother or sister, in equal portions, the capital sum liferented by the parent so deceasing (the issue of such children being entitled to the share of their parent if also predeceased), and that in so far as the same can be done with a due regard to the foregoing purposes of this trust, of which my said trustees shall be the sole judges, and on the death of the said Mrs Elizabeth Bromfield or Ramsay my said trustees shall make over and sell my whole heritable and moveable means and estate, including that conveyed to me by the disposition and assignation by the said Mrs Elizabeth Bromfield or Ramsay herein in part before recited, and that in equal shares, upon my said brother and sisters in liferent, for their liferent use alienarily, in terms and under the conditions before specified, and the issue of their bodies respectively, whom failing, to the issue of the survivors or survivor in fee."

This sixth purpose of the deed is expressed in some respects in very peculiar terms, and it raises questions of some nicety as to the vesting.

As already mentioned, the testator died on 31st August 1843, survived by his widow, his brother, and four sisters. Of these the testator's sister, Mrs Young, died first, in April 1851, leaving no issue, and on this event the liferent of the surviving brother and three sisters was increased under the fifth purpose of the deed, each survivor being then entitled to a liferent of a fourth of the residue instead of a liferent of a fifth. As Mrs Young left no issue, the fee of the share liferented by her, I think, simply accresced to and increased the share of the surviving brother and sisters.

In 1861, 1863, and 1865, the brother, James Ramsay, and two of the sisters Mrs Duncan and Mrs Finlay, died, all leaving issue, and on their deaths respectively the shares of the residue liferented by them became divisible among their respective children (so far as the trustees might think proper, having regard to the subsisting liferent and annuity of the widow). I am of opinion that the shares of the residue belonging to the issue of James Ramsay and of Mrs Duncan and Mrs Finlay vested *a morte testatoris*, or as soon thereafter as any of them and their issue respectively came into existence, in each case vesting in the issue as a whole, though not payable till the parent's death. This practically disposes of three-fourths of the whole residue which vested in the families of James Ramsay, Mrs Duncan, and Mrs Finlay respectively, payable on the deaths of their parents respectively, so far as could be done consistently with the security of the widow's annuity and liferent.

The widow next died on 22d May 1865, and, I think, the only effect of her death was to enable the trustees to pay to the issue of James Ramsay, Mrs Duncan, and Mrs Finlay, the balance of the three-fourths of the residue which had previously vested in these issue respectively, and thus there was left in the trustees' hands only one-fourth of the residue, being the one-fourth then liferented by the surviving sister, Miss Isabella Ramsay. Of this fourth Miss Isabella Ramsay had only a liferent alienarily.

Now, the fee of this fourth, that is, the fourth liferented by Miss Isabella Ramsay, was destined under the sixth purpose to the issue of her body, and it is only on the event of her having no issue of her body that other substitutes are called. She was then unmarried, and as in the eye of the law her having issue of her body was a possible and uncertain event, I think that the fee of her share did not vest till her death on 17th February 1873, on which event the unvested

the condition was purified for she died without issue. I think, therefore, that the fee of Isabella's share vested at her death on 17th February 1873, and vested in and then only, in the substitutes called by the deed. The substitutes called by the deed, failing Isabella's own issue, are the issue of the survivors or survivor, and as Isabella herself was the last survivor, if this were to be read as meaning that issue should take unless Isabella's brother or sisters should survive her, it would produce intestacy. But, I think, intestacy is excluded by the construction of the deed, and therefore, I am compelled to read "survivors or survivor" as if the words had been "others or other." I think it clear that the testator intended, failing the issue of any of his brother or sisters, to give the fee to the issue of any others who might leave issue, and as the parties directly substituted are issue I read the provision just as if it had run in favour of "my sons or nieces." It would come to the same thing if we were to read the "survivors or survivor" as referring to the survivors of the testator himself. The result is that the fee of the one-fourth liferented by Isabella Ramsay is to be paid to all her nephews and nieces who survived her, and (although this is a somewhat different question) I think they will take *per capita* and not *per stirpes*. If they take in their own right, and not as in right of their respective parents. If Isabella's nephews and nieces predeceased her, leaving issue, such issue take their parent's share, the vesting being at Isabella's death on 17th February 1873. The word "issue" is a general word which includes grand-children as well as children in cases like the present. The direction given to the trustees to make over and settle the residue on the widow does not, I think, make any real difference as to the fee of the share, which was the only share the fee of which had not vested prior to the widow's death. If the trustees had so settled Isabella's share they must do so in the precise terms of Mr Ramsay's trust-deed, and that would be exactly the same question which now arises. As to the effect now explained, and decrees of preference in conformity with the will, I think, enable the trustees, who are the pursuers and real raisers of the fund, to distribute the residue now in their hands.

LORD JUSTICE-CLERK concurred generally, holding, however, with Lord James, that the fund was divisible *per stirpes* and not *per capita*.

LORD JUSTICE-CLERK was pronounced:—"Recall the interlocutor complained of: Find that, according to the true construction of the fifth and sixth purposes of the testamentary trust-deed of the late John Ramsay, the parties who are entitled to the fee of the share of the trust-estate liferented by the late Miss Isabella Ramsay are such of the issue of the brother and other sisters of the truster or their descendants who survived the said Isabella Ramsay, and that *per stirpes*: Find the parties to this discussion entitled to their expenses out of the trust-estate, and remit to the Auditor to tax the same and to report, and remit the cause to the Lord Ordinary with power to decern for the expenses now found due, and decern."

W.S.—DUNCAN & BLACK, W.S.—JAMES C. MURRAY, W.S.—
DRUMMOND & REID, W.S.—Agents.

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ROBERT THORNTON SHIELLS, Complainer.—*Sol.-Gen. Macdonald—
J. P. B. Robertson.*Dec. 22, 1876.
Shiells v. Fer-
guson, David-
son, and Co.FERGUSON, DAVIDSON, AND COMPANY, Respondents.—*Lord-Adv. Walm-
—Trayner.*

Partnership—Assignment—Debtor and Creditor.—A building association with unlimited liability, entered into a contract with a tradesman, who was a member of the association, for the execution of certain works, to be paid for instalments on certificates being granted by the architect employed by the association. The tradesman having obtained a certificate that £500 was due to him, assigned the debt to a third party, who raised an action against the association and the individual partners, and, having obtained decree in absence thereupon charged one of the partners.

In a suspension brought by the partner, *held*, after proof that the association was insolvent at the date of the assignment, (1) that calls or contributions leviable by the association from the cedent as a partner for payment of the debt of the association might be set off against the debt due to him by the association, and (2) that the assignee was in no better position than the cedent.

1st DIVISION.
Ld. Craighill.
M.

WILLIAM BRODIE, builder, Edinburgh, a member of an association called The Imperial Building Association, in 1874 obtained a contract for the joiner work of three houses which the association were building in Prince Regent Street, Leith, at the contract price of £2520, to be paid in instalments upon certificates by the architect as the work went on. Brodie received three payments on certificates, and Mr Shiells, architect, granted a fourth certificate on 15th September 1874 in the following terms:—"Imperial B.A.—65 George Street, 15th Sept. 1874.—I hereby certify that Mr William Brodie has executed such portions of the joiner work Imperial Building Association, Leith, as entitle him to payment of 4th instalment, amounting to the sum of five hundred pounds (£500). R. THORNTON SHIELLS."

Mr Brodie failed to obtain payment from the association, and pressed by Ferguson, Davidson, and Company, who had supplied with the wood for his contract, for payment of certain bills, he assigned the debt due by the association to him to Ferguson, Davidson, and Company by the following letter written on the certificate:—"Edinburgh, 10th October 1874.—Messrs The Imperial Building Association, Prince Regent Street, Leith.—Gentlemen,—I request you to pay to the order of Messrs Ferguson, Davidson, and Company, Leith, the sum of five hundred pounds sterling, as per annexed certificate granted by R. Thornton Shiells, Esq., architect, whose receipt shall be binding on your obedient servt. Wm. Brodie." The assignment was intimated to the association before 5th November 1874. Ferguson, Davidson, and Company, on 16th December 1874 received a letter from Mr Garson, the agent of the association, stating that the association was being wound up, and "there will be ample funds to meet the whole claims of parties when the conveyances are taken up."

On 27th January 1875 Ferguson, Davidson, and Company, with the concurrence of Mr Brodie, raised an action against the association and the individual members, and obtained decree in absence for £500, interest and expenses. Upon this decree they charged Mr Robert Thornton Shiells as a member of the association.

Mr Shiells brought the present suspension of the charge mainly upon the ground that "the said William Brodie was, and is himself, a partner in the said association. The affairs of the said association are in an embarrassed condition, and its assets are not sufficient to meet its liabilities, with the exception, moreover, of the present complainer, and one or two others."

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the whole individual members of the association are insolvent. The share of the deficit in the funds of the said association falling to be paid by the said William Brodie, and due by him to the said association and the present complainer, is largely in excess of the sum charged for." Dec. 22, 1876.
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In April 1875 Brodie's estates were sequestrated.

The complainer pleaded;—2. He was not liable, in respect that Brodie was due to the association as a partner thereof a sum in excess of the sum sued for. 3. In any view, the chargers have no title to sue for the said instalment—(1) in respect that the sum was not validly assigned to them, and (2) that any mandate granted in their favour was recalled by Brodie's sequestration.

In the course of a proof Peter Couper, judicial factor on the estate of the association, stated that on 11th March 1875 the assets were valued at £4616, 16s. 1d., and that the liabilities were £8045.

The Lord Ordinary pronounced this interlocutor:—"In the first place, finds as matter of fact that value was given by the chargers to William Brodie for the draft, order, or mandate referred to on the record; in the second place, finds as matter of law that the said draft, order, or mandate is such a document as entitled the chargers to sue for the sum decerned for in the decree sought to be suspended, and having been granted for value was not recalled by the subsequent sequestration of Brodie's estates;—therefore repels the third of the pleas in law for the suspender; in the third place, finds further, as matter of fact (1) that the said William Brodie, the granter of the said draft, order, or mandate, was a partner of the Imperial Building Association, to which that document was addressed; (2) that the £500 covered by the said draft, order, or mandate was due by said association for work done for them by the said William Brodie; (3) that before said draft, order, or mandate was intimated, that is to say, before the 15th of October 1874, the affairs of the said association had become embarrassed, and the said association, for want of funds, had become unable to meet their obligations as these ought to have been discharged; (4) that in March 1875 the affairs of the company were placed in the hands of Peter Couper, accountant in Edinburgh, as judicial factor appointed by the Court for the purpose of liquidation; (5) that, according to the estimate of the value of the assets of the association made by the judicial factor for the purposes of this action, as contrasted with the debts of the association, calls or contributions from the partners will be required that funds with which their obligations can be discharged may be provided; and (6) that it has not been shewn, and is at present uncertain, whether the calls or contributions leviable from the said William Brodie will exceed or fall short of the sum due to him for work done by the association; and, in the fourth place, finds as matter of law (1) that calls or contributions leviable by the said association from the said William Brodie for the discharge of the debts of the association may be set off against the debt due to him by the association, and consequently against the £500 covered by the said draft, order, or mandate, of which the chargers are now in right; and (2) that as the affairs of the company are only now in course of liquidation, and it is uncertain whether there is any sum which the chargers, as in right of the said William Brodie, are entitled to recover from the said association, and from the suspender or one of the partners, all the questions on which parties have joined issue in this suspension cannot at present be determined: Therefore sists the process *hoc statu*, reserving, however, leave to the suspender, as well as to the chargers, to move that this sist shall be recalled when the mutual liabilities of the said William Brodie and the said association shall have been or can be definitely ascertained: Finds no expenses of

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process hitherto incurred to be due either to or by either the suspender or the chargers, and decerns." *

The chargers reclaimed.¹

After the case had been argued the complainer was allowed to put in an amendment, and the chargers to put in answers.

The complainer stated—The association was, on 2d October 1874, via the mandate or order above referred to was granted in favour of the chargers, insolvent and unable to meet its liabilities, and at that date, in consequence of several of the partners being persons of no means, William Brodie's liability amounted to the sum of £605, 17s., including the sum of £75, being the amount due on the three shares held by him.

Along with his amendment the complainer lodged a state of affairs of the association as at 2d October 1874, shewing that the assets of the association amounted to £4574, 10s. 3d., the liabilities to £8209, 13s. The liabilities were made up of sums due to the bank, to six tradesmen, the architect, and the law-agent, who were all members of the association.

The chargers stated—"The chargers do not know, and do not admit that the affairs of the association were, at 2d October 1874, or are, in the position stated, nor that the statements made with regard to individual members thereof are accurate. *Quoad ultra* denied; and explained that the chargers do not admit that the state of affairs referred to embraced the assets of the association, or correctly represents the payments that had been made by it. *Inter alia*, the chargers believe and aver that the value of the three tenements at Prince Regent Street, Leith, set down in the said state at £4500 sterling, is under-stated to the extent of at least £500 sterling; and further, that Mr Anderson, one of the creditors of the association, received payment of at least £160 more than is mentioned in the said state as having been paid to him. Explained farther that the state of affairs now produced shews the deficit in the funds of the association on the footing that the whole creditors of said association were not paid in full; and that, even upon the assumption that the said state of affairs and the suspender's statement are correct, it appears that Brodie was a creditor of the association as at 2d October 1874 to the extent of £1120, and liable as a member thereof in the sum of £605, 17s., leaving a balance due to Brodie of £514, 3s. sterling. Mr Brodie's alleged liability to the association in £605, 17s. was, however, illiquid and not ascertained in October 1874, and depended upon contingencies: neither the association nor the complainer gave any notice to the chargers that they had any claims of compensation against Brodie till the present.

* "NOTE. . . .—The third, and here the most important, of the pleas of the suspender is to the effect that Brodie is due to the association, as a partner, a sum larger than the £500 claimed by the chargers. Brodie was a partner, and, as the Lord Ordinary thinks, there is no doubt that against the debt, which originally was due to Brodie, there might be set off whatever was due by Brodie to the association. But it unfortunately happens that the mutual liabilities of Brodie and the association have not yet been ascertained. The affairs of the association are only in course of liquidation, and in the mean time it is impossible to say, unless conjecturally, whether there is or there is not due by Brodie, as a partner of the association, a sum as large as that which is claimed by him as a creditor of the association. In this predicament, the Lord Ordinary considers that it would be unsafe to give judgment at present upon the point in question, and therefore the cause has for the present been sisted. This, the Lord Ordinary thinks, is the only course by which possible, or rather probable, injustice will be prevented."

¹ *Malcolm v. West Lothian Railway Company*, June 10, 1835, 13 S. 887, 7 S. 411, 10 Jur. 404; *Carter v. M'Intosh*, March 19, 1862, 24 D. 925, 34 Scot. Jur. 411.

suspension was brought; but, on the contrary, the association led the No. 44.
 chargers to believe that their claims as in right of Brodie would be fully
 met out of the funds of the association, and thereby induced the chargers
 to abstain from taking action against Brodie." Dec. 22, 1876.
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The chargers admitted at the bar that the figures given by the complainant were substantially correct.

At advising,—

LORD PRESIDENT.—William Brodie, the cedent to the chargers, was a builder in Edinburgh, and a member of a company of unlimited liability, called the Imperial Building Association. The business of this association was to acquire building-ground, build houses on it, and then sell them. Another object was to find employment to its various members. Brodie got a pretty extensive contract from this company—the slump sum which he was to receive being £2520. He got into embarrassment before his work was completed, but it appears that in producing the architect's certificate he had received certain sums to account from time to time, amounting in all to £1700. Brodie was indebted to the chargers, Ferguson, Davidson, and Company, for timber with which they had supplied him, and being unable to pay their account he assigned to them a certificate obtained from the architect, Mr Thornton Shiells, dated 15th September 1874, which bore "that Mr William Brodie has executed such portions of the joiner work, Imperial Building Association, Leith, as entitle him to payment of 4th instalment, amounting to the sum of five hundred pounds (£500)." The way in which this assignation was effected was by Brodie addressing a letter to the association requesting them to pay the amount to the order of Ferguson, Davidson, and Company, and it seems that this order was given almost immediately, for there is a correspondence upon it commencing on the 15th October immediately after. At all events it was intimated by 5th November 1874. If a building association had been prosperous no difficulty, I suppose, would have arisen about making this payment; but when a charge was given on 11th November 1875 it was suspended, on the ground that the association was insolvent, and that every partner would be called upon to contribute his share. This is stated in the 6th reason of suspension—"The said William Brodie was and is himself a partner of the said association. The affairs of the said association are in an embarrassed condition, and its assets are not sufficient to meet its liabilities. With the exception, moreover, of the present complainer, and one or two others, the whole individual members of the association are insolvent. The share of the deficit in the funds of the said association falling to be paid by the said William Brodie, and due by him to the said association and to the present complainer, is largely in excess of the sum charged for." The complainer being Mr Thornton Shiells, who was one of the members of the association against whom this charge was directed, the Lord Ordinary came to the conclusion that, if that were the fact, the association, and Mr Shiells, a member of it, were entitled to resist the demand made, on the ground that Brodie was not to relieve the association, and that that claim could be set off against the £500 due to him; and further, that this claim was good against Brodie's assignee. The Lord Ordinary therefore resisted procedure, "reserving, however, leave to the complainer, as well as to the chargers, to move that this case shall be recalled on the mutual liabilities of the said William Brodie and the said association which shall have been or can be definitely ascertained." It occurred to the Court, on the leading counsel on the reclaiming note, that the evidence was hardly sufficient

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to justify the course adopted by the Lord Ordinary. It might be that Brodie was due to the association sums exceeding that which the association owed him, but it might also be that at the date of the assignation he was not due to the association a sum in excess of what it owed him, and it might therefore be doubtful whether the claims of the association were good against Brodie's assignees or not.

We therefore allowed an amendment of the record, to shew that Brodie was under an obligation of relief to the association at the date of the assignation exceeding that which was due to him. The result of the amendment and admissions enables us to see how that matter of fact stood. The result is, that at the date of the assignation the liabilities of the association exceeded its assets by £3635, and very few, if any, of its members were able to contribute anything.

The question comes to be—Was Brodie liable to relieve the complainer to an amount not far short of or equal to the amount charged for? I am of opinion that he was, and that therefore the complainer is entitled to hold the Lord Ordinary's interlocutor. The principle is that an assignee is liable to all pleas competent against his author when the assignation was made. A claim emerging subsequently has never been held competent to be pleaded against the assignee, but the assignee is certainly liable to all pleas maintainable against his author at the date of the assignation.

LORD DEAR.—The aspect of this case when first heard before us was this: Brodie was a member of the Imperial Building Association, which had employed him to build three tenements in Leith on the usual condition that the cost should be paid by instalments, according to certificates granted by the architect. On 15th September 1874 Brodie obtained a certificate from the architect, entitling him to payment of £500, being the value of the work which he had then executed. It was the right conferred by this certificate which he made over to Ferguson, Davidson, and Company. The debt for which he made it over was contracted for materials used in building the tenements of the association; and when the claim of the assignees was intimated and payment demanded, it was given on the representation of the agent of the association that, if legal measures injurious to the credit of the association were not resorted to, it would be enough to pay everybody. Assuming this to be the whole case, it appeared to me that Ferguson, Davidson, and Company had a strong equitable claim to payment from the association, and that it was a nice question whether the general rule that an assignee can only use the right of his cedent would have been applicable and sufficient as an answer to the claim.

But an amendment to the record has been allowed and made, which materially alters the aspect of the case. It appears that the liability of the members of the association is unlimited. It further appears from the state of affairs of the association, as at the date when the assignation was intimated, that Brodie was not only member of the association entitled to payment for work done on the tenement in question. He was the contractor for the joiner work only. There were other tradesmen, members of the association, who had done work for it to a large amount—the builder, ironmonger, glazier, plasterer, plumber, and also some of whose outstanding accounts exceeded that of Brodie, and all of whom held certificates from the architect giving them just as much right to payment as Brodie had, and the architect had granted a certificate in his own favour for £94, which also remained unpaid. They were all themselves employers or

in hand, and parties employed on the other; they all held liquid documents No. 44
debt, and were themselves all liable personally for these and other debts of
an association. In that state of matters I cannot resist the conclusion arrived
by your Lordship.

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LORD MURK.—When this case first came before the Court it was pleaded, on
the part of the chargers, that whatever might be the position of Brodie as
regards his right to recover against the association, the fact that he was a
member of and in debt to the association could not operate against his assign-
ees. Now, all that was then alleged was that at the date of the charge the
association was insolvent, and Brodie their debtor; but there was no distinct
statement that Brodie was debtor to the association at the date of the assigna-
tion, and it was not admitted on the part of the chargers that he was indebted
to the association even at the date of the charge. In this state of matters it was
arranged that there should be an amendment of the record in order to bring out
how these facts stood. That has been done, and it seems now to be admitted
that Brodie was indebted to the association at the date of the intimation of the
assignment in about the amount of the sum charged for. In these circum-
stances the question arises, whether the claim of the assignees is met by the plea
of compensation. From the correspondence it appears that the chargers dealt
privately with the association, and gave them some delay in October 1874,
being assured by the agent of the association that they would get payment of
their debt, and if it could be shewn that they were prejudiced by their giving
up there should have been a special plea to that effect. But there is no such
plea. If, therefore, a charge had been given on 15th October 1874 instead of
the following year, the same question would have arisen, and the allegation
in the affairs of the association were then in such a state as to shew a balance
against Brodie would, I apprehend, have been a relevant defence, at all events
against any claim at his instance to the extent to which he was a debtor to
the association. And I do not think that his assignees, as the facts now stand
stated, can be held to be in any better position, for there was plainly a con-
currence of debtor and creditor prior to the date of the intimation of the assigna-
tion. I have therefore come to the conclusion that the Lord Ordinary's inter-
pretation is right, and should be adhered to.

AND SHAND.—The law applicable to this class of cases is shortly and
lately stated by Mr Bell (2 Com., M'Laren's ed. p. 131)—“The right to
pursue passes against assignees if once vested in the cedent by a proper
course before assignment. But if a debt be assigned and the assignment
made before the counter debt arises, the concurrence is prevented, and there
is no compensation.” The view taken by the Lord Ordinary in the present case
accordance with the law thus stated.

It appears that Brodie obtained from the architect a certificate, bearing that
he was a creditor of the association for work executed under his contract to the
amount of £500. The property of the association consisted of two blocks
of houses valued at £4500, but burdened with a debt of £4800. The re-
sidual assets were trifling, while sums were due to the bank and to other
creditors, some of them members of the association, which brought the actual
state of matters to be a deficit of £3635. The architect's certificate did not put
him in any better position than that of other creditors, as, e.g., other trades-
men who had supplied goods to the association, the price of which had become

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due. When he presented his claim the association were bound to pay. But the answer of the association is, "We have no funds; the solvent partners must contribute; and you must contribute money to meet part at least of your own claim as well as to pay the other debts of the association. For this purpose there is a larger sum due by you than to you, or, at least, the amounts are equal." This raised a clear case of compensation, and, to the extent to which Brodie was bound to contribute, the debt is extinguished. The assignee cannot take a higher right than the cedent, and a "proper concurrence" had taken place at the date of the assignation.

It is true that Ferguson, Davidson, and Company supplied a great deal of wood used in the erection of the buildings which belonged to the association, but they did so under a contract with Brodie, and on his personal credit. When they took from Brodie an assignation to his claim under the certificate of security of the payment of his account due to them they had to ascertain for themselves the value of the security obtained, and could acquire no higher value than he had. Immediately on the claim for payment under the certificate being made the plea of compensation arose, and was a good answer. If the state of the facts had been so far different that the association after the intimating the assignation had gone on trading or building, and in this way had by subsequent operations raised up a claim against Brodie, the result as regards the claim would have been different. If the assignation be intimated "before" the counter debt arises the concurrence is prevented, and there is no compensation. But that is not the state of the facts. The counter debt, or liability in contribution on the part of Brodie, had arisen at the date of the assignation. Brodie's claim, whether made by himself or his assignees, was thus properly barred by the plea of compensation.

THE COURT adhered.

LINDSAY, PATERSON, & CO., W.S.—PATRICK S. BEVERIDGE, S.S.C.—Agents.

No. 45. RICHARD DUDGEON, Complainer.—*Lord-Adv. Watson—Balfour—Henderson*
WILLIAM THOMSON AND BENJAMIN DONALDSON, Defenders.—*Advocate—Jameson.*
Dec. 22, 1876.
Dudgeon v. Thomson and Donaldson.

Patent—Interdict.—The patentee of a tool for expanding the ends of boiler tubes in the flue-sheet claimed in his specification "the combination in an expanding tool of the following implements, viz. the rollers, roller stock, and expanding instrument, these three operating in combination substantially as set forth." The expanding instrument was described as "a tapering plug, or equivalent, by whose action the rollers are forced outwards in the tube." The manufacturer against whom interdict had already been obtained for infringement invented a new tool in which the rollers were fixed at an angle with the axis of the tool converging towards a point, so as to make the whole tool of a conical shape, and expansion was effected by screwing the tool into the tube without any expanding instrument or divergence of the rollers. In a petition and complaint for breach of interdict held (*diss.* Lord Deas) that there was no infringement.

1st DIVISION.
Lord Rutherford
Clark.
B.

On July 4th 1873,¹ Richard Dudgeon, patentee of a tool for expanding the ends of boiler tubes in the holes of the flue-sheet, obtained interdict against William Thomson, engineer in Glasgow, who had been using a similar tool, which he had patented. In 1873 Thomson went into

¹ Reported 11 Macph. 863.

with Benjamin Donaldson, and in 1874 he patented another tube-expander, which he and Donaldson manufactured and sold under the firm of William Thomson and Co.

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Dudgeon presented this petition and complaint for breach of interdict against Thomson and Donaldson, alleging that the new tool was also an infringement of his patent.

Dudgeon in his answers stated that the new invention was substantially different, Dudgeon's tool having effected the expansion by means of rollers parallel to each other, which were made to diverge and press apart the tube by a tapering plug driven in among them, whereas the new tool was a conical instrument all of one piece, in which the rollers moved at an angle with the axis of the tool, and the expansion was effected by screwing the whole tool into the tube.*

Donaldson stated the further defence, that the interdict was not personally directed against him.

The Court remitted the cause to the Lord Ordinary in terms of A. S. c. 11, 1828; and he after taking evidence reported the cause.

The import of the proof, so far as material, appears in the opinions of the Judges.

Deciding,—

PRESIDENT.—This is a petition and complaint for breach of interdict.

Dudgeon's specification as amended by a disclaimer and memorandum of amendment, filed on 28th May 1875 bore to be for "improvements in apparatus for expanding boiler-tubes," as set forth:—

The object of the invention is to enable the ends of the boiler-tubes to be expanded in the holes in the flue-sheet. Previous to this invention it has been customary to expand the ends of tubes by an expanding tool composed substantially of a series of swages radiating from a common centre, and caused to diverge by the use of a tapering plug driven into the centre of the tool by the repeated use of a maul or sledge.

The principle of the invention which constitutes the subject-matter of this patent is to expand the tube by rolling the metal by the application of pressure to the interior of the tube, so that the metal is extended by rolling it in distinction to the old system of driving it outwards by hammering, and as the operation can be operated by hand the use of mauls or sledges and all the expenses that attend their employment are dispensed with.

The roller expanding tool for general use is constructed by preference as shown at figures 1, &c. . . . In this case the tapering plug is simultaneously forced inwards between the rollers, and turns upon its axis by the application of the hands of the operator to a wrench or spanner D fitted to the head of the tool, and the rollers a, a, a, are caused to turn by the frictional contact of the surface of the plug with their surfaces, so that the series of rollers are caused to roll within the end of the tube, and are at the same time caused to diverge by the turning and entrance of the tapering plug.

Another form of roller expanding tool is represented at figures 6 and 7 of the accompanying drawings. In this example three rollers, a, a, a, are used, instead of being made solid are bored out and arranged to turn loosely upon a common axis, e, so that they may diverge when the expanding plug C is turned round in between them.

In the above described modifications of the roller expanding tool rollers are provided with a tapering plug (or its equivalent, by whose action the rollers are forced outwards in the tube), and with a stock or holder by which the rollers are prevented from twisting sidewise as they are turned round in the tube. It is claimed therefore as the invention to be secured by letters-patent is, the application in an expanding tool of the following implements, viz., the rollers, the stock, and expanding instrument, these three operating in combination substantially as set forth."

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The interdict was granted by Lord Mackenzie, Ordinary, and we affirmed his judgment on the 4th of July 1873. The interdict was to prevent the respondent from infringing a patent held by the complainer. The patentee Dudgeon had obtained a patent of a certain invention for improving the apparatus used for expanding boiler tubes, and it was alleged in the suspension and interdict that the respondent Thomson was using a tool substantially the same as the described and claimed in the patentee's specification. We thought that the objection was well founded, and therefore we adhered to the Lord Ordinary's interlocutor. It may be worth while by and by to recall the nature of the infringement which was then complained of. But, first, we must have a distinct view of the invention described and claimed. Since the interdict was granted the patentee has lodged an alteration and disclaimer in addition to his specification, but I do not think that alteration at all affects the merits of the question before us. The specification may be improved, but the nature of the invention and claim remains unaltered.

The object of the invention is to enable the ends of boiler-tubes to be expanded where they enter the flue-sheet. There is no doubt that previously the ordinary mode of effecting this purpose was very rough and unsatisfactory. The ends were expanded by putting in a series of swages radiating from a common centre, and then causing them to diverge by means of a tapering plug driven in by the blows of a heavy hammer. In contradistinction to that method the complainer's invention expands the tubes by rolling pressure. Pressure is applied by rollers to the interior of the tube and so it becomes expanded. This is a simple and obvious idea. The only difficulty was to find a good mode of accomplishing the expansion by means of rollers, and accordingly the patentee does not claim as his invention the substitution of rolling for hammering. Probably it would not have been safe to do so. He is careful to shew that he does not intend to monopolize the right of expanding by means of rolling, but he claims a certain mode of effecting that object. Accordingly he describes what he considers the best arrangement of the parts of a tool of this kind, though he does not confine himself to that arrangement, and in the end he tells distinctly what it is that he claims. It is "the combination in an expanding tool of the following implements viz., the rollers, roller stock, and expanding instrument, these three operating in combination substantially as set forth."

Now, in order to expand a metal tube by rolling, it is necessary not only that the rollers should turn on their own axis, but also that they should be pressed strongly against the sides of the tube. Without that they would have no effect in expanding it. Therefore a double action is necessary, rolling and pressure. The way in which the patentee proposes to accomplish this double action is to have the rollers so adjusted that they can be made to diverge from the axis of the tool, and so press against the inner sides of the tube, and in order to enable them to diverge he suggests a certain mechanism. The rollers must be so adjusted in the roller stock as to be capable of being pressed outwards, and for that purpose they are to be fitted in radial slots, — that radial slots are an essential part of the invention, but that is one mode suggested by which the rollers may be made to diverge from the axis of the tube. The patentee suggests another mode, a spring ring fitted in a ring groove in the roller stock, and so bearing on the rollers as to hold them in position when pressed outwards against the interior sides of the tube. That is presented as a good substitute or equivalent for the radial slots, and the patentee does not

confine himself to one or both of these plans or any other adjustment; provided the effect is the same, namely, to make the rollers capable of being made to diverge, it is equally within what he claims as his invention.

But then, what is to be the active power which is to cause the rollers to diverge? It is described as a tapering plug which is inserted in the centre of the tool, and its effect as it is gradually worked into the tool in the centre of the rollers is to cause these to diverge and work in the radial slots or on the spring so that they are pressed outwards from the axis of the tool and against the interior of the tube. That is the entire implement, and it is plain that to work the tool satisfactorily there must be a combination of rollers so adjusted to be capable of being pressed outwards, and a tapering plug which will have the effect of pressing them outwards gradually as the metal of the tube expands.

But again the patentee does not confine himself to a tapering plug as the only active instrument which can accomplish the divergence. He suggests that there may be equivalents. He does not say what these are, but he does say in the above description "a tapering plug, or its equivalent, by whose action the rollers are forced outwards in the tube." It is plain that whatever the equivalent may be it must have one thing in common with the tapering plug, it must act upon the rollers so as to force them to diverge and press against the inside of the tube.

Now, the tapering plug or its equivalent has two actions. I have hitherto described its action in pressing out the rollers, but it has also a rotatory action, which it communicates to the rollers, and so at the same time that it causes the rollers to diverge it also makes them rotate on their own axis, and so accomplishes the purpose of rolling the metal tube. The patentee describes his invention as a combination of rollers, a roller stock, and an expanding instrument, these three operating in combination substantially as set forth." Now, what are we to understand by that? Is it not that the rollers are to be made to diverge from the axis of the tool, and press against the interior sides of the tube, and that the expanding instrument is to have the effect of making them so diverge and press. It is impossible to read the patent otherwise. That being our opinion in granting the interdict was that Thomson was using a tool of that description, not indeed exactly the same, but substantially the same, a veritable imitation.

Now the question comes to be whether the tool used by Thomson since the interdict also falls within the combination, which is the only thing patented by the plaintiff. Now, the tool is certainly different in some remarkable particulars, and the question is, whether the variation is sufficient to take it out of the patent. In the first place, the rollers are not made to diverge from their position. It is not therefore by means of such divergence that they are made to press against the interior sides of the tube. It follows that for Thomson's tool a tapering plug is not only not required, but out of place, and, not only so, but an equivalent for it such as is suggested by the patentee is equally out of place. The means by which the rolling of the metal is accomplished is not divergence of the rollers but a different means, and one not contemplated by the patentee. No doubt Thomson uses rollers, and to make them available for rolling the interior of the tube he is obliged to use a roller stock on which they are fitted. It appears to me that with these two points the things which the tools have in common come to an end. The rollers are fitted in a different way, and for a

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different purpose, and they act in a different way. Thomson's tool in its best form has also a plug or centre which may be also said to be a point in common. But it is not a tapering plug, and it is not a plug by which the rollers are forced out, and therefore it is not intended to serve the one great object of the tapering plug in the patent. It is merely for the purpose of communicating a rotatory motion to the rollers.

The manner in which Thomson effects the great object of pressure against the interior sides of the tube is entirely different. The construction, shape, and contour of the tool is quite different. The tool is skewed or tapered, to a certain extent conical in shape, and its effect is that when it is put in at the end of the tube it works itself in by a rotatory motion communicated by the hand outside, and it becomes gradually drawn, or as some witnesses express it, swallowed into the tube. The effect is that the rollers being skewed as well as the roller stock, the metal is gradually rolled out, first by that part of the tool whose circumference is the smallest, and so gradually to a greater extent until the expansion is complete. Again, whereas the patentee's tool is stationary, Thomson's tool is necessarily in constant motion, as it feeds itself into the tube. It is by that gradual forward motion that the pressure is accomplished.

The difference between the two may be further illustrated by remarking that Thomson's instrument in all its essential qualities may be used without a plug at all,—not indeed so beneficially, but still with all its distinguishing characteristics,—by screwing in the roller stock itself into the tube. Such a tool was produced to us, and the patentee admitted that he could not complain of it, but that the one thing which is said to make the tool complained of identical with the patentee's is, that each has a plug, although in the one case it serves a different purpose altogether from the other.

If, then, the patentee is not entitled to claim all modes of rolling metal, he is forced to the conclusion that this tool is not the combination which he has claimed, but a different one for the same object, and that it is no infringement of the patent.

LORD DEAS.—I concurred in the observations which your Lordship made on the occasion of granting the interdict on 4th July 1873 (11 Macph. 863). I and your Lordship were all then of the same opinion with the Lord Ordinary, and I refer to the observations then made, and which I adopted as applicable to Mr Thomson's tool as it was manufactured by him at that time. But Mr Thomson has subsequently set himself with great ingenuity to attempt a farther variation of his tool, with the view of removing the objections to which it was then liable as an infringement of Mr Dudgeon's patent. The question is, has he been successful in that attempt?

I do not intend to go into all the details, which have been clearly stated to your Lordship. But I have great difficulty in holding that Mr Thomson has got himself out of the objections. The combination claimed by Mr Dudgeon is distinctly stated in the end of his disclaimer, where he says,—“In the above described modifications of the roller expanding tool rollers are combined with a tapering plug (or its equivalent), by whose action the rollers are forced outwards in the tube, and with a stock or holder by which the rollers are prevented from twisting sidewise as they are turned round in the tube. What is claimed therefore as the invention to be secured by letters-patent is, the combination of the roller expanding tool of the following implements, viz., the rollers, roller stock

expanding instrument, these three operating in combination substantially as set forth." No. 45.

The complainer plainly does not confine himself to a tapering plug as his expanding instrument. He says a tapering plug, or its equivalent, and, accordingly, he explains that what he claims is "the rollers, roller stock, and expanding instrument," operating in combination. Now, in Thomson's tool, as your Lordship has distinctly stated (and I quite agree in that statement) there are rollers, roller stock, and expanding instrument. This I conceive would be conclusive against Mr Thomson were it not that in the passage above quoted from Mr Dudgeon's disclaimer, when describing the modifications of his tool as introductory to his claim, there occur, after the words "tapering plug, or its equivalent," the additional words (which are not in the claim itself) "by whose action the rollers are forced outwards in the tube." Dec. 22, 1876.
Dudgeon v.
Thomson and
Donaldson.

Your Lordship, if I have followed your reasoning rightly, has come to the result that because in Thomson's new tool the expanding instrument does not force the rollers outwards in the tube the new tool is not an infringement of the patent.

In one sense, according to Mr Bramwell, the rollers may be said to be forced outwards in Mr Thomson's tool; but I am not sure that I follow Mr Bramwell sufficiently to rely upon his view on that point, and I take the case therefore upon the footing that there is a variation in this respect between the two tools, and that consequently the words particularly referred to by your Lordship do make a difficulty. It is that variation, I think, which forms the sting of the matter in the view of your Lordship. On the whole however, I am disposed to think that this variation is a colourable difference only. Mr Thomson's tool plainly does not accomplish the purpose in precisely the same way as Mr Dudgeon's tool does. It does not perhaps force out the rollers in the same way and manner. The necessity of doing that is obviated by Mr Thomson's rollers being fixed at the one end than the other, so that the pressure is produced by the expanding instrument going forward and, as your Lordship has expressed it, getting allowed in the tube. This difference, however, sounds much more formidable in words than it appears when you take up and look at the two instruments together. The principle of both appears to me substantially the same, and, to a man of Mr Thomson's skill, I think the one mode of producing the result would naturally suggest the other. I do not say that that would be enough. Mr Thomson was entitled to study Mr Dudgeon's tool, as it is plain enough he did, and to vary it as to get out of the position of an infringer if he could. But I do not think he has succeeded in producing anything more than a colourable imitation.

The decision which I understand your Lordships are to pronounce renders it necessary to consider the consequences which might have attached to a breach of the patent had my view been adopted. But I may say that I should in that case have considered a nominal sentence sufficient to vindicate the authority of the Court, the complaint being really only an appropriate form of trying the merits of the question.

MR. MURK.—This is a nice and delicate question, as almost all questions relate to patents of this description are; but after giving the matter the best consideration in my power I have come to the conclusion that the petitioner has failed to shew that there has been an infringement of his patent.

No. 45.

Dec. 22, 1876.
Dudgeon v.
Thomson and
Donaldson.

The first point for consideration is what was the invention claimed in the disclaimer of Mr Dudgeon, that is, in the second specification? and it appears to me that in this specification he does not claim every kind of mechanism by which tubes are rolled out by interior pressure. I think that this is plain upon the terms of the specification itself; and it is also, I think, made pretty clear, by the fact that the object of this disclaimer was to exclude one or two other modes of expansion by means of rollers which had been before included in the patent, under the apprehension apparently that the patent might be held to be invalid if it claimed those modes, or every mode, of expanding tubes by roller pressure from the interior. After so disclaiming these modes, and referring to the other system of driving the tube outwards by hammering, for which the application of pressure rollers is to be substituted, the specification goes on to describe the mode in which that is to be done, and the principal feature in the description appears to me to be by the divergence of the rollers outwards by means of what are called "radial slots." Thus, in the disclaimer, it is stated,—“The journals, e, e, are also held in radial slots, which permit the rollers to move outwards from the centre of the stock. In this case the tapering plug is simultaneously forced inwards between the rollers, and turns upon its axis by the application of the hands of the operator to a wrench or spanner D like to the head of the plug C, and the rollers a, a, a, are caused to turn by the frictional contact of the surface of the plug with their surfaces, so that the ends of rollers are caused to roll within the end of the tube, and are at the same time caused to diverge by the turning and entrance of the tapering plug.”

There are thus two things here particularly specified, viz., the use of radial slots, and of a tapering plug, the object of these radial slots being to enable the rollers to diverge or move outwardly; and it is distinctly stated in the specification that the series of rollers are caused to roll in the tube, and then caused to diverge by the turning and entering of a central plug. Now, this divergence of the series of rollers by means of the tapering plug, as fully explained in the evidence, appears to me to be an essential feature of the patent. For the tapering plug goes in, these rollers are made to diverge or press out at a particular spot where the instrument is fixed, and it is by the forcing out of the rollers through the operation of these radial slots that the expansion of the tube is effected.

Then upon turning to the claim it further appears to me that this divergence of the instrument is what is specially in view. For the claim bears—“In the above described modifications of the roller expanding tool rollers are combined with a tapering plug (or its equivalent, by whose action the rollers are forced outwards in the tube), and with a stock or holder by which the rollers are prevented from twisting sidewise as they are turned round in the tube. What is claimed therefore as the invention to be secured by letters-patent is the combination in an expanding tool of the following implements, viz., rollers, roller stock, and expanding instrument, these three operating in combination substantially as set forth.”

There is, I think, in this passage a difference between the words “expanding tool” and “expanding instrument.” “Expanding tool” is the expression used with reference to the whole three things in combination; but what is specified as the expanding instrument is the tapering plug, which can only act as an expanding instrument in the case where there are radial slots or some thing equivalent to them, which enables the rollers to diverge. That is, I think

substance of what is claimed ; for the gauge which is used in the operation is not distinctly claimed. But although this gauge is not distinctly claimed, it is, as I understand from the evidence adduced, almost always used, because it is necessary, as explained by the witnesses, to keep the instrument fixed at the part of the tube which is to be expanded ; it is only when the tool is so fixed that the tapering plug will cause the expansion of the rollers in the slots at the part of the tube which it is wished to expand.

Now, that being the way in which Mr Dudgeon's tool or instrument is made to work, the instrument which has been shewn to us as having been made in conformity with Mr Thomson's patent appears to me to be different in construction, and also to operate differently, as has been fully explained by your Lordship in the chair, and with that exposition I substantially concur. I have only therefore to add that the main distinction between the instruments appears to me to consist in this, that in the respondents' there can be no divergence of the rollers, as they are fixed in the stock, and there are no radial slots on which they can be made to expand, and no tapering plug. But while the rollers are thus fixed in the stock, they are made narrower at the one end than at the other, and skewed so that the tool is conical, and operates, as I understand it, only when it is in the act of moving inwards through the tube. It must be kept moving inwards, in short, to operate effectually, entering and passing through the tube gradually until the thickest part of the tool has passed into the tube, when the expansion is complete.

On these grounds, and without going further into detail, I am of opinion that the respondents' instrument is different from that patented by the petitioner, both in principle and in the mode of its operation ; and that it is not proved that there has been any infringement of the petitioner's patent.

LORD SHAND was not present at the discussion, and did not take part in the judgment.

THIS interlocutor was pronounced :—"Find that the complainer has failed to prove that since the date of the interdict mentioned in the petition and complaint the respondents, or either of them, have infringed the complainer's patent for 'improvements in apparatus used in expanding boiler tubes :'. Therefore refuse the prayer of the petition and complaint, and decern : Find the complainer liable in expenses," &c.

D. CURRIE, S.S.C.—AULD & MACDONALD, W.S.—Agents.

FORTUNAT EDUARDO VON ROTBERG, Petitioner.—*Thoms.*

No. 46.

Bankruptcy—Sequestration—Notice of Meeting to elect Trustee—Hour of Meeting omitted per incuriam in Gazette Notice—New Advertisement inserted.—The estates of Fortunat Edwaro von Rotberg were sequestrated on 18th December by the Lord Ordinary on the Bills, and in his Lordship's deliverance awarding sequestration a meeting of creditors was, in terms of section 77 of the Bankruptcy Act, 1856, appointed to be held at Dowell's Rooms, 18 George Street, Edinburgh, on Wednesday the 17th December, at two o'clock afternoon, to elect a trustee and commissioners, that being a day not earlier than six nor later than twelve days from the date of the Gazette notice, that sequestration had been awarded.

Dec. 22, 1876.
Von Rotberg.

Bill-Chamber.
I.

No. 46.

Dec. 22, 1876.
Von Rotberg.

In the notice of meeting published in the Edinburgh Gazette of 19th December the hour of meeting was *per incuriam* omitted.

The bankrupt presented a petition to the First Division of the Court, craving their Lordships either to appoint intimation to be made of new in the Edinburgh Gazette of 22d December, or to discharge and postpone the meeting fixed for 27th December, and to appoint a meeting to be held on 29th December, and intimation thereof to be made in the Gazette.¹

THE COURT pronounced this order:—"Appoint intimation to be made in the Edinburgh Gazette of this day that the meeting of creditors for the election of a trustee and commissioners on the sequestrated estate of Fortunat Edwardo von Rotberg, lately merchant in Leith, and now residing at Craighend Villa, Ferry Road, Edinburgh, is to take place at two o'clock afternoon, on Wednesday next, the 27th inst., in Dowell's Rooms, 18 George Street, Edinburgh."

DRUMMOND & REID, W.S.—Agents.

No. 47.

MRS MARJORY WALLACE (Robert Wallace's Executrix), Pursuer.—
Strachan.

Dec. 22, 1876.
Wallace v.
Henderson.

JAMES HENDERSON, Defender.—*Henderson.*

Process—Expenses—Condition precedent.—Where the pursuer in an action concluded both for damages and for count and reckoning, and the Inner House upon a report on issues by the Lord Ordinary, dismissed the conclusion for damages, with expenses—*held* (by Lord Curriehill) in conformity with *Strachan v. Dykes*, 8 D. 815, that the payment of expenses to the defender was a condition precedent to any subsequent procedure under the other conclusion of the action.

Process—Expenses—Extract Decree—Interest.—*Held* (by Lord Curriehill) in conformity with *Dalmahoy and Cowan v. Mags. of Brechin*, 21 D. 210, that interest runs upon an interim decree for expenses when the decree has been extracted and charged upon.

Outer-House.
Ld. Curriehill.

ON 27th February 1866 Robert Wallace raised an action concluding for £2000 in name of damages for breach of agreement against James Henderson, Esquire, of Bilbster, in Caithness. He also concluded for count and reckoning as to the rents of certain subjects belonging to him, which the defender had intromitted.

On 11th January 1867 the Lord Ordinary (Kinloch) reported the case on issues to the First Division, and of that date the Court pronounced this interlocutor:—"Find that there are not on record averments relevant or sufficient to warrant the issues proposed by the pursuer: Remit the Lord Ordinary to dismiss the action in so far as regards the first conclusion for £2000, and to proceed with the other conclusions of the action: Find the pursuer liable to the defender in expenses since the date of the closing of the record, and remit," &c.²

Mr Henderson lodged his account, had it taxed and approved of, and the expenses were extracted and charged on the decree. Wallace did not pay the expenses, and the action fell asleep.

On 12th October 1874 Wallace, with the concurrence of his wife, re-

¹ Kinnear on Bankruptcy, p. 67, and cases there cited.

² 5 Macph. 270, 39 Scot. Jur. 124.

the action of count and reckoning with regard to the rents of the subjects against Mr Henderson. No. 47.

The Lord Ordinary (Young), on 4th March 1875, sustained the defender's motion for *his alibi pendens*, in respect of the former action being still in progress, and dismissed the action, with expenses. Dec. 22, 1876. Wallace v. Henderson.

The First Division, on advising a reclaiming note on 20th July 1875,¹ held the Lord Ordinary's interlocutor, and sustained the action as a reclaiming note with regard to the rents from and after the date of the signing of the summons in the first action, with £5, 5s. of expenses.

The second action was subsequently remitted to the Lord Ordinary's consideration, in which the former action was pending. Wallace had died before the reclaiming note in the second action was lodged. His widow was the executrix-dative to him, and as such, after the first action had been decided, was sisted in both actions.

The causes were then put to the roll by Mrs Wallace to have them called.

The defender opposed this motion, on the ground that no step could be taken in the first action until the expenses found due in the Inner-House of Session in May 1867 had been paid, with interest, and relied on the case of *Struthers v. Dykes*, June 16, 1846,² where payment of such expenses was held to be a condition precedent to going on with the action. He maintained that he was entitled to interest upon the amount of expenses decreed in the extracted decree.³

The pursuer contended that *Struthers v. Dykes* had never been followed as a precedent, and argued that at all events, as the defender could have obtained Wallace upon his failure to pay when charged he had no right to insist. It was also maintained that the pursuer was entitled to deduct five guineas of expenses to which she had been found entitled by the First Division in the second action from any payment made to the defender in name of expenses.

The Lord Ordinary, on the authority of the case of *Struthers v. Dykes*, *Macmahoy and Cowan v. Mags. of Brechin*, refused to conjoin the two actions until the expenses decreed for in the first action had been paid, with interest, but under deduction of the five guineas decreed for in the first instance in the second action.

The pursuer thereupon paid the expenses, with interest, but under deduction of £5, 5s. decreed for on 20th July 1875, and the causes were again conjoined.

WALLS & SUTHERLAND, S.S.C.—HORNE, HORNE, & LYELL, W.S.—Agents.

JOHN HARVEY, Pursuer.—*Party*.

No. 48.

JOHN NEIL DYCE, Defender.—*Balfour—Mackintosh*.

Dec. 23, 1876.

Charge—Judge—Slander.—An action of damages against a Sheriff, for alleged to have been uttered by him while sitting in judgment, held to be incompetent. Harvey v. Dyce.

There was an action by John Harvey, writer, Lanark, against J. N. Sheriff-substitute of the county, for damages in consequence of the defender having, on a certain day, while sitting in judgment and in the presence of the pursuer in a debate in an action at his instance, "slandered" the pursuer. 1st Division. Sheriff of Lanarkshire. M.

¹ 1st vol. ii., p. 999.

² D. 815, 18 Scot. Jur. 446.

³ *Macmahoy and Cowan v. Mags. of Brechin*, Jan. 5, 1859, 21 D. 210, 31 Scot. Jur. 119.

No. 48. the pursuer by stating falsely, maliciously, injuriously, and without probable cause that the pursuer was an insane man to have raised an action like the one above referred to, and also that the pursuer was a juggler meaning thereby that he was a cheat and a trickish fellow, and was practising juggling on him, the defender; and further, that the pursuer was a liar for having written letters to him, the defender, full of falsehoods stating in one of said letters that errors had been made by the defender in writing down the proof in said action."

Dec. 23, 1876.
Harvey v.
Dyce.

The defender pleaded;—(1) The action is incompetent in the Sheriff Court of Lanarkshire, or any other inferior Court. (4) Generally, an action being raised against a judicial functionary in respect of matters arising in the course of his judicial functions and for alleged damages as a consequence to arise, is an incompetent action, and the statements therein are not relevant to infer the conclusions.

The Sheriff-substitute (Galbraith) and Sheriff (Dickson) assented to the defender.

The pursuer appealed.¹

At advising,—

LORD PRESIDENT.—I am of opinion that this action is not maintainable. It has been settled by a series of judgments in this Court and in England against an action of this kind the privilege of a Judge is absolute. No Judge is irresponsible, but no Judge is responsible for acts done in his judicial capacity in an action of damages. I adopt the judgment of Lord Chief Baron Martin in *Scott v. Stansfeld*, which has been quoted to us, which forcibly expresses the doctrine which has been established.

The plea which ought to be sustained is the 4th.

LORD DEAS.—I am of the same opinion, and on the same grounds. The plea raises a very important question. But it is not necessary to decide it.

LORD MURE and LORD SHAND concurred.

THE COURT sustained the fourth plea for the defender and assented to him.

PARTY—J. W. & J. MACKENZIE, W.S.—Agents.

No. 49. DONALD FRASER (Clerk to the Police Commissioners of Fort-William) Complainer and Appellant.—*Fraser—Guthrie Smith.*
COLIN KENNEDY, Respondent.—*Balfour—Mackintosh.*

Jan. 9, 1877.
Fraser v.
Kennedy.

2D DIVISION.
Sheriff of
Inverness.
I.

General Police and Improvement Act, 1862, 25 and 26 Vict. sec. 162—Projection of buildings beyond the line of a street.—Kennedy was proprietor of a house forming the north-west corner of Church Street and Church Square, Fort-William. As originally built this house stood back some feet from the line of the adjoining house, below which the British Linen Company, and had a small plot of ground in front of it about 11 feet long, separated from the street by a low railing fixed on a curb stone. Kennedy proposed to pull down the front wall of his house and advance it to the site of the railing in front, which projected beyond what beyond the line of the adjoining premises.

¹ *Authorities quoted.*—*Hagart's Trustee v. Lord President Hope*, June 1824, 1 S. 46, H. L. April 1, 1824, 2 S. App. 125; *Hamilton v. Anderson*, J. 1858, 3 Macq. 363; *Scott v. Stansfeld*, June 3, 1868, L. R. 3 Exch. 22.

The Commissioners of Police of the burgh of Fort-William, founding section 162 of the General Police Act, 1862,* gave notice to Kennedy that they required him in rebuilding to keep the new front wall of his house in a line with that of the adjoining house. Certain statutory provisions took place before the Sheriff on the subject, but there being some doubt as to its regularity the commissioners presented an ordinary petition for interdict against Kennedy in the Sheriff Court at Fort-William. This petition the Sheriff (Ivory) refused.

No. 49.
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Kennedy.

On appeal it was maintained (1) that section 162 of the statute by implication applied to the case of houses the front wall of which retreated on the line of the adjoining houses; and (2) that it applied just as much to the railing in front of the respondent's house as to the front wall of the house itself; and that as soon as the respondent commenced alterations on the line of his railing, which projected beyond the line of the adjoining house, the commissioners were entitled to require him to set it back to the line, otherwise the provision of the statute would, in such a case as at present, be entirely abortive.

The Court held that the section of the statute founded on did not apply to the case, as there was no old building taken down which projected in front of the buildings on either side, and as the railing was not a "building" in the sense of the statute.

MUNRO & ROBERTS, S.S.C.—GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—Agents.

GEORGE ALEXANDER CRUICKSHANK (Inspector of Poor of Lonmay),
Defender and Appellant.—*Balfour—Moncreiff.*
JAMES GREIG (Inspector of Poor of St Fergus), Pursuer and
Respondent.—*Asher—Pearson.*

No. 50.
Jan. 10, 1877.
Cruickshank
v. Greig.

Settlement—Constructive Residence.—A, who was a farm servant, had had a residential settlement in the parish of X prior to Whitsunday 1866. At that date until 12th April 1875, when he became chargeable as a pauper, continued tenant of a house in the parish of X, where his family resided, supported by him, under the charge at first of an unmarried sister (his first wife being dead) and afterwards of his second wife. He himself was (with the exception of periods of six months each in 1867-68, 1871, and 1874-75, during which he was employed in the parish of X and personally resided there) employed on farms in neighbouring parishes on which he personally resided, visited his family at his own house in the parish of X regularly every fortnight, and was more frequently, as the exigencies of his employment permitted, that he had retained his residential settlement in the parish of X.

The question raised in this action was whether Gordon Webster, a farm-servant, who at Whitsunday 1866 had acquired a residential settlement in the parish of St Fergus, had retained that settlement down to 12th April 1875, when he became chargeable as a pauper. Webster was born in the parish of Lonmay. He came to the parish of

2D DIVISION.
Sheriff of
Aberdeen.
I.

§ 26 Vict. c. 101, sec. 162, provides that, "When any house or building part of which projects beyond the regular line of the street, or beyond the line of the house or building on either side thereof, has been taken down or is to be altered, or is to be rebuilt, the commissioners may require the owner to be set backwards to or toward the line of the street, or the line of the adjoining houses or buildings, in such manner as the commissioners may direct, for the improvement of such street: Provided always that the commissioners make full compensation to the owner of any such house or building for any loss he thereby sustains."

No. 50. *St Fergus in 1842, and took up house there in 1847. From 1847 down to the date of chargeability he was tenant consecutively of various houses in the parish of St Fergus. Down to Whitsunday 1866 his residence in the parish was continuous and uninterrupted. From Whitsunday 1866 down to the date of chargeability he was, with the exception of three periods (viz., Martinmas 1867 to Whitsunday 1868, Whitsunday to Martinmas 1871, and Martinmas 1874 to Whitsunday 1875), engaged on farms in neighbouring parishes on half-yearly engagements.*

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The farms in neighbouring parishes on which he was employed during this period were from two to six miles from his house in St Fergus. During these engagements he resided on the different farms, going home to his house in St Fergus regularly every fortnight from Saturday night to Sunday night, and sometimes oftener. During the three periods of his employment in the parish of St Fergus he resided in his own house in that parish. His first wife had died before Whitsunday 1866. But from Whitsunday 1866 to July 1873 his house was kept by an unmarried sister who took charge of his children. In July 1873 he was married a second time, and from that date down to the date of chargeability his second wife resided in his house in St Fergus along with his children. From Whitsunday 1866 down to the date of chargeability he regularly supported, first, his sister, and then his second wife and his children, by his own labour, both during the time that he himself was living on the farms and during the periods when he was residing in the parish of St Fergus.

An action of relief having been brought in these circumstances by the parish of St Fergus against the parish of Lonmay as the parish of the pauper's birth, on the ground that prior to the date of chargeability the pauper had lost his residential settlement in the parish of St Fergus, the Sheriff-substitute (Dove Wilson) held that the pauper had not retained his settlement in the parish of St Fergus, and that the parish of his birth was therefore liable.

An appeal was taken to the Court of Session.

Argued for Lonmay, the parish of the pauper's birth;—It was not of length but the character of a man's absence that was to be considered in determining whether he had lost a residential settlement. Here, though the period of absence had been long enough in duration its character was not inconsistent with constructive residence. The pauper's absence was never continuous. They were constantly broken by returns at regular intervals, and those fortnightly and often weekly, to his own house, the rent of which he was paying and the expenses of which he was defraying. He was in truth merely leaving his house in the exigencies of his employment, returning to it as often as that employment permitted, bringing with him his gains, and spending them in the maintenance, for himself and his family, of a house in the parish. This was therefore a very strong case of constructive residence.¹

Argued for St Fergus, the parish of residential settlement;—At Whitsunday 1871 the pauper had lost the residential settlement which he had acquired prior to Whitsunday 1866 in the parish of St Fergus, because during the five years, Whitsunday 1866 to Whitsunday 1871, he had not resided six months in the parish. The doctrine of constructive residence did not apply to a case such as this, where a man leaving his family in one parish had his own personal residence in another. In such cases

¹ *Milne v. Ramsay*, May 23, 1872, 10 Macph. 731, 44 Scot. Jur. 435; *Beattie v. Smith and Paterson*, Oct. 25, 1876, *supra*, p. 19; *Macgregor v. Watson*, Nov. 7, 1860, 22 D. 965, 32 Scot. Jur. 410; *Jackson v. Robertson*, Jan. 7, 1851, ante, vol. i. p. 342.

ment must go with his own personal residence. It only applied to those whose employment was such that they had no personal home in any other parish, and were here to-day and there to-morrow, as a sailor or commercial traveller, and whose only home necessarily was the place where they left their families, and to which they returned when their employment permitted them.¹

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JUDGE-CLERK.—The facts in this case are that the pauper had acquired a partial settlement in the parish of St Fergus, in which he had resided for many years prior to 1866. After that period, he worked and lived temporarily in several of the adjoining parishes; but he never maintained a domestic establishment in any of them, but retained his house in St Fergus, to which at the end of a week or a fortnight he was in the habit of returning. It is in my opinion, that, in this state of facts, the parish of St Fergus cannot have been freed from the liability arising from the pauper's settlement there. It never was lost or interrupted. The constant personal presence of the pauper is essential to the acquisition and much less to the retention of a settlement, if the man's home was truly in the same place, as here it was.

MR. MURDOCH.—The question to be determined in this, as in most cases of its kind, I think, a delicate one, and not unattended with difficulty. I am, however, to come to any other conclusion than that arrived at by your

learned brethren settled by previously decided cases that actual personal residence in the parish for the requisite period is not indispensable either for the retention or acquisition of a settlement therein. What has been called a "constructive" settlement has been in certain circumstances held to be sufficient for that purpose, as in the case of *Miles*, which was referred to in the argument. The principle of a general nature, and one of great importance, which influences much in this case, is that laid down in the well known case of *Adam v. Lough*,² in the House of Lords by Lord Chancellor Cranworth, to the effect—"Considering the peculiar nature and object of the poor-laws,—the relief to those unable to maintain themselves,—it is absolutely necessary that we should construe the provisions of the Legislature so as to meet the very social wants of those for whose benefit they are made." Applying this principle to the circumstances of the present case it would be difficult, I think consistently with it, to hold that the pauper here has lost his settlement in the parish of St Fergus. For a period of upwards of thirty years, or, in other words, for nearly the whole working portion of his life, he has had his home in that parish; he was twice married there, and there his wives successively lived; his first wife died; there also his children were born and brought up; and to that parish he himself constantly resorted whenever he could get away from his work when it happened to be elsewhere; and in his evidence he says that he had at any time been taken ill he would have gone to his house in St Fergus. Accordingly, when he was at last taken ill, and disabled from working, he remained there. In short, it is indisputable that although occasionally employed as a

¹ *Greig v. Miles and Simpson*, July 19, 1867, 5 Macph. 1132, 39 Scot. Jur.

² *Moncrieff v. Ross*, Jan. 5, 1869, 7 Macph. 331, 41 Scot. Jur. 196.

³ May 30, 1853, 1 Macq. 376, Lord Chancellor, 380.

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farm-labourer in adjoining parishes, the only house or home he had of his own was in St Fergus; and, as I have already said, to that house and home he always resorted whenever he could manage it. He seems besides to have worked in St Fergus when he could get work there, and although he worked when necessary in other adjoining parishes he spent the fruits of his labour in St Fergus.

Looking therefore to the circumstances of this case, as now generally referred to, I have not much hesitation in holding with your Lordship that the Sheriff's judgment appealed against must be altered to the effect of its being found that St Fergus is the parish of the pauper's settlement.

LORD GIFFORD.—I am of the same opinion, and upon the same grounds, although I feel this to be a very narrow case. Indeed, naturally, and almost necessarily, cases of this class have a tendency to get narrower, each successive case presented being in advance of and more difficult than its predecessor.

On the question as to whether the residence of the pauper in the parish of his residential settlement was interrupted by non-residence so as to prevent the settlement being retained I cannot hold that there was any discontinuity. The man always had a house in St Fergus and paid rent for it. If his rent was large enough he would be rated for it, and would pay or be liable in poor rates. His family always lived in St Fergus, and he visited them as often as his employment permitted. He at no time had any other residence except a bothy provided by his master. Looking at the history of the man we find he never ~~was~~ for any considerable period of time in one place—he was never long anywhere. His house in the parish of St Fergus was always regarded and must be held upon as his home. It will always be difficult to make out a breach of continuity of residence when the man has all along kept a house in the parish and has no other house anywhere else. His family is there—his *lares et penates* are there. This pauper never had another home—as one cannot call a bothy a home. I think therefore the Sheriff-substitute is wrong here, and I agree with Lord Ormisdale that upon a popular construction of the statute, where a man's ~~home~~ is his home is, and that is his residence, although he may have to go out of the parish in order to find his work.

THIS interlocutor was pronounced:—"Find that the pauper ~~had~~ resided in the parish of St Fergus for upwards of twenty years prior to 1866, and had acquired a residential settlement in the parish: Find that the pauper after that date worked in several adjoining parishes but retained possession of his house in St Fergus to which he returned at intervals of a week or a fortnight, and in which his family resided: Find that these periods of absence on the part of the pauper did not interrupt the continuity of his residence in the parish of St Fergus, or affect retention of his settlement in that parish: Therefore sustain the appeal, recall the judgment of the Sheriff-substitute, assoilzie the defender from the conclusions of the summons, and decern, and find the appellant entitled to expenses both in this Court and in the Sheriff Court, and decern," &c.

PEARSON, ROBERTSON & FINLAY, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

COLONEL ALASTAIR M'IAIN M'DONALD, Pursuer.—*Lord-Adv. Watson—
M' Laren—Balfour.*

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COLONEL ALASTAIR M'IAIN M'DONALD AND OTHERS, Defenders.—
Fraser—Trayner.

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Entail—Marriage-Contract—Reserved Power—Jus Crediti.—By antenuptial marriage-contract a husband settled an estate on himself and his intended wife in conjunct fee and liferent, and on the heirs-male of the marriage, whom failing, the heirs-male of any subsequent marriage, whom failing, on his brothers in coession and their heirs-male, whom failing, on his heirs whomsoever. He, however, reserved a power to entail the estate on the same series of heirs, and on other heirs as he should think proper. He subsequently executed a deed of entail in which he called his eldest son as institute, and the heirs-male of his body, whom failing, his other sons of the marriage in order and their heirs-male respectively, whom failing, the daughters of the marriage in order and their heirs-male respectively, whom failing, the heirs-female of his eldest son, whom failing, the heirs-female of his other sons and daughters of the marriage, whom failing, the sons of any subsequent marriage and the heirs of their bodies, whom failing, the daughters of such subsequent marriage and the heirs of their bodies, whom failing, his brothers and their heirs-male in order, whom all failing, his heirs whomsoever.

In an action of reduction of the entail by the institute on the ground that the destination to heirs was *ultra vires* of the entailer as not being in conformity with the power reserved in the marriage-contract, held that the institute had no title to pursue the reduction as by the institution of himself and the heirs-male of his body in the entail any *jus crediti* created under the marriage-contract to him or his heirs-male was completely satisfied.

Entail—Marriage-Contract—Jus Crediti.—Observed (per Lord Justice-Clerk) when a father becomes bound in an antenuptial marriage-contract to convey a fee and estate to the heir of the marriage, with a substituted destination to others, there are two general rules which have been very clearly fixed by decision. The first of these is, that such a destination creates no *jus crediti* whatever in any member of the destination other than the descendants of the marriage, and that regarding other members of such a destination the father retains the absolute power of alteration and disposal. The second of these is, that if the father during his lifetime propels or conveys the estate so destined to the apparent heir of the marriage, and he accepts of the conveyance, the obligation under the marriage-contract and the *jus crediti* created by it are satisfied; and even although the conveyance contain an alteration of the destination, no right remains in the substitute to challenge it or set it aside, even in the case of the apparent heir precluding the grantor.

COLONEL M'DONALD raised this action against himself and the surviving 2^d Division.
of entail called, for reduction of a deed of entail of the lands of Dalchoshnie, Loch Garry, and Kinloch Rannoch, executed by his father, Sir John M'Donald, on 18th July 1837, under the following circumstances. By antenuptial marriage-contract, dated 8th September 1826, Sir John M'Donald (then Colonel John M'Donald), who was fee-simple proprietor of estate of Dalchoshnie, in consideration of their marriage disposed that the estate to himself and his intended wife, Adriana M'Inroy, in conjunct fee and liferent, but for her liferent use alienably, should she survive him, and to the heirs-male of the marriage, whom failing, to the heirs-male of his body by any subsequent marriage, whom failing, to his three brothers in succession to the respective heirs-male of their bodies, whom failing, to his own next heirs whomsoever. In the marriage-contract, however, he reserved the power to execute an entail of the whole or any part of Dalchoshnie, failing, if he thought proper, prohibitory, irritant, and resolute clauses, providing only that in any such entail he should be bound, first,

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to call to the succession the series of heirs given above and in the order there narrated, and thereafter such other heirs as he should think proper.

Some time after his marriage Sir John purchased the estates of Loch Garry and Kinloch Rannoch adjoining Dalchosnie, and afterwards on 18th July 1837, he executed the deed of entail now brought under reduction.

This deed proceeded on the narrative that he and his wife wished to settle all their estates on themselves and their family, "and failing heirs-male, so far to alter the destination in the marriage-contract with regard to Dalchosnie as to settle it with the other lands, giving his female of the present marriage a preference and priority to heirs-male of any subsequent marriage." Accordingly Sir John disposed the three estates in favour of himself and his wife and the survivor of them in life-rent, and to the following series of heirs in fee, viz., to his eldest son Alastair M'Iain M'Donald (the pursuer), and the heirs-male of his body whom failing, to his other sons, born or to be born of his present marriage *seriatim*, in order according to their seniority, and the heirs-male in succession of their bodies; whom failing, to the daughters of his present marriage, born or to be born, *seriatim*, in order according to their seniority, and the heirs-male in succession of their bodies; whom failing, to the heirs-female of the pursuer and the heirs of their bodies; whom failing, to the heirs-female of his other sons of his present marriage, *seriatim*, in order of their seniority, and the heirs of their bodies; whom failing, similarly to the heirs-female of his daughters as above; whom failing, any sons that might be born of his body in any subsequent marriage, and the heirs-male of their bodies; whom failing, any daughters of such subsequent marriage, of his body and the heirs of the body of such daughter or daughters, *seriatim*; whom failing, to his brothers in succession and to the heirs-male of their bodies; whom failing, to his heirs whomsoever.

Infestment followed upon this deed in favour of John M'Donald and Adriana M'Inroy or M'Donald, his wife, and the survivor in life-rent, and in favour of the pursuer, Alastair M'Iain M'Donald in fee, in Dalchosnie in July, and recorded August 1837, and in Loch Garry and Kinloch Rannoch in May, recorded June 1838. At this time the pursuer was in pupillage.

This deed of entail was duly recorded in the Register of Tailzies on 11th November 1837. Sir John M'Donald died on 24th June 1866, survived by his widow, who died on 7th November 1872. The pursuer as intestate under the deed of entail entered into possession of the lands so entailed.

This action of reduction was brought on the ground that Sir John M'Donald in the deed of entail as executed had not first called the series of heirs specified in the contract of marriage, but had introduced other persons as heirs-substitute in priority and preference to certain of the heirs in that series.

The summons concluded for reduction of the deed of entail and the decrees which had followed thereon, in so far as they related to the estate of Dalchosnie, and for declarator that the estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, or at least the estate of Dalchosnie belonged to the pursuer in fee-simple.

The pursuer pleaded;—(1) The entail libelled ought to be set aside, so far as it relates to Dalchosnie, in respect that it was not executed in conformity with the power reserved to Sir John M'Donald by the marriage contract, and was therefore *ultra vires* of him and inept. (2) The entail being *ultra vires* and inept as regards Dalchosnie, and the pursuer having right to that estate by virtue of the conveyance contained in the marriage-contract, he is entitled to have that right declared, and to be

and possess the lands of Dalchosnie in fee-simple. (3) It having been the intention of Sir John M'Donald that the estates of Loch Garry and Kinloch Rannoch should be added to and descend along with the estate of Dalchosnie, and the last mentioned estate not having been effectually entailed, the entail should also be reduced as regards Loch Garry and Kinloch Rannoch, and it should be found and declared that the pursuer, the person having right to Dalchosnie, has also right to Loch Garry and Kinloch Rannoch.

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His surviving brother and sisters defended the action, and pleaded, *inter alia*;—The pursuer has no title or interest to maintain the pleas stated, or to insist in the conclusions of the action.

On 10th March 1876 the Lord Ordinary pronounced this interlocutor:—“Finds that the pursuer has neither title nor interest to maintain the pleas stated, or to insist in the conclusions of this action: Therefore sustains the preliminary defences of want of title stated by the several defenders, dismisses the action, and decerns: Finds the pursuer liable in expenses to the said defenders—reserving for consideration the question whether and how far the defenders are entitled to the full expenses of separate appearance after the date of closing the record,” &c.*

* NOTE.—(After narrating the destination in the marriage-contract, and the reserved power and the destination in the deed of entail in so far as in favour of the heirs-male of the marriage)—So far it is not disputed by the pursuer the destination in the entail is in entire conformity with the obligation or conveyance in the marriage-contract, as it is in favour of the sons of the marriage in their order, and the heirs-male of their respective bodies,—in other words, in favour of the heirs-male of the marriage. And in particular it must be observed that the institute of entail is the pursuer, Alastair M'Iain M'Donald, who is the first stirps in the destination, the estates being conveyed to him and to the heirs-male of his body. *Prima facie*, therefore, the pursuer cannot complain of the destination, as he and the heirs-male of his body occupy the precise position in the deed of entail actually executed by Sir John M'Donald which they would have occupied had the deed been expressed precisely in terms of the marriage-contract in all respects.

The entail, however, instead of calling next in succession, after the heirs-male of the marriage, the heirs-male of any future marriage of Sir John, and after his brothers and their respective heirs-male, and his own heirs whom he calls first the daughters of his marriage with Miss M'Inroy in their order, the heirs-male of their bodies respectively; whom failing, the heirs-female of the sons of the marriage in their order; whom failing, the heirs-male of the body of the daughters of the marriage; whom failing, the brothers of Sir John in their order, and the heirs-male of their bodies respectively; whom failing, the heirs-female of their bodies respectively. And the pursuer claims that whereas under the destination in the marriage-contract the heirs-male of his body had a protected right of succession, that right has been interdicted with or postponed in the destination contained in the deed of entail; and maintains that although he is unmarried, he is entitled to protect the interests of such possible heirs-female. He seeks to protect these interests by reducing and setting aside the deed of entail *in toto*, or at least in so far as the same deals with the estate of Dalchosnie, and by asking decree of declarator that the said estate belongs to himself in fee-simple. It is difficult to see how the interests of the pursuer's possible daughters, which he says are protected by the marriage-contract, will be in any way secured by a decree in this action finding that he is simple proprietor of Dalchosnie. And this consideration alone is, in my opinion, sufficient to shew that the pursuer has no title to insist in the present action. But as the case was not pleaded at the bar on this footing, but was argued on both sides as if the sole question was whether daughters or heirs-female of the pursuer had a protected succession under the marriage-contract, which has

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Colonel M'Donald reclaimed, and argued ;—Under the provisions in the marriage-contract a *jus crediti* was created in the series of heirs there called, and whenever Sir John changed the order of these heirs in the deed of entail he was acting *ultra vires*, and the deed therefore fell to be reduced. At advising,—

LORD JUSTICE-CLERK.—(After stating the nature of the action)—I am very clearly of opinion that the interlocutor of the Lord Ordinary is right, and ought to be adhered to. I doubted at one time whether the judgment would not have been more correctly put on the absence of interest on the part of the pursuer rather than on the want of title ; but I have come entirely to concur in the view of the Lord Ordinary, and I am further of opinion that, even if these had been doubtful, the pursuer is not in a position to insist on any such demand at present.

When a father becomes bound in an antenuptial marriage-contract to convey a land estate to the heir of the marriage, with a substituted destination to others, there are two general rules which have been very clearly fixed by decision. The first of these is, that such a destination creates no *jus crediti* whatever in any member of the destination other than the descendants of the marriage, and thus as regards other members of such a destination the father retains the absolute power of alteration and disposal. The second of these is, that if the father during his lifetime propel or convey the estate so destined to the apparent heir of the marriage, and he accepts of the conveyance, the obligation under the marriage-contract and the *jus crediti* created by it are satisfied ; and even though the conveyance contain an alteration of the destination, no right remains in the pursuer to substitute to challenge it or set it aside, even in the case of the apparent heir predeceasing the granter.

In this case the complaint by Colonel M'Donald, the eldest son of the pursuer, is, not that he has failed to receive any patrimonial benefit which the marriage-contract secured to him, but that the granter of the deed of 1837

has been interfered with by the destination in the entail, it is necessary to consider that question.

"It is clear that if the entail, after calling the heirs-male of the marriage, to implement of the marriage-contract, had proceeded to call the other heirs, none but the other heirs, who are specified in the marriage-contract, the destination must have been in favour of the heirs-male of any subsequent marriage of Sir John M'Donald, and failing them, the three brothers of Sir John, and failing them, the respective heirs-male in their order of seniority, whom all failing, the heirs-whomsoever of Sir John. But it is undoubted that under the marriage-contract neither the heirs of any future marriage of Sir John M'Donald, nor his brothers and their heirs-male, nor the heirs whomsoever of Sir John, had any *jus crediti* or any protected right of succession. And there is as little doubt that under the destination to heirs whomsoever of Sir John could the succession be open to the heirs-female of the pursuer. In short, none of the heirs specified in the marriage-contract, beyond the heirs-male of the marriage between Sir John M'Donald, and his wife Adriana M'Inroy, had any *jus crediti* or protected right of succession ; and the rights of all these parties, as has been shewn, have been effectually secured by the destination in the deed of entail above recited. Being so, I am unable to see what title or interest the pursuer,—to whom the heirs-male of his body, as heirs-male of the marriage, the succession is secured by the deed of entail,—can possibly have to secure to his daughters or to his female, who are not creditors under the marriage-contract, any right of succession to the estate of Dalchosmie.

"I am therefore of opinion that the pursuer has failed to shew any title in support of this action, and that the action must therefore be dismissed, with expenses.

¹ Routledge v. Carruthers, May 19, 1812, F.C., aff. H. of L., 2 Bligh, 652.

and the position of certain of the members of the destination, on whom no *jus crediti* whatever was conferred, and has given a priority to heirs-female of marriage over the possible heirs-male of any subsequent marriage which he contracted, and over his collateral relations. It is perfectly evident that the heirs-male of any subsequent marriage, had any such existed, would have had no right to challenge this exercise of the granter's undoubted power. He might have omitted them entirely from the destination. It is equally clear that even on his own view the heir of the marriage can suffer nothing by the change.

The pursuer founds on the clause in the marriage-contract reserving power to General M'Donald to execute an entail of the whole or any part of the lands, reading "only that he should call to the succession the series of heirs above named in the order above narrated, and thereafter such other heirs as he shall think proper." He maintains that no entail could be conform to the terms of the marriage-contract in which that order was not strictly observed, and this was a reserved power and required to be executed precisely as it was granted. To the extent of his own interest under the contract this may be true. General M'Donald could not have interposed between the eldest son of the marriage and the heirs-male of his body any of the other members called to the succession. To that extent the order set down in the marriage-contract might be a condition of the power to entail. But beyond that, as the heir of the marriage had no interest in the subsequent order of succession, that order was not a condition of his right; and as regards the members of the destination, he could pretend to no *jus crediti* under the marriage-contract, the terms of the contract in no respect limited the power of General M'Donald, and the alteration was consistent with the good faith of the marriage-settlement, which is the rule in all such questions. The right of Colonel M'Donald was to obtain a share from his father under the fetters of a strict entail, in which he should be substituted and the heirs-male of his body should be next called to the succession. Beyond this he had no interest whatever in the order of the destination, and certainly none in the position which the heirs-male of any subsequent marriage might occupy in it.

An attempt was made in the argument, although not seriously pressed, to maintain that the heir of the marriage had an interest that the members of the destination should not be enlarged so as to interpose additional lives between him and the possible event of the whole destination being exhausted. It is unnecessary, however, to consider this contention, because it is excluded by the words of the contract itself, the power being to call first the series of heirs above mentioned and thereafter such other heirs as he shall think proper, which left it entirely in the power of General M'Donald to add to the destination as he should think fit. Even without this clause I should have doubted greatly if any such objection in the possible exhaustion of the tailzied line could be held to be within the *jus crediti* created by the marriage-contract. But as General M'Donald has been called to the destination, but has only altered the order in which the heirs were to take, this question does not arise.

These views, which I suggest in addition to those very clearly stated by the Lord Ordinary, are sufficient to dispose of the case. But although the record contains meagre materials for the view, I should be inclined to hold that even if it were not so the case is entirely in the position of the series of cases, including *Routledge v. Carruthers*, in which it was found that the apparent heir of the marriage by accepting a disposition during the father's lifetime of a land

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estate destined to the heir of the marriage and other substitutes by antenuptial marriage-contract, extinguished the *jus crediti* thereby created, as far as regards the rest of the destination, and that this is complete fulfilment of the obligation created by the marriage-contract. In this case the entail in question was executed so long ago as 1837. The grantor reserved his liferent, and propelled the succession to Dalchosnie and the two other estates of Loch Garry and Kinloch Ramsay (in regard to which he lay under no obligation) to Colonel M'Donald his son, and other substitutes under the fetters of a strict entail. Infestment passed on the conveyance, and the entail was recorded in 1838. At that time no doubt Colonel M'Donald was under age. But he came of age several years before the death of his father in 1866, and since that date he has taken up all three estates and maintained his right under the conveyance in every possible way. I should have been of opinion, had it been necessary to decide the point, that he had conclusively accepted of the conveyance as it stood, and that the contentions maintained in this action are entirely excluded.

LORD ORMIDALE.—I concur with your Lordship in thinking that the Lord Ordinary's interlocutor is right.

It is obvious that, so far as the pursuer is individually concerned, his right and interest in the entailed estates in question have not been affected by the difference on which he founds betwixt the deed of entail as executed and the reserved power in respect of which it bears to have been executed. Neither am I able to understand how it can be maintained that the pursuer is entitled to insist in the present action for behoof and protection of heirs called after him to the destination; and certainly it is, as remarked by the Lord Ordinary, an anomalous mode, to say the least of it, of securing and protecting the interests of future heirs of entail for the pursuer to conclude that the lands should be held to belong to him in fee-simple.

The estates in question originally belonged absolutely to the entailor, and he had right to entail them upon any series of heirs he pleased, provided only that he did not interfere with or prejudice the rights conferred by the contract of marriage between him and his wife upon the children of the marriage. The parties alone had any *jus crediti* or protected right of succession. But it is not to be said, and could not be said, that the rights of the children of the marriage have been interfered with or prejudiced by the entail as executed. And if this be so, the authorities which were cited in the course of the debate are, I think, conclusive against the pursuer. Thus Mr Erskine (b. iii., t. 8, sec. 39), while he states and illustrates his statement by various examples, that settlements in marriage contracts restrain the father from executing "gratuitous deeds to the prejudice of the heir of the marriage," concludes by saying—"As to the remoter substitutes, if the husband contracted, it was with himself alone, and therefore substitution must be accounted a simple destination as to them, which may be altered by him at his pleasure." To the same effect is the statement of Mr Erskine in section 1970 of his Principles, and the cases to which he there refers. In accordance with this doctrine one of the questions in the case of Macdonald v. Cunninghame (20th July 1841, 3 D. 1288, 13 Scot. Jur. 570), cited in the course of the argument, seems to have been decided.

I may add that I concur with your Lordship in thinking that there is no ground for holding that the pursuer has, by taking up the entailed estates in the way he did, precluded himself from founding on his other objections. But I

not help feeling that the materials for determining this point are not before me in proper form I do not rest my judgment on it. These are shortly the grounds which have influenced me in coming to the conclusion that the judgment of the Lord Ordinary is right.

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LORD GIFFORD.—(After stating the conclusions of the summons)—The ground which the pursuer makes this demand is that the deed of entail executed by his father in 1837 was *ultra vires* of his father, and in contravention of the provisions contained in his father's antenuptial contract of marriage with Miss Inroy, afterwards Lady M'Donald. He pleads that although the antenuptial contract of marriage reserved power to Sir John M'Donald to make a deed of entail, it was provided that such deed should be in favour of a certain series of heirs named in the marriage-contract, whereas the deed of entail actually executed is not in favour of the prescribed series of heirs but in favour of another and a different order of heirs.

I am of opinion that the contention of the pursuer is not well founded. I think that the deed of entail actually executed by the late Sir John M'Donald was entirely within the powers reserved to him in his antenuptial contract of marriage, and that the same is not challengeable on any of the grounds now urged in by the pursuer.

At the date of his marriage with Miss M'Inroy, Sir John, then Colonel Donald, was proprietor of the lands and estate of Dalchosnie, and by antenuptial marriage-contract between him and his wife dated 8th September 1826, in consideration of the marriage, made over that estate to himself and his wedded wife in conjunct fee and liferent, but for her liferent use alienarily in case she should survive him, and to the heirs-male of the marriage, whom failing, to the heirs-male of his body by any subsequent marriages, whom failing, to his three brothers in succession and their respective heirs-male, whom failing, to his nearest heirs whomsoever.

Now, if this provision had stood alone it would have entitled the present pursuer on his father's death to take up the estate of Dalchosnie in fee-simple as heirs-male of the marriage, and the pursuer's father could not have defeated his title by any *mortis causa* or gratuitous deed.

But the marriage-contract contains an important reservation in these terms—“reserving, nevertheless, full power to the said John M'Donald to execute an entail of the whole or of any part of the lands before mentioned, and that concluding, if he shall think proper, prohibitory, irritant, and resolute clauses, reserving only that the said John M'Donald shall in such entail first call to the heirs-male the series of heirs above mentioned in the order above narrated, and then such other heirs as he shall think proper, and no way defeat or injure the said Adriana M'Inroy's liferent right hereby created in her favour over the lands of Dalchosnie and others during her lifetime.”

It is alleged in exercise of this reserved power, and on the further narrative, *inter alia*, that he had purchased the two additional estates of Loch Garry and Kinloch Rannoch adjoining to Dalchosnie, and that he and Lady M'Donald wished to take the whole three estates on themselves and their family, “and failing our heirs-male, so far to alter the destination in the marriage-contract with regard to the said Dalchosnie as to settle it with the other lands, giving heirs-male of the present marriage a preference and priority to heirs-male of any subsequent marriage,” John M'Donald executed the deed of entail of 18th July 1837 of the whole three estates of Dalchosnie, Loch Garry, and Kinloch Rannoch to and in

No. 51. *favour of himself and Lady M'Donald and the survivor of them in life, and to the heirs therein mentioned in fee, viz., the pursuer, the eldest son, and the heirs-male of his body, whom failing, John, the second son, and the heirs-male of his body, whom failing, the other sons of the marriage and the heirs-male of their bodies respectively, whom failing, the daughters of the marriage successively and the heirs-male of their bodies respectively, whom failing, the heirs-male of the pursuer and the heirs of their bodies, whom failing, the heirs-male of the body of the other sons *seriatim*, then the heirs-male of the body of the daughters of the marriage *seriatim*, then the heirs-male or heirs-male of any subsequent marriage of the said Sir John M'Donald, whom failing, to the entitled brothers then surviving and the heirs-male of their bodies respectively, whom failing, the heirs-male of the entail, whom failing, his heirs whomsoever.*

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Now, the main difference between this destination and the destination mentioned in the antenuptial marriage-contract is, that in the entail actually male heirs-male of the marriage and heirs-male of the sons and daughters of the marriage are called to the succession before the entail's brothers and their heirs and it is upon this difference that the pursuer founds as rendering the whole void as *ultra vires* of the reserved power contained in the marriage-contract.

I am of opinion, however, that the pursuer has no interest and no right to complain of the entail as actually made. In the first place, the pursuer has evidently no right to complain of the destination of the two estates of Sir John Garry and Kinloch Rannoch, which were acquired by Sir John M'Donald at the date of the marriage-contract. These two estates were not included in the settlement by the marriage-contract at all. No *jus crediti* or right of any kind in favour of the heirs of the marriage was created by the marriage-contract as to these two estates. These estates were Sir John's absolute property after he purchased them, and he might settle them in any manner he pleased. The pursuer's complaint must be limited to Dalchosnie alone.

But even as to Dalchosnie, I think the pursuer's challenge of the entail is not valid. The variation in the destination in no way prejudices the pursuer. The pursuer himself and the heirs-male of his body are first called to the succession, then his brothers and their respective heirs-male, and it is surely not in the pursuer's mouth to object that the destination is then made in favour of the heirs-male of the marriage, including among others the heirs-male of the pursuer's own body—instead of the succession being diverted, failing heirs-male of the marriage, to the brothers and collaterals of the entail. The reserved power gave the entail full liberty, after his brothers and their heirs-male were called to introduce "such other heirs as he shall think proper." So that if the heirs-male in question had been called at the end of the destination this would have been strictly under the reserved power. I think it is not in the pursuer's mouth to object that the heirs-male are introduced in the destination to the pursuer's uncles.

The alteration is an alteration not against but in favour of the pursuer. It would give the estate to the pursuer's daughter if the pursuer should survive and leave no son. The daughter would otherwise be excluded or postponed.

It is quite fixed that while the provisions in an antenuptial marriage-contract confer indefeasible rights upon the spouses and upon the issue of the marriage yet when there are in such a deed ulterior gifts or destinations over in favour of collaterals of the spouses or of third parties, no indefeasible right is conferred upon or created in favour of such third parties, but a mere *express* reservation.

stirely dependent on the will and pleasure of the spouses or of the granters of No. 51.
 each gift or destination, and revocable by the grantor at any time of the grantor's
 life. Accordingly I am clearly of opinion that the brothers of Sir John M'Donald v.
 M'Donald, although specially mentioned in the marriage-contract, had no *jus* M'Donalds.
editi under it, and could not have compelled Sir John M'Donald to make the
 entail in their favour. In like manner, supposing any of these brothers to be
 still alive, I do not think they could have challenged the existing entail because
 it interposes the heirs-female of the marriage before calling them (the brothers)
 and their heirs-male to the succession. I think it is quite clear that Sir John's
 brothers had under the marriage-contract a mere *spes successionis* which Sir
 John might defeat at pleasure by any gratuitous deed, either *inter vivos* or *mortis*
causa. Now, if Sir John's brothers who have been postponed to the heirs-female
 of the marriage, and who are thus undoubtedly prejudiced by having their *spes*
successionis made very greatly more remote, could not object to the deed of
 entail on this ground or on any other ground, it is difficult to see how the pur-
 suer, who is in no way prejudiced, but on the contrary is benefited by the
 variation, can be allowed to plead on behalf of his uncles what his uncles could
 not have pleaded for themselves even if they were now alive and objecting. In
 a case like the present the interest to challenge and the right to challenge are
 the same. If there is no interest to challenge then there is no right to do so.
 If, indeed, the pursuer could say that by the entail in question more heirs of
 entail are created than the entailer had power to introduce or to name, this
 would be a relevant challenge, for it is plain that the institute of an entail is
 always entitled to object to the substitutes being multiplied, for this diminishes
 his chance that by failure of all the substitutes he himself may become fee-simple
 proprietor. The entailed succession is as it were a burden on the fee-simple suc-
 cession, and this burden must not be unwarrantably enlarged. It often happens,
 as it may happen, that even an institute of entail may, by surviving all the sub-
 stitutes called, and all the special heirs called, become absolute proprietor; for
 whenever the destination opens to "heirs whomsoever" the entail is at an end.
 If the pursuer cannot say this in the present case, for undoubtedly under the
 marriage-contract Sir John M'Donald could call by the entail any number of sub-
 stitutes or any number of heirs he might "think proper" to the succession, and
 the pursuer has no interest whatever in the order in which they may be placed.
 I agree, therefore, in the conclusion at which the Lord Ordinary has arrived,
 but I doubt how far the form of his judgment is strictly accurate. He simply
 dismisses the action for want of title, and this may leave it open to bring any
 new action. I should have been disposed to have allowed the production to be
 refused, and thereafter to have granted decree of absolvitor, and not a mere dis-
 missal of the action. I think the pursuer, the institute of the entail seeking to
 quit of its fetters, has sufficient title to insist on its production, and there-
 fore the defenders are entitled not merely to have the action dismissed, but to
 decree of absolvitor. Perhaps, however, this is a mere matter of form, and may
 require any alteration in the form of the judgment.

THE COURT pronounced the following interlocutor:—"Refuse said
 note, and adhere to the interlocutor complained of, with additional
 expenses, and remit to the Auditor to tax the same and to report,
 and decern."

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M'Donald.

JOHN ALAN M'DONALD, Pursuer.—*Fraser—Trayner.*
ALASTAIR M'IAIN M'DONALD, Defender.—*Lord-Adv. Watson*
—*M'Laren—Balfour.*

Entail—Entailer's Debts—Prohibition—Irritancy.—The institute in possession of entailed estates came also to be in right of a bond secured over the estates containing a power of sale, which he assigned to third parties. In an action at the instance of the next heir for declarator of irritancy, on the ground that the institute had contravened a prohibition against doing any act whereby the estates might be evicted, by assigning the bond to third parties, who might sell the bond, *held* (1) that the institute was entitled to keep up the bond as a lien against the estate, and (2) that no irritancy had been incurred by assigning the bond to third parties.

Entail—Clause of Relief—Obligation on Heirs and Successors to Relieve of Debt.—The maker of a deed of entail inserted a clause, binding himself, his heirs-at-law, executors, and successors whomsoever, to free and relieve the entailed lands, and the heirs to succeed thereto, of all debts and obligations whereby they might be evicted. He afterwards purchased another estate, and entailed it on the same series of heirs as were called in the former deed, binding himself, his heirs, executors, and representatives to relieve the estate of the grantor's debts, but reserving a power of revocation. At his death the estates under the first entail were burdened with certain entailer's debts. The heirs under the two entails succeeded.

In an action against the institute in possession of both estates, at the instance of the next heir, *held* that the defender was not, in respect of his having succeeded to the second estate, personally bound to relieve the first estate of the entailer's debts.

Question. Whether the obligation of relief contained in the first entail could be made effectual against the lands held under the second entail.

2d DIVISION.
Lord Shand.
1.

Vide ante, vol. ii. H. L. pp. 28 and 125.

Colonel Alastair M'Iain M'Donald, institute of entail in possession of the estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, and entailed executed by his father, Sir John M'Donald, in 1837, by an Act of the House of Lords on 17th June 1875, was found entitled to a bond for £25,000 held by the marriage-contract trustees of his father and mother over the lands of Loch Garry and Kinloch Rannoch. In obtaining and recording an assignation from the trustees he assigned the bond, which contained a power of sale, to certain onerous assignees, and had advanced the sum of £25,000 to him.

Sir John M'Donald, the entailer, at the date of his death in 1875, was indebted to the Central Bank of Scotland in the sum of £9000. Colonel M'Donald, under the authority of the Court of Session, had placed this sum a charge upon the estates of Dalchosnie, Loch Garry, and Kinloch Rannoch.

John Alan M'Donald, the next heir of entail in the destination, in this action, concluding against his brother, Colonel M'Donald, (1) declarator of irritancy, and for denuding, &c., of all right, title, and interest in the entailed estates of Dalchosnie, Loch Garry, and Kinloch Rannoch.

The conclusion for declarator of irritancy and denuding was granted upon the averments that the keeping up of the bond for £25,000 over the entailed lands, and the assigning it to third parties, who might adjudge, and the charging the estate with the £9000, were in contravention of the prohibitions in the deed of entail.

The pursuer founded on a clause in the deed of entail, which contained prohibitions against alienating the estates or incurring debt, and a clause containing this prohibition—"And with and under this prohibition and limitation also, that the said Alastair M'Iain M'Donald

the other heirs succeeding to the said lands and estate, are, and shall be, fully limited and restrained from doing any act and granting any right, directly or indirectly, whereby the said lands and estate before disposed, or any part thereof, may be affected, appraised, adjudged, forfeited, confiscated, or be in any manner of way evicted from the said lands, or Sir Alastair M'Donald, or any other of the said heirs, or this nomination, or the order of succession hereby established, be sold, hurt, or changed, excepting as in the cases before excepted." The operative clause bore—"And with and under this irritancy, as it is hereby conditioned and provided, that in case the said Alastair M'Donald, or any of the other heirs succeeding to the lands and estate before disposed, shall contravene the before-written conditions, provisions, covenants, and limitations herein contained, or any of them, that is, shall neglect to obey or perform the said other conditions and provisions, or any of them, or shall act contrary to the said other restrictions to be observed and appointed by me, excepting as is before excepted, in any of these cases, the person or persons so contravening shall, whether self only, *ipso facto*, amit, forfeit, and lose all right, title, and interest which he or she hath to the lands or estate before disposed, and as the said shall become void and extinct, so that the said lands and estate shall survive and accrue and belong to the next heir appointed to succeed, descended of the contravenor's own body, in the same manner as if the contravenor were naturally dead and had died before the contra-

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was also (2) a conclusion to the effect that Colonel M'Donald, as executor, and as successor to Sir John in another estate Dunalastair, was bound to free and relieve the other entailed estates of £25,000 and £9000 above referred to. This estate of Sir John had been purchased by Sir John M'Donald about 1853, and considerable sums had been expended in improvements and building a new house—the £9000 debt to the bank having been incurred in so doing. Sir John in 1860 executed a deed of entail in favour of himself and Colonel M'Donald, and the same series of heirs as in the entail of

of revocation was expressly reserved to Sir John in this deed. The deed contained an obligation binding the granter, his heirs, and representatives, to relieve the estate of the granter's debts. The pursuer contended that, in consequence of an obligation to free the estates contained in the entail of 1837, Colonel M'Donald was bound to discharge the burdens on the estates of Dalchosnie, Loch Kinloch Rannoch out of the proceeds of Dunalastair.

Following was the provision in the deed of 1837 relied on:—"In order to this tailzie and settlement the more effectual I hereby bind and oblige myself, and my heirs-at-law, executors, and successors whomsoever, to relieve the lands and estate before disposed, and the heirs thereof to be named to succeed thereto, of and from the payment and discharge of all the debts and obligations to which I, the said John M'Donald, for myself, or as representing any of my ancestors, are or shall be bound of and from all claims and demands whatever whereby the said lands and estate, or any part thereof, may be evicted."

The pursuer also averred that Colonel M'Donald, as executor of Sir John, had collected and retained upwards of £3000 of executry funds of Sir John. These funds the defender averred had been exhausted in paying Sir John's debts.

On November 1876 the Lord Ordinary pronounced this interdict. He finds that the pursuer has stated no relevant grounds in sup-

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port of the conclusions of the action for declarator of forfeiture and denuding by the defender in favour of the pursuer of the estates of Dalchoshnie, Loch Garry, and Kinloch Rannoch, and assoilzies the defender from these conclusions, and also from the conclusions that the pursuer should be found entitled to be now infeft in the lands, and to delivery of the title-deeds thereof, and decerns: And with regard to the remaining conclusions of the action, finds that it is not disputed that the executry of the estate of the late Sir John M'Donald is liable in relief for the debts mentioned in said conclusion; and in respect the parties are not agreed as to the amount of the executry estates, appoints the defender as executor of his late father, to lodge an account thereof within the next eight days: Further, finds that the defender is not bound to free and relieve the estates of the said debts in respect merely of his having succeeded to Dunalastair as heir of entail and provision of his late father under the deed of entail of these lands of 1860, and assoilzies the defender from the conclusions of the summons to that effect, but reserving to the pursuer to take all competent proceedings directed against the lands of Dunalastair and the heirs of entail called under the deed of 1860 to have these lands sold in order to free and relieve the lands held under the entail of 1837 of the entailor's debt affecting the same, and meantime to serve all questions of expenses; and grants leave to the pursuer to reclaim against this interlocutor.*

* "NOTE.—This action presents practically two questions for decision: first, whether the defender has incurred a forfeiture of his right to the estates of Dalchoshnie, Loch Garry, and Kinloch Rannoch; and the second, assuming that no forfeiture has taken place, whether the defender is bound to disburden the entailed estates of certain debts of £25,000 and £9000, which now affect them.

"The pursuer maintains the conclusions of forfeiture on two grounds. The first of these is that, in contravention of the entail, the defender has assigned to third parties, in return for money advanced by them, his right to a bond of disposition in security for £25,000 granted by his late father over the estates in favour of marriage-contract trustees, and which has been the subject of discussion in two previous litigations between the parties. It is maintained that forfeiture of the estates also resulted from certain leases which the pursuer granted, but this point was given up in the argument, and the assignment to various creditors of the £25,000 security is now the sole ground on which the alleged forfeiture is maintained. I have no difficulty in holding that the defender is entitled to succeed on this part of the case.

"It cannot be disputed that the debts of the entailor, the late Sir John M'Donald, the father of the pursuer and defender, form a proper charge upon the entailed estates, and may lawfully be made burdens upon the estates by bonds and dispositions in security in ordinary form. The entailor at his death was indebted to the Central Bank of Scotland the sum of £9000, and assumed that there was no executry or other estate to meet this debt, the pursuer does not dispute the right and obligation of the defender to grant the bond and disposition which he executed in security of this debt affecting the entailed estates. The conclusion for forfeiture is not based to any extent on the fact that the defender granted this heritable security. It cannot be disputed that the defender was entitled to charge the estates with entailor's debts which could not be provided for out of his general estate.

"The decision of the case, as regards the alleged forfeiture, thus depends on the question whether the £25,000 security was an entailor's debt, and if so, whether there be any obligation on the defender, in the deed of entail, to discharge the debt, or any provision which precludes him from assigning the debt to other creditors.

"There is no doubt that the debt was due by the entailor. It was not

John Alan M'Donald reclaimed. When the cause was in the Inner-house he amended his summons to the extent of adding a conclusion to

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re, but the entailor himself, on 13th October 1828, nine years before he executed the entail, which is dated 18th July 1837, granted a bond and disposition in security for the amount in favour of his marriage-contract trustees, from whom he borrowed the money, which was part of his wife's fortune settled by the marriage-contract. By this deed the entailor acknowledged the debt, and granted a disposition in security over the lands, containing a power of sale in common form.

"The defender acquired right to this entailor's debt by assignation in his favour granted by the marriage-contract trustees, in terms of a direction to that effect contained in the mutual general settlement and deed of division by his father and mother, executed on the same day as the entail, viz., on 18th July 1837. It is clear that, in ordinary circumstances, an institute or heir of entail acquiring right to an entailor's debt, and to a security over the estate granted by the entailor, held by a creditor, is under no obligation either to pay the debt or to refrain from assigning it to third parties. If an institute or heir of entail purchases a debt he is in no different position from any other creditor, except that he cannot charge succeeding heirs with the interest becoming due, year by year, during his possession. It was at one time contended that the debt became extinguished *confusione*, but a series of decisions settled that this was not so; but the estate was practically the debtor, and the heir of entail, as an individual, a creditor—(Bell's Principles, 6th edition, sections 1728 and 1743; *Welsh v. Maxwell*, 11th February 1837, 15 S., 537, and authorities there cited).

"It makes no difference in the case that the defender acquired right to the security for £25,000 by succession, or by virtue of the provisions of the marriage-contract of his parents, and relative deed of division. So far as the deed of entail is concerned all entailors' debts are in the same position. They are properly chargeable against the estates, whoever may become the creditor, and whether the creditor's title has been derived by purchase or succession. An entail might no doubt provide that an institute, or any succeeding heir, by acquiring the estates, should be bound personally to pay off the entailor's debts, but there is nothing of the kind in this entail, which contains only prohibitory clauses to the usual effect, that is, prohibiting alienation of the estate, or the extinction of debt, by the succeeding heirs; and I think, therefore, there is no ground for the pursuer's contention on this subject.

"The declarator of forfeiture is founded entirely on the provision of the deed of entail; but even if the provisions contained in the deed of settlement and division can be imported into this question, it would make no difference, for it has been settled beyond question by the decision of the House of Lords in the earlier litigation between the parties (*Law Reports, Scotch App.*, vol. ii., p. 482) that that deed imposed no obligation on the defender to discharge the debt, or to refrain from enforcing it. It was there held that he was entitled to a conveyance of the security in favour of himself, and that the expressions in the deed of settlement which the present pursuer pleaded as creating an obligation on him to pay the debt to be discharged were either an expression of a wish merely, which was of no legal effect, or an attempt to adject a condition which was void. The result is, that this provision of £25,000 is in no different position from any other entailor's debt; and that being so, there is no reason for saying that the lender is under restriction as to his power of assigning it, any more than any other creditor would be.

"The alternative conclusion of the summons is founded on the clause contained in the deed of entail of 1837, by which the entailor bound and obliged himself, and his heirs at law, executors, and successors whomsoever, to free and relieve the entailed lands, and the heirs to succeed thereto, 'of and from the payment and performance of all the debts and obligations to which I, the said John M'Donald, for myself, or as representing all my ancestors, are or shall be liable, and of and from all claims and demands whatever, whereby the said lands and estate, or any part thereof, may be evicted.' This clause in express and

No. 52. the effect that Colonel M'Donald was bound, as a condition of retaining possession of the estates of Loch Garry and Kinloch Rannoch, to these lands of the debt of £25,000.

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stringent terms binds the entailor and his heirs, executors, and successors to relieve the entailed estate of all his (the entailor's) debts.

"The pursuer alleges that the defender succeeded to free executry estate; he claims that this estate shall be applied, so far as it will go, in extinguishing the debts for £25,000 and £9000 which now affect the lands. The defender does not dispute that if there had been free executry estate he would be bound so to apply it. He explains, however, that there was no free executry. Inquiry into this matter of fact is therefore necessary, and the defender has appointed to lodge an account of the executry, to which the pursuer will have an opportunity of objecting.

"But the pursuer further maintains that the defender is bound to relieve the entailed estate of the entailor's debts, because the defender succeeded as heir to the estate of Mount Alexander, now called Dunalastair, on the death of his father in 1866. This estate was purchased by Sir John M'Donald in 1853, at the price of £22,500; and the pursuer explains that after the purchase his father expended about £20,000 in the building of a mansion-house, and in the policies, and that the debt of £9000 to the Central Bank was incurred as a consequence of this expenditure. The estate of Dunalastair adjoins the estate of the entailor, and is contained in the deed of entail of 1837; and the pursuer explains that it was his father's intention that the house built by him should be the mansion-house for all the estates. The entail of this estate is in favour of the series of heirs as are called by the deed of 1837. It is dated and registered in the Register of Tailies in July 1860, and was conceived in favour of the entailor himself, and the heirs thereafter called, of whom the defender and the pursuer are the male of his body are the first; but the deed contained a reserved power of revocation which might be exercised at any time during the entailor's life.

"It appears to me to be beyond question that, however desirable it may be for the whole series of heirs that Dunalastair and the other estates should continue in time coming to be practically one entailed estate, yet, if the pursuer should insist on it, he is entitled to have the estate of Dunalastair sold, in that the price should go towards the extinction of the entailor's debts affecting the estates contained in the entail of 1837. Dunalastair must be regarded as having been within the power of Sir John M'Donald on the day of his death. He might have disposed of it as fee-simple estate by revoking the entail. It follows that Dunalastair in the same way as the executry was liable for Sir John M'Donald's debts and obligations, and one of these was the obligation contained in the deed of 1837, to free the lands thereby entailed of all the entailor's debts.

"In a proper action to that effect, therefore, I think the pursuer, as heir of entail, would succeed in having Dunalastair sold to meet the debts affecting the other estates. I am, however, of opinion that the present action is not one in which a decree to that effect could be given. The pursuer concludes that the defender, as successor to his father in the lands of Dunalastair, should be decreed to pay the debts which affected the other estates. But Dunalastair is not fee-simple property in the person of the defender. It is entailed, and has been held by the defender as an entailed estate for the last ten years. The defender is not personally liable to disburden the lands held under the entail of 1837 merely because he has taken the other estate as heir of entail under the fetters of the deed of 1860, which is the view presented by the conclusions of the summons, and the pursuer's third plea in law in support of them. The obligation by the late Sir John M'Donald, binding his successors whom the court will no doubt give relief against the lands, but cannot be construed as imposing personal responsibility for the debts on each individual who obtains the lands by right of an heir of entail in possession.

"It has been maintained, however, that at least the defender is bound to take the initiative by a petition to the Court, or by an ordinary action, to obtain authority to sell the estate of Dunalastair, and that a decree to that effect

At advising,—

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LORD JUSTICE-CLERK.—(After stating the nature of the case)—In this case ^{Jan. 11, 1877.}
the Lord Ordinary has repelled the first alternative conclusion of the summons ^{M'Donald v.}
irritating the right of Colonel M'Donald to these estates; he has sustained
the second alternative conclusion, which is directed as against Colonel M'Donald
personally, in so far as regards his character of executor, but he has dismissed the
conclusion *quoad ultra*, reserving to the pursuer to assert his claim against the estate
Dunalastair in any competent action. In this case also I am of opinion, al-
though it raises some questions of difficulty, that the views of the Lord Ordinary
are correct, and that his judgment should be adhered to.

The conclusion of the summons for declaring the right of the defender to the
entailed estate to be forfeited is not attended with any difficulty. The entail
did not bind any of the heirs of entail to pay off this debt, and therefore the
obligation to pay or discharge it is not within the fettering clauses; but, if it exist
at all, is a personal obligation arising outside the entail. It is said that when
Colonel M'Donald paid these debts, although he took an assignation to them,
they were extinguished *confusione*; and that conveying them to third parties

pronounced in this action. With every desire to avoid the necessity of other
proceedings between the parties, I do not think that even to this extent
the pursuer can succeed in this particular case. There is no conclusion to the
effect now suggested. The only conclusion on the subject and relative plea are
based on the view that the defender has become personally liable to pay the debts
because he has succeeded to Dunalastair, and it is clear that his limited interest
in Dunalastair imposes no such liability. There is no conclusion to have the
defender ordained to take proceedings to bring Dunalastair to a sale in any action
for that object. It appears to me it would be necessary, in an action with such
conclusions, to call the other parties having interest in Dunalastair under the
deed of 1860.

It was assumed that the defender could proceed to have Dunalastair sold to
pay the entailer's debts by a petition to the Court under the entail statutes;
even if the present action were not open to the objection, that it is without
conclusion either in form or in substance to that effect, it appears to me that
the provisions of the entail statutes are not such as could be made available for
sale of the estate. The Rosebery Act, 6 and 7 Will. IV. c. 42, throughout
contemplates and provides for the case of the sale of a part of the
entailed lands only to meet debts affecting the whole, and not the case of a sale
of the whole estate to meet the entailer's personal obligations otherwise. The
Rosebery Act limits the power of sale to entailed lands other than the man-
sion-house and offices, and this power would be of no use in the present case,
as the mansion-house also must be sold. It seems to me that if the pursuer,
any of the heirs of entail, desire to have the lands of Dunalastair sold in re-
lief of the obligation contained in the deed of 1837, the proper course of pro-
ceeding is by action of declarator (probably having conclusions for reduction of
entail of 1860, as a deed *ultra vires* of the granter) to have it found that
the estate was liable in relief of the debts which might affect the lands in the
deed of 1837, and to have the estate of Dunalastair sold at the sight of the
Court. The defender does not desire that this should be done, and for obvious
reasons does not propose to raise such an action. The pursuer appears to have
no title to enforce the obligation as the defender has. It therefore appears
that the pursuer's remedy is by an action of the kind indicated, with con-
clusions directed against the lands, and in which all parties interested should be
joined; and at all events, I do not think the pursuer is entitled to succeed in
his conclusions in this action for decree against the defender requiring him to
pay the debts in question."

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was a violation of the prohibitions of the entail, and infers an irritancy. It is very clear on the authorities that there is no ground for this proposition. It may be true that an heir of entail cannot keep up as a charge against the other estate of the entailer a debt which was specifically made a real burden on the entailed estates. But it is quite fixed that an heir of entail paying off a debt which burdens the entailed estate out of his own proper funds, and not out of the separate estate of the entailer, may keep up the debt against the entailed estate by taking an assignation to it even in his own name. Here Colonel M'Donald paid this debt out of the sum appointed to him as his share of his mother's fortune by the deed of appointment, and the other heirs of entail could have no interest whatever to object to his doing so, unless he lay under an obligation to discharge these debts, which is not at all events to be found in the deed of entail.

The case in the alternative conclusion of the summons, turns, in the first instance, on the true construction of the clause of relief contained in the deed of entail. In regard to this I have felt a little difficulty—(Reads clause on p. 28.) Now, first, this is a clause in favour of the heirs of entail. It does not burden the heirs succeeding to the estate, but it gives them right to be relieved of the burden. The heirs called are the creditors in the obligation, and that right of credit became fixed when infeftment was taken on the conveyance in 1837. In the second place, the burdens, in regard to which they have this right of relief, are any debts of the maker of the entail which may affect or burden the entailed estates. Whatever question might arise in regard to personal debts which have not been claimed or made effectual against the entailed estate, I have no doubt that it does at once apply to personal debts secured over the entailed estate. The intention, in this case, of the clause of relief was, I think, beyond all doubt to leave the entailed estate entirely free of the entailer's debts, and I cannot see any ground for giving it a more limited construction. I am further of opinion that any heir-substitute has a title to make this obligation effectual against the debts which actually affect the lands. To hold that each heir must wait until he himself succeeds would frustrate the object of the clause, for before that time the property in the hands of the executor, or the heir-at-law, would be liable to fulfil it, might be entirely dispersed. So much for the nature of the obligation, the burdens to which it applies, and the creditors who are entitled to enforce it. The remaining question is, Who are the debtors in the obligation?

Colonel M'Donald is the executor of his father, and although the obligation is conceived in his favour as the heir in possession, as well as in that of the other members of the destination, as executor he is beyond doubt liable to discharge it, and so the Lord Ordinary has found. He could, however, only reach this conclusion by giving to the obligation the construction which I think it truly bears. The other branch under this conclusion stands in a different position. Before the entail of 1837 had been executed General M'Donald purchased certain lands, which he named Dunalastair, and conveyed them to Colonel M'Donald by a disposition entailing them on Colonel M'Donald and the same successors as he, but expressly reserving a power to revoke. The entail was recorded, and no infeftment passed on the disposition during General M'Donald's lifetime. It is now contended that this estate of Dunalastair is liable for the debts of the entailer, and that Colonel M'Donald by taking up the succession has made himself responsible for this obligation.

As regards the estate itself, it is enough to say that its liability to bear

of the obligation contained in the Dalchosnie entail is in no degree No. 52.
 affected by the fetters of the entail under which it was conveyed, or even by any
 declaration of intention, if there were any such disclosed in the conveyance on Jan. 11, 1877.
 part of the granter. This is not an adjusting of burdens between heirs suc- M'Donald v.
 ceding to separate estates, but a question between creditors and gratuitous dis-
 poses. The estates under the Dalchosnie entail were vested in Colonel
 Donald and the other heirs of entail by the infestment in 1837, under which
 but a liferent remained with the granter. The latter had no power to
 discharge upon the obligation contained in that deed by any gratuitous alienation
in causa. The obligation would certainly have attached to the funds by
 which Dunalastair was purchased in the hands of the executor, nor could that
 debt be discharged by any conditions which the debtor in the obligation
 attached to his gratuitous conveyance. It is unnecessary, however, to con-
 sider this matter further, because no steps have been taken to make the obliga-
 tion effectual against the fee of the estate. The action is directed solely against
 the heir in possession personally, as if he by taking up the estate had incurred
 the representation. I am of opinion that there is no ground on which that
 action can be sustained, nor is there any doubt as to the law on this matter.
 The provision under a gratuitous deed, although it may be fenced with
 clauses, certainly represents the maker, and that in his just order in which
 he is liable. But it has been long fixed that he only represents *in valorem*
 the property which he takes. It was otherwise in the times of our older
 law, and Erskine elaborately disputes the doctrine. But the point was settled
 in the case of Baird v. The Earl of Rosebery, reported in Morrison 14,019, and
 affirmed in the House of Lords in 1767. In this case Lord Monboddo says—
 "It is determined a very general point of law, viz., that an heir of provi-
 sion taking a particular estate, such as an heir of tailzie, is not by his service univer-
 sally, but only *in valorem*, like an heir *cum beneficio inventarii*." Of
 course where an heir takes under an entail made by a third party, he does not
 represent his immediate predecessor to any effect, but this proposition refers to
 the provision taking by a gratuitous title directly from the granter, although
 subject to the fetters of an entail. In the case of Mackenzie, 9 D. 836, which is
 authoritative on this branch of the law, Lord Jeffrey doubted whether the liability
 of the heir of provision could be properly called representation at all, but he dif-
 fered from the majority of the Court, who did not adopt his views.
 It is therefore clear that, although the liability of the lands of Dunalastair for
 payment of this obligation of the granter is in no degree affected by the terms
 of the disposition to that estate, the interest taken by the defender is materially
 affected by it. Had this been an action directed simply against the defender to
 clear the estates of Dalchosnie and others of the debt of £25,000, in so far as
 the fee of his life-interest could extend, the case might have been different;
 but then, I think, the heir in possession would have been entitled to insist
 that the fee of the estate ought to be represented, because before he could be
 liable for the value of his succession it was necessary to determine the
 value of the estate to the full amount. But this is not the conception of the
 law, and it is impossible to deal with it on that footing.
 I have said, not without force, that if the estate was liable for this obligation
 of the granter, the defender, as heir in possession, had the means of making this
 obligation effectual against it, in respect that under the entail statutes he had the
 power of relieving himself of his personal obligation, by adopting the necessary

No. 52. procedure for that purpose. But whatever force there might be in such view, there is one essential preliminary which is absent, viz., that it must be judicially found that this obligation does not affect the fee of the estate, and until that is done it is premature to raise the question, what powers in that event the heir in possession may have of freeing himself and the lands from the burden. We leave these steps to be pointed out as they may be advised, but we propose to add to the Lord Ordinary's reservation of his right of action a reservation of any answer which the defender may have thereto.

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I must, however, say in conclusion, that if this be the issue to which this part of the pursuer's contention comes, it seems to be a very idle dispute. The case of Dunalastair will come to the pursuer at the same time as that at which Dalchosnie reaches him, and not sooner. If he never succeeds to the one he will never succeed to the other; and it cannot matter to him whether it is burdened or not. He ought to consider well whether, if he fail in irritating the right of the defender, he has any real interest in the rest of this action.

LORD ORMIDALE.—The summons in this case has various conclusions, to the effect, 1st, that the entailed estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, of which the defender is the heir of entail in possession, have been forfeited by him and now belong to the pursuer; and to the effect, 2dly, that the defender is bound to free and relieve these estates of and from certain debts of considerable amount at present a burden on them.

The Lord Ordinary has assoilzied the defender from the whole conclusion of the action, except as regards the free executry, if any, of the late Sir John M'Donald, a matter about which the defender raises no dispute.

(1) The first branch of the summons proceeds on the assumption that the defender by assigning the debts in question to third parties has contravened the conditions of the entail, and therefore forfeited his right to the estates, which consequently devolve upon the pursuer as next heir of entail entitled to succeed. But I am unable to see how any contravention of the entail has taken place. It is true that the defender as in right of the debts referred to has assigned them to third parties. But it does not necessarily follow that this operates as a contravention of the entail. That no such contravention is specified in the entail appears clearly enough on the pursuer's own shewing in the various articles of his condescendence, where the conditions and provisions of the entail are enumerated. It is conditioned and provided that it shall not be lawful for the heirs of entail to sell, alienate, wadset, impignorate, dispose, burden, or affect the entailed estates, but the mere granting of an assignation to the debts referred to—debts which were not incurred by the defender—is certainly not alienating, wadsetting, impignoring, or disposing, burdening, or affecting the entailed estates, and it was scarcely contended that it was.

Accordingly, the pursuer did not seem to rely upon any positive or express contravention by the defender of the conditions of the entail, so far at least as I have yet noticed them. He founded chiefly, as I understood his argument, upon the provision in the entail to the effect that the heirs of entail succeeding to the entailed estates are limited and restrained from doing any act and granting any deed, directly or indirectly, whereby the said lands or any part thereof may be affected, appraised, adjudged, forfeited, confiscated, or be in any manner of way evicted. The argument

the pursuer was, that the debts in question having been extinguished *confusione* No. 52.
 on the defender's succeeding as heir of entail, and thereby becoming, as the
 pursuer maintained, both debtor and creditor in them, he had no right thereafter Jan. 11, 1877.
 to rear them up in third parties, thereby enabling these third parties to enforce M'Donald v.
 their recovery against the entailed estates. Now, supposing the debts to have been M'Donald.

once extinguished, which *ex hypothesi* they were on the pursuer's argument, it is difficult to understand how they could be afterwards reared up by assignation. But, independently of this, it appears to me that the reasoning of the pursuer is founded upon an entire fallacy in assuming that the debts were or could be extinguished *confusione* merely by the defender's succeeding to the entailed estates. The defender in place of forfeiting his right to the £25,000 on succeeding to the entailed estates rather obtained right to that sum just in respect of his being the heir in possession of the estates. Such seems to be the import of the marriage-settlement of the entailer and his wife. And, as explained by the Lord Ordinary, it has been determined in a former litigation that there is no obligation on the defender to discharge the debt or to refrain from enforcing it. On this point the authority of Mr Bell (Principles, secs. 1728 and 1743), and the case of *Welsh v. Barstow*, referred to by the Lord Ordinary, appear to me to be conclusive to the effect that the debts here in question were not extinguished *confusione* in the person of the defender.

Assuming this to be so, it was not and could not well be said that there is reason for holding that the pursuer had contravened the conditions of the entail, or any of them, except that he had assigned the debts in question in the way he did. But that very point was the subject of discussion in the case of *Welsh v. Barstow*, and was there determined adversely to the pursuer's contention in the present case. Mr Bell also, in section 1728 of his Principles, expressly says that the heir of entail is not bound "as such to pay the entailer's debts as not being his representative, but only for the interest during his possession, as the rents are bound; and he may either neglect to pay the debt, or, if he may, by assignation, keep it up as a debt against the estate."

The second branch of the pursuer's action is founded on the obligation of the defender, as quoted in his condescendence.

Now, in so far as it may turn out that there has been any free executry of John M'Donald intromitted with by the defender—although he denies there was any such—he has never disputed his liability, and accordingly the Lord Ordinary has so found. That matter may therefore for the present be laid aside. Nor has the pursuer shaped his action so as to enable him to get at the entailed estates, either drawn or to be drawn by the defender, and he did not propose to restrict or amend to any effect his summons or record.

Independently of these points, the defender denies and disputes that the pursuer has any good ground as against him for insisting further or otherwise in this branch of the action.

The obligation referred to the entailer binds himself and his "heirs-at-law, assigns, and successors whomsoever, to free and relieve the entailed lands and sirs named, or to be named to succeed thereto," of and from payment of all debts and obligations to which he was liable, and of and from all claims and demands whereby the entailed lands or any part thereof might be evicted. Is there an obligation enforceable against the defender on any of the grounds laid in the present action? It cannot well be maintained that he has incurred such liability by taking as heir of entail the lands which are intended to be relieved,

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for the obligation is obviously one in which the heirs of entail are creditors and not debtors. The obligation expressly bears that its object was not only to free and relieve "the entailed lands," but also "the heirs named or to be named to succeed thereto." The defender might, no doubt, be, but in different characters, both debtor and creditor in the obligation. Thus, if, besides taking as heir of entail, he had succeeded to property as heir-at-law or executor of the entail, he might, to the extent of his succession in these characters, be debtor in the obligation, but it is not averred that the defender has succeeded to anything as heir-at-law, or in any other character than heir of entail, except as executor; and as to his liability as executor on the qualified footing already referred to there is no dispute.

If the defender, then, cannot be made liable in relief as heir of entail, under an obligation in which, so far as his character as such is concerned, he is creditor and not debtor, the question occurs, Is there any other ground of liability in respect of which he can be subjected in relief as concluded for? I cannot observe any, unless it is to be found in article 32 of the condescension, where the pursuer says the defender has made up a title to the estate of Dunalastair under a strict entail thereof executed by the late Sir John M'Donald. But, neither in that article nor anywhere else is it said that the defender undertook a personal liability for the debts of Sir John M'Donald by entering to the estate as an heir of entail; and it is clear on the authorities before referred to, and especially the authority of Mr Bell, in sections 1728 and 1743, that he cannot come under no such liability. Whether and how far the estate of Dunalastair itself might be proceeded against for the debts referred to is a question which has been reserved by the Lord Ordinary, and in regard to which I at present offer no opinion. It is sufficient, I think, to say that the present action directed against the defender personally, and it is a personal decree, if any, is not one against the lands, that would require to be pronounced, having regard to the form of action and the conclusions of the summons.

In these circumstances, I am of opinion that the interlocutor of the Lord Ordinary reclaimed against ought to be adhered to.

LORD GIFFORD.—I agree in the result which the Lord Ordinary has made, and in the mode in which he has disposed of this action. I agree also in the views which the Lord Ordinary has expressed in his note, with one exception, namely, as to the right which the pursuer has to insist that the entailed estate of Dunalastair shall be sold, and that the price shall be applied towards satisfaction of the entailer's debts affecting the other estates of Dalchosnie, Loch Garry, and Kinloch Rannoch. On this point I am inclined to differ from the view expressed by the Lord Ordinary, but though the question is a very important one, I do not think its decision is at all necessary for the disposal of the present case, and therefore I concur in the judgment—while, merely to preserve the question about Dunalastair, which the Lord Ordinary has reserved. I will be disposed to add to his Lordship's reservation a reservation of the defender's answer to the claim as accords.

The first question raised in the summons is whether the defender has incurred an irritancy under the entail of 18th July 1837, and has thereby admitted and forfeited his whole right and interest in the entailed estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, and whether these estates now belong to the pursuer as the next heir of entail. The alleged irritancy is founded, in the

place, on the fact that the defender, as the institute of entail, has acquired in his own favour, and has then assigned to third parties, an entailer's debt of £25,000, by means of which assignations to third parties, it is said, the whole three entailed estates above-mentioned are liable to be sold or adjudged, and carried off by the creditors now entitled to and vested in the said entailer's debt of £25,000.

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I am very clearly of opinion that none of the acts done by the defender on which the pursuer founds constitute in any sense an irritancy of the entail, or are in any view contraventions of its prohibitions. It was hardly maintained but the mere acquisition by the defender of the bond for £25,000 due by the entailer constituted a contravention or an irritancy of the entail. We know from a previous litigation in this Court the circumstances in which the defender acquired that debt as his own property. He was found entitled to take, and to take, the entailer's debt in question as his own absolute property in virtue of the decree of this Court, and of the House of Lords, as being his share of the estate of Lady M'Donald, the defender's mother, settled and apportioned in pursuance of the antenuptial marriage-contract. It was found that the bond was originally due to the marriage-contract trustees was the absolute and undivided property of the defender under the deed of apportionment, and that the defender was entitled to it absolutely and in his own right, and free from any obligation to extinguish it or apply it in freeing and relieving the entailed estates. The bond was as much the unqualified property of the pursuer as if he had bought it with his own earnings.

It is not possible to hold that this debt of £25,000 was extinguished merely by the mere fact of its acquisition by the defender who was at the same time of entail in possession. The bond was not discharged or extinguished. On the contrary, it was assigned and kept up. The assignation was taken to the defender, his heirs and assignees whomsoever, and not to the defender as entailer or to the defender and the series of heirs in the entailed destination. In short, it was simply an entailer's debt kept in force, and kept separate from the entailed estate in the mode in which such debts are always, or almost always, preserved as valuable and preferable burdens upon the entail. It is entirely impossible to hold that the debt was extinguished merely by its assignment to the defender.

It is not the pursuer who went on to contend that an irritancy was incurred not by the defender himself holding the bond, but by the defender assigning it to third parties, by whom it is said diligence may be used against the entailed estates. There is no prohibition in the entail against the defender assigning debts to himself, even although they happen to be entailer's debts. The defender does not contract the debts. He is the creditor and not the debtor in them. It is in consequence of the defender's act that the estate is liable to be attached for the entailer's debt. It is the act of the entailer himself who contracted the debt and granted the bond therefor, and the estate is in no greater degree liable for the debt than it was when the debt remained vested in the marriage-contract trustees, or than it was during the life of the late Sir John M'Donald. It is not conceivable that there might have been a condition in the entail providing that if any of the heirs of entail should acquire in any character entailer's debts, then the estates they should not be entitled to assign the same. Such a clause would be very unusual, perhaps unprecedented, and it might raise very serious questions. But it is enough that there is no such clause in the present

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entail, and no provision whatever as to the mode in which entailor's debts are to be dealt with so long as they are unpaid. Accordingly we have just here the common case of entailor's debts purposely kept up by the heir of entail for his own behoof and for behoof of his executors, and the very purpose for which such debts are so kept up is, that the heir who is vested may use them at his own pleasure, may leave them to his own executors, or use them either *in vivos* or *mortis causa* as his own proper funds.

It is perhaps needless to shew the difficulties which the pursuer's contention involves. What if the defender should die intestate? This debt would then belong to his executors or next of kin, or to his heir at law if different from his heir of tailzie—What then? Would that be an irritancy? Or suppose the debt to be adjudged from the defender by the defender's own personal creditors or to be otherwise attached by diligence, would an irritancy arise out of such proceedings? Such difficulties might be multiplied—but it is needless. I think it perfectly plain that the defender, by assigning the entailor's debt, was merely exercising his right and disposing of his, the defender's, own absolute property.

I am clearly of opinion, therefore, that the pursuer has failed to establish that the defender has incurred any irritancy or forfeiture of the entailed estates, or of any of them, and accordingly the defender is entitled to absolvitor from the declarator of irritancy and forfeiture, and from the conclusions auxiliary thereto.

But there remain other conclusions which seek to have the defender ordered to pay off or free and relieve the entailed estates not only of the bond for £25,000, but of another bond for £9000 which was granted under the authority of this Court for another debt of the entailor; and still farther, by the amendment tendered for the pursuer, an alternative conclusion is introduced that it is a condition of the defender retaining possession of two of the estates—*Lees Garry* and *Kinloch Rannoch*—that he free these estates from the burden of the debt of £25,000.

I am of opinion that none of these conclusions are well founded, and that the defender should be absolved therefrom. I think it quite clear, on the ground already mentioned, that the £25,000 bond is simply, and in the strictest sense, an entailor's debt, duly, validly, and effectually kept up against the entailed estates, and the same must be said still more clearly as to the other debt for £9000, the bond for which was granted under the authority of the Court and in terms of the recent entail Acts. Now, the moment the character of the debts as ordinary entailor's debts is established then all that the heir of entail in possession is bound to do is to keep down the interest on the entailor's debts accruing during such heir's possession, and that out of the rents which such heir is receiving. No heir of entail is bound to pay off the principal or capital of the entailor's debts unless this be a condition of the entail, or unless of course the heir of entail has incurred a separate or general representation of the entailor. *Quia* heir of entail he is not the debtor in the bonds, and he is only bound to pay out of the rents the interest accruing during his possession.

This brings the question simply to this: Whether it is a condition of the present entail—a condition validly made by the entailor—that the pursuer, or first heir of entail, or that any subsequent heir of entail, shall, as a condition of succeeding, “and irrespective altogether of how long he may be in possession as heir of entail,” be bound, out of his own means, to pay off the pr-

ipal or capital sums constituting the entailor's debts? Now, there is no such No. 52.
 condition in the entail, and no such condition is implied at common law, and
 therefore there is an end to the pursuer's whole action, both as originally laid Jan. 11, 1877.
 and as amended or proposed to be amended. The defender is entitled to absol- M'Donald v.
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 tion from the whole conclusions of the action.

In regard to the liability of the separate entailed estate of Dunalastair, to be sold or made available in some way for paying off the previous debts of the entailor affecting the other entailed estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, I wish entirely to reserve my opinion, although, as I have already mentioned, I incline to differ from the opinion expressed by the Lord Ordinary in his note. My difficulty is this, that both entails—that is, the entail of Dunalastair as well as the previous one—bind the granter, Sir John M'Donald, alone, and his heirs, executors, and representatives whatsoever—that, is his general representatives—to relieve the entailed estates of the granter's debts. There is no obligation laid upon the heirs of entail in any of the entailed estates to pay entailor's debts, even those affecting the estates respectively entailed, far less is it made a condition that the heirs succeeding to one entailed estate shall pay off the debts affecting other and separately entailed lands. None of the heirs of entail are bound at common law to do so, although of course all the estates are attachable at the instance of the creditors. Now, when the question of liability for entailor's debts, or questions as to the right to be relieved therefrom, arise, not between the heirs of entail and the general representatives of the entailor, but between two of a series of heirs of entail under separate deeds of entail, I do not think it is material, at least it is not conclusive, that one of the entails was executed long before the other, or that one of the entails contains a power of revocation while the other does not. These may be indications of intention, but they are no more. In particular, the power of revocation though reserved was never exercised, and I think it impossible to hold that the entail must be held revoked *eo ipso* from the mere fact that the entailor left debts unprovided for. It appears to me that in all such cases the real question is a question as to the intention of the testator or entailor. Did the late Sir John M'Donald really mean and intend that the estate of Dunalastair—carefully and specially entailed—should be burdened with, made answerable for, and probably sold to pay off, a heritable debt which he had previously constituted effectually as an entailor's debt and a real burden affecting and against the separate entailed lands of Dalchosnie, Loch Garry, and Kinloch Rannoch? Reading the note, I should have the greatest possible difficulty in holding that this was Sir John M'Donald's intention, and when we remember that Sir John M'Donald himself, at great expense, built upon Dunalastair the mansion-house which he intended to be the mansion-house of the whole entailed estates, viewed as one estate and settled upon the same series of heirs, then if it should turn out that Dunalastair must be sold in order to pay off the heritable debt affecting Dalchosnie, Loch Garry, and Kinloch Rannoch, I cannot help thinking that this would be defeating, and signally defeating, the intentions of the testator. While I say this much, however, in consequence of the clear opinion to an opposite effect expressed by the Lord Ordinary, I do so merely for the purpose of expressing my difficulty and reserving my opinion entire, for I think that the question cannot be decided under any of the conclusions of the present action.

The case may go back to the Lord Ordinary to ascertain the amount of the

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THE COURT pronounced this interlocutor:—"Having heard counsel on the reclaiming note for John Alan M'Donald against Lord Shand's interlocutor of 22d November 1876, Refuse said note, and adhere to the interlocutor complained of, with the following addition to the Lord Ordinary's reservations:—"And to the defender his defences thereto:" Find the defender entitled to expenses since the date of the Lord Ordinary's interlocutor: Appoint the defender to lodge the executry account in this Court within eight days: Remit," &c.

DEWAR & DEAS, W.S.—A. P. PURVES, W.S.—Agents.

No. 53. THE HUNTINGTON COPPER AND SULPHUR COMPANY (LIMITED), Pursuers
—Lord-Adv. Watson—Balfour—Lov.

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WILLIAM HENDERSON, Defender.—Asher—Mackintosh.

Public Company—Duties and Obligations of Directors—Payments by Vendor to Directors.—Held that an original director of a company, formed for the purchase and working of certain mines, who had received a sum of £10,000 from the vendors out of the purchase money paid them, was bound to repay that sum with interest to the company, although the agreement between the vendors and him had been made before the company was formed.

Observed that the defender's allegation that he had rendered services to the company to the value of the sum he had received from the vendors was irrelevant.

Trust—Agent.—*Observed*, Wherever it can be shewn that a trustee has arranged matters as to obtain an advantage, whether in money or in money worth, to himself personally, through the execution of his trust, he will not be permitted to retain it, but be compelled to make it over to his constituent.

Observed (*per* Lord Young), When an agent or other trustee takes money from a person with whom he contracts for his constituents, the law assumes that he takes it at the cost of his constituent, and admits of no evidence to the contrary.

Observed (*per* Lord Young) When a constituent finds that he has been defrauded in a purchase by his agent by means of a secret agreement between the agent and the seller, his remedy is not confined to compelling the agent to give up what he has received, but he may repudiate the purchase and seek compensation or redress from the seller and the agent.

1st DIVISION.
Lord Young.
B.

THE HUNTINGTON Copper and Sulphur Company (Limited), incorporated under the Companies Acts of 1862 and 1867, raised this action against William Henderson, chemical manufacturer in Glasgow and Irvine, at one time a director of the company, for payment of £10,000, with interest thereon at the rate of five per cent from 1st April 1872 until payment. The company also concluded for disclosure and account of premiums and payments made to Henderson by certain persons who had been interested in the mines, now the property of the company's vendors; and failing such an account they concluded for £5000 as the amount of such premiums.

The pursuers averred that in 1872 the Honourable Mr. Huntington Canada came to England with the view of getting up a limited company to purchase certain mines in Canada, then the property of the "Huntington Mining Copper Company of Canada (Limited)," of which he was shareholder and director, and also to purchase certain lands adjoining these mines which belonged to himself; that with a view to carrying out this project he arranged to get the assistance of Alexander M'E

a financial agent; and that either Mr Huntington or M'Ewen applied to Henderson, who was conversant with the affairs of the Canada company, to become a director of the projected company. No. 53.

The following averments were then made:—(Cond. 3) . . . "Messrs Jan. 12, 1877. Huntington and M'Ewen, in order to induce the defender to become a director of the company and allow his name to appear on the prospectus as a director, which, it was supposed, would induce the public to take shares in the company, and to use his influence to obtain gentlemen of position to join the board of directors, offered to pay him the sum of £10,000 out of the purchase money to be obtained by the sale of the said mining properties to the company. The defender accepted the said offer, and agreed, in consideration of the said sum of £10,000, to become a director of the said company, to allow his name to appear as a director in the prospectus, to obtain other gentlemen of influence to become directors, and otherwise to aid Messrs Huntington and M'Ewen in promoting and establishing the said company. It was further arranged between the defender and Messrs Huntington and M'Ewen that Mr James Henderson, a nephew of the defender, who was also a shareholder of the Huntington Mining Company of Canada, should be interim secretary of the proposed company, and that the defender's office in Glasgow should be the temporary office of the new company." Other averments were made in connection with the prospectuses and bringing out of the company, which, so far as substantiated, are given below in the summary of the evidence led at the proof. Messrs Copper Co. v. Henderson.

The defender answered the averment in cond. 3 as follows:—Ans. 3) "Admitted that Messrs M'Ewen and Huntington applied to the defender to become a director of the said proposed company. Admitted that it was agreed between them and the defender that the latter should receive £10,000 out of the sum to be paid by the proposed company to the vendors. Admitted also that the defender's nephew was appointed secretary to the company, and that the defender's offices were used as the temporary offices of the company. *Quoad ultra* denied, and reference made to the defender's statement."

The defender (Stat. 1) set forth that he was a metallurgical chemist of great experience, and was patentee of certain processes for treating ores which the intended company proposed to work, and that he had been applied to as his services as a person of skill were necessary in setting going the company's business. He added,—(Stat. 2) "In consideration of the sum of £10,000 agreed to be paid to the defender by Messrs M'Ewen and Huntington, the defender undertook to perform a variety of services which lay entirely outwith the ordinary duties of a director of the company, and which were necessary to be performed in the interest of the vendors and of the company, and, in particular, he undertook to experiment upon the ores proposed to be worked, to procure and employ suitable managers, chemists, &c., to design the works, furnaces, &c. to be erected, and, if necessary, to go out to Canada and set the company's works agoing. All the services thus agreed to be rendered the defender fully rendered to the vendors and the company. In particular, and, *inter alia*, he bought with his own funds fifty-two tons of the Huntington ores, and had the same taken to his works at Irvine, and there experimented on in great detail, and at considerable cost, in order to determine the form of apparatus and the particular modification of his patented processes which were best suited for working the said ore. He also selected two managers for the company's works, and had them, one for some months and the other for some weeks, at his works at Irvine, instructing them in the details of his processes. He further furnished plans and designs, and

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made a journey to Canada in order to set agoing the company's work. Apart from any allowance for his own time and trouble he expended the performance of these, and the other services rendered by him in consideration of the said sum of £10,000 a sum not less than £8000. the result the defender has derived no profit whatever from or under said agreement with Messrs M'Ewen and Huntington."

The pursuers pleaded, *inter alia*;—(1) The defender is bound to pay to pursuers the said sum of £10,000, in respect that the said sum was stipulated for by the defender, and received by him from Messrs Huntington and M'Ewen, the vendors, under the arrangement and upon the conditions stated in article 3 of the condescendence, without the knowledge or sanction of the pursuers, and contrary to the duty which he owed to them as their director and agent.

The defender pleaded;—(1) The averments of the pursuers are irrelevant and insufficient to support the conclusions of the action. (2) The averments of the pursuers being, so far as material, unfounded in fact, and, in particular, the only sum received by the defender from Messrs M'Ewen and Huntington having been received on the footing set forth in the defender's statement, the defender is entitled to absolvitor. *Separatim*, the defender is entitled to absolvitor, in respect that no benefit or profit has accrued to him under the said agreement between him and Messrs M'Ewen and Huntington.

A proof was allowed to both parties, in which the defender led. The result of the evidence was as follows:—After M'Ewen and Huntington had persuaded Henderson to become a director of the company, upon an understanding, verbal, not written, as both M'Ewen and Henderson deposed, that he was to give his services and the use of his patent required, to the company, in consideration of the sum of £10,000 to be paid to him by the vendors, a proof prospectus of the company was issued with Henderson's name appearing on it as the only director as yet named upon. Copies of this prospectus were distributed, and eventually other gentlemen, including Mr Huntington, were induced to promise to act as directors. Of the gentlemen so selected three received money from the vendors, two £1000 each, and the other £500, and eventually another director was selected who also received £500. The prospectus, as issued to the public, bore that the purchase money to be paid for the mines was to be £125,000. It also contained this clause,—“It is proposed to sell the whole of the sulphur contained in the poorer ores treated at the mines, and for this purpose to make arrangements with Mr Henderson and his partners to adopt the most improved processes, when fully developed by Mr Irvine, which will very much increase the profits of the company.”

The only contract mentioned in the prospectus was stated to have been made between John George Long (who was M'Ewen's head clerk), James Henderson (the nephew of the defender), and was dated 25th or 26th March 1872. It contained this clause,—“This agreement shall be binding until adopted by the company.” The defender's office in Glasgow was used as the temporary offices of the company. On 1st April 1875 the company was registered, and on 5th April the first meeting was held, and the defender, along with the gentlemen above referred to, were formally appointed directors.

The company continued in operation with this board of directors until 1875, when, at a meeting on 30th July, a committee of investigation was appointed. The directors, other than the defender, who had received money from the vendors, all repaid what they had obtained to the company. The committee having ascertained that Henderson had been paid £10,000 by the vendors, instructed their law-agents to write to

ing on him to repay this sum to the company. In reply to the letter making this demand Henderson's agents wrote as follows:—"On his part we have to inform you that he never received any promotion or reward whatever. You have doubtless before you the original prospectus of the company, to the following statement in which we would refer you: 'It is proposed to utilise the whole of the sulphur contained in the ores treated at the mine, and for this purpose to make arrangements with Mr Henderson and his partners to adopt the most improved process when fully developed at Irvine, which will very much increase the profits of the company.' For the advantages accorded by him to the company, and for the benefits the company would derive from his special skill and experience (which, we would remind your committee, he has been unceasingly devoted to the company—quite distinct from the duties of a director—at great inconvenience, with very considerable loss of time, and without any other remuneration), the vendors paid Mr Henderson £10,000."

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Henderson, in his evidence, deponed that M'Ewen and Huntington had engaged him to assist in bringing out the company, but to undertake only the necessary works and see that they were properly managed, and that it was in return for this and kindred services that he was to receive, and did receive, the £10,000. It was proved that Henderson had visited Canada to set the works in order after they had gone bankrupt, and had only been paid his travelling expenses. He had also acted as managers for the works at his own works at Irvine, and had made claims against the company for so doing. Several of his co-directors deponed that he took the whole practical management of the business, and that his experience and reputation as a metallurgical chemist was highly valued by them as of great value to the company. M'Ewen deponed that he never would have started the company without the promise of Henderson's assistance, and that his arrangement with him was fully confirmed before the sale to the company. Henderson produced an account of his books for expenditure on experiments which he had made with the company, which brought out a debit on account of the experiments of £11,907. The pursuers, on the other hand, produced receipts from Henderson for small charges for analyses, &c. made upon their ores.

On June 1876 the Lord Ordinary pronounced this interlocutor:—"On the defender's pleas, and decerns against the defender to make good to the pursuers of the sum of £10,000, with interest thereon at the rate of 5 per cent per annum from the 31st day of August 1872 till the date of payment of the last instalment of the purchase money, and in respect the pursuers do not insist in the remaining conclusions for accounting and payment, finds it unnecessary to dispose of the remaining conclusions: Finds the defender liable in expenses, and remits,"

JUDGMENT.—The relevancy of the pursuers' case as stated was not disputed, notwithstanding of the plea of irrelevancy on record; and I am of opinion that it is clearly relevant. The relevancy of the defence, or its legal effect as an answer to the action, might, I think, have been reasonably established, but the pursuers, no doubt advisedly, abstained from doing so as an answer to proof, although before the commencement of the evidence they contended that, having regard to the defender's admissions, which they represented as sufficient *prima facie* to entitle them to judgment, the defender ought to be granted this course. This course was in accordance with my own impression, and was not taken by the counsel for the defender. It was, however, understood that the course taken should be without prejudice to the pleas of parties on the whole when the proof was concluded.

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Henderson reclaimed, and argued ;—There was no dispute as to the Lord Ordinary's law with regard to persons occupying trust relations, but

“The facts of the case as established, and indeed substantially admitted, are very simple. Mr Huntington of Montreal, being interested in a copper mining company in Canada called after his own name, and whose property he had authority to sell, and being himself proprietor of certain lands adjoining the company's mine and works, which he wished to dispose of, came to this country in order to effect a sale of the whole for the company and himself. His first communication, so far as we know, was with Mr Alexander M'Ewen of London, a gentleman of experience in promoting the formation of companies to purchase such properties as Huntington wished to dispose of. In the result Huntington and M'Ewen together applied to the defender for his aid in the matter, which was no doubt important, or thought to be so, to the success of the scheme. They, on the part of the proposed vendors, offered him £10,000 for it, or (adopting the expression in the defender's answer to condescendence 3), agreed that ‘should receive £10,000 out of the sum to be paid by the proposed company to the vendors.’ The defender agreed to these terms after (as he says no doubt truly), satisfying himself by inquiry that the property was valuable, and that the concern was likely to prosper in the hands of a joint stock company. The agreement being thus made, the defender set about the performance of his part of it by assisting in the preparation of a prospectus for a company, which was printed and circulated with his name as sole director, the purpose of it being apparently to induce other gentlemen of probable influence to allow their names to be added to the direction, with a view to a further and more complete prospectus. The measure was successful to the extent of inducing five gentlemen to join and add their names to the direction. They were no doubt influenced by the confidence which they not unreasonably reposed in the defender, ignorant of the terms upon which his aid had been purchased by the vendors, though four of them had some reason for suspicion from the circumstances, viz. bribes being promised, and in the result paid, to themselves for the use of their names as means of promoting the interests of the vendors. The bribes promised and eventually paid to these gentlemen were of less amount than that first agreed, but were, I think, of exactly the same character. The result was that of the six provisional directors, who had been selected because of the influence which their names were likely to carry with the public, five had been induced to give the use of their names by bribes to the aggregate amount of £13,000, promised on the part of the vendors speculating on the advantage of the sale which they hoped to effect through the influence thus procured. On the 25th and 26th March 1872 the contract whereby the sale was made to the intended company was executed by a Mr John George Long on the part of the vendors, and by the defender* on the part of the intended company. By this contract, which is set out in condescendence 5, it was agreed that ‘the company, when incorporated, purchase’ the property specified ‘for the sum of £125,000, payable as therein mentioned. This contract was necessarily conditional on the formation and incorporation of the projected company, but the condition was immediately thereafter, viz., on 1st April 1872, purified by the registration of the company. For all legal purposes the contract may be taken as effected by the directors of the company (including the defender), immediately after registration whereby its incorporation was effected. It has since been confirmed by a conveyance of the property, and payment of the agreed price. The vendors have also kept faith with the defender, and those of his co-directors with whom they had agreements, by payment of the rewards promised to them for the services which they received at their hands, and to which no doubt the advantageous sale which they effected through their means is greatly attributable.”

“Had the company prospered, nothing might ever have been heard of the manner in which the directors, who were charged, indeed had charged themselves with the company's interests in the matter of the purchase, had been

* This should be by the defender's nephew.—See Lord President's judgment, p. 307.

facts of this case took it out of the rule. It was proved (1) that at date of the agreement under which the £10,000 was paid, the defender

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at least greatly tempted by the vendors whose interests were necessarily used to those of which the directors were the guardians. But the company being proved unfortunate, and a committee of investigation having been appointed, the facts came to light. The defender's brother directors who received money from the vendors have seen fit to pay to the company what they so received, with interest. Their view seems to have been that the price agreed to them for the company may be considered as having been higher by at least amount than it would otherwise have been, but the defender declines to even this apparently moderate view, and insists on retaining what he has. Hence the present action.

The view of his position or of the agreement between him and the vendors at which he was to 'receive £10,000 out of the sum to be paid by the proposed company to the vendors,' as urged at the debate, is distinctly enough set out in his agents' letter quoted in cond. 12:—'For the advantages accorded him to the company, and for the benefits the company would derive from his technical skill and experience (which we would remind your committee have been unceasingly devoted to the company,—quite distinct from the duties of a director,—at great inconvenience, with very considerable loss of time, and without any other remuneration), the vendors paid Mr Henderson £10,000.'

I cannot assent to this view. The import of it is that by the contract of the 18th 1872, the vendors, for the agreed on price of £125,000 sold and agreed to transfer, not only the property therein carefully specified, but also the defender's services as a skilful and active director, together with some undefined right to use his peculiar processes, for which they had prepaid him £10,000. There was no contract between the vendors and the defender, the benefit of which was capable of being sold and transferred to the company, and in the contract between them and the company there is no allusion to anything of the kind. But, laying aside this view as untenable, the rule of law applicable to the case, in my opinion, is not doubtful. It is the simple and familiar rule of trust law, that a trustee (using the term in its largest sense), shall not without the knowledge and consent of his constituent make profit of his office, or take any personal advantage from his execution of it. It is not a different rule, but merely a developed instance of the same rule, that a trustee shall not be permitted to do anything which involves or may involve a conflict between his personal interest and his trust duty. The rule is not confined to particular cases which are capable of being enumerated, but is commensurate with a large and important principle on which it rests. That principle is that a person who is charged with the duty of attending to the interest of another shall not bring his own interest into competition with his duty. It is immaterial, as many cases illustrate, what is the particular relation which raises the duty, provided only it raises a duty on reposed trust, of which the law takes cognisance. The remedy for breach of the rule depends on the circumstances of the particular case, and is, in some extent, in the option of the person who has suffered thereby, either to sue or to rely on presumption of law. I say in presumption of law, for it is very well settled that remedy under the rule is not confined to cases of established fraud; and that the law presumes an injury wherever the rule has been violated. Without speculating on the remedy in general, it is, I think, firmly established that wherever it can be shewn that the trustee has so arranged matters as to obtain an advantage, whether in money or in money's worth, to himself, through the execution of his trust, he will not be permitted to retain it, but will be compelled to make it over to his constituent. It is unnecessary to add such limitations as must tacitly accompany so general a proposition, as, for example, by excluding cases of fraud practised by a trustee, for his own benefit, on a third party with whom he was dealing for the trust, and in which the remedy would be to the party defrauded.

Applying the rule to the case in hand, it appears, and so I hold in point of fact, that the defender being a director of the pursuer's company, and so charged

No. 53. stood in no trust relation to the company. (2) It was no part of the agreement that he was to enter into a trust relation; he undertook

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with the duty of attending to their interests, made on their behalf a contract the purchase of certain specified property at the price of £125,000, having the time when he made it, a secret agreement with the vendors to reimburse himself £10,000 out of that price. The company implemented on their part the sale so made for them, by paying the price and accepting a conveyance of the property, and the defender received back from the vendors £10,000, which he has retained. Assuming the facts to be so, the case seems to be *prima facie* an exceptionally clear one for the application of the rule of law to which I have adverted.

"The first point which the defender makes in answer to it is, that when he made his bargain for the £10,000 he was in no trust relation, and that there was nothing to hinder him accepting the vendors' offer of that sum for his services in aiding them to sell their property to advantage. To this I agree. *prima facie* the proposition does not extend to the case that the services were to be given in first bringing about the constitution of a trust relation between the defender and a contemplated purchaser, and then effecting the sale through the medium of that relation. But I must exclude that case from my general assent. I do not think an agreement to that effect would be an agreement to commit a fraud of no importance truly if the contemplated fraud was not in the result actually perpetrated, but very important, even in its character of a preliminary agreement, if the fraud was afterwards in fact perpetrated in pursuance of it. This is precisely what I must, on the evidence, hold to be the fact here. It would it signify, in my opinion, that the agreement between the defender and the vendors might have been otherwise implemented, as, for example, by procuring a purchaser to whom the defender did not stand in any trust relation. I think it was in fact implemented exactly as contemplated and intended from the first, but it would not affect the result in my opinion had this been otherwise. The defender being a trustee did in fact purchase for his constituents a vendor who agreed to pay and did pay him £10,000 for his services in this matter, and the date or the terms of the preliminary agreement or understanding according to which he was to receive the money are, I think, altogether immaterial, except as bearing on a question of personal integrity, which need not be decided.

"The next point the defender makes is, that the company was not incorporated when the sale was concluded, and that the present members, or the body of them, joined subsequently. But, 1st, I think it clear that the sale was made on behalf of the incorporated company, and by the defender as a director of the incorporated company. From the necessity of the case, at least quite naturally and in ordinary course of business, the contract was made provisionally before the incorporation. But it was made in contemplation of that event, and in terms dependent upon it, so that on the incorporation a few days thereafter, it became instantly a contract of the company, made for it by the directors, and as such accompanied by all the ordinary legal rules and incidents applicable to it and to the conduct and responsibility of the directors in making it, notwithstanding that the directors and the contract were originally provisional, and remained so till the incorporation. 2d, The ordinary rules of law apply to an incorporated company, and to the relations between it and others, including its directors, without regard to changes in the membership. Further, apart from this rule of law as I regard it, and looking only to the facts and justice of the thing, I must hold that members joining an incorporated company at any time after its incorporation are entitled to rely upon it that all existing contracts have been made by the directors in the due discharge of their duty as governed by the rules of law, and on finding the fact to be otherwise are entitled, through the ordinary vital action of the company itself, which they have power to set in motion, to all the remedies which the law may allow to a company in the circumstances which may be established. Nor, for the reasons which I have indicated, can I distinguish in the matter between *prima facie*

her special skilled services to the vendors and the company, and was a director only as the most convenient way of getting his services

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acts which became absolute by the incorporation, and those made subsequently to the incorporation, and so absolute from the first.

The last point the defender makes is of this nature. He says there is no reason that the price agreed to be given for the property was extravagant or unfair, and contends that when the price, thus assumed to be fair, was actually paid to the vendors the money became theirs to dispose of as they pleased, and that if they were pleased to give £10,000 to the defender, that was their affair and not the concern of the company's, who, on the assumption, had only paid a fair price for the property they acquired. This, which was the burden of the defender's argument, I must regard as altogether unsound, for it ignores the rule of law to which I have already sufficiently adverted, and a host of cases by which it has been illustrated. According to the view of the law thus maintained an agent or trustee purchasing a property may take any sum he pleases from the company's personal gratification to himself, without any remedy to his constituent, and on proof that the price was extravagant or unfair. Or an engineer or contractor may, without violation of duty, take gratifications from the contractors paid by him for his principal, in recognition of his patronage, and the principal has no remedy except on proof of extravagant prices. The law, as I understand it, is otherwise. When an agent or other trustee takes money from the company with whom he contracts for his constituent, the law assumes that he does so at the cost of his constituent, and admits of no evidence to the contrary. If otherwise would greatly defeat the wholesome object of the rule by which those who sought a remedy under it to litigation about values to determine whether or not abatements, for the trustee's personal gratification, had been paid at fair prices and fair profits, and so really at the sacrifice by the third party of what they were reasonably entitled to for their goods or services, and of the injury to the constituent who got his money's worth. The law is founded on this by holding firmly to the rule, that a trustee or agent shall have no remedy except what the law allows or his constituent knowingly agrees to, and if he receives more he receives it unfairly at his constituent's expense. This is founded on good sense, and the mischief of any other would be infinite. Thus, to instance in the case of sale, it seems only reasonable to hold that a vendor will not subsidise a buyer's agent for merely performing his duty as such. But if not what is the conclusion when such a subsidy has been given? Simply, that which every man forms who hears of it, that the interest of the buyer has by his own agent been sacrificed to that of the seller, and that this is precisely what the seller has paid for. The law, so far as it protects principals against the danger of having their interests so sacrificed, prohibiting agents from taking any benefit whatever in this manner without their knowledge and consent, and by taking from agents, without further proof, the fruits of any violation by them of this prohibition.

The defender attempted to make a point of the circumstance, that it did not appear that the £10,000 which he received was part of the very money which the vendors had from the company. It was probably, or even certainly, not. All the payments together may have been by cheques or bills, or in any way as the defender was concerned, by credit in accounts between him and the vendors. The identity of the money is of no importance, nor would it affect the application of the rule on which I decide the case had the money been paid by the vendors to the defender been not in money but in money's worth, as by a conveyance or delivery to him of heritable or other property hereafter.

Now, I hope and believe, made it sufficiently clear that I decide the case on the general rule of law, the application of which does not imply any imputation of fraud on the defender, in the sense that he bought the property in question for the company solely because of the benefit he was personally to receive from the vendors, and without believing that the property would be worth to the company for which he acted the price he agreed to pay for it, although

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as manager and not in order to bring about the purchase of the mine &c. (3) The defender had made no profit, having expended in experimen-

that did necessarily include the large amount which he had agreed with vendors to receive out of it on his own account. So far from this, it is according to my conviction of the fact on the evidence that he believed, as the result of his inquiries and the exercise of his judgment, that the company which he was so instrumental in calling into existence would be successful, and that there would be no reason to regret the purchase. He, no doubt, also thought that in the event of the success which he anticipated he ought to have a gratification for his skill and active services in originating the concern, setting it a-going, beyond a mere participation in the profits according to shares. Nor could there have been any objection to an arrangement between him and the company, whereby he was to be remunerated as the originator and most active director, in such manner and to such extent as they mutually agreed on, and that either absolutely and in any event or conditionally on success and according to profits. Such agreement might indeed have formed part of the articles of association, and appearing there would necessarily have been binding on the company incorporated according to these articles. This was the obvious, familiar, and above-board course if the defender meant that the company should remunerate him for his services, and the only objection to taking it appears to be that it might have formed an obstacle to the successful creation of the company, for men might not have been willing to join on such terms. But here, for whatever reason, omitted to take this course, the defender was, I think, clearly without any resource except an appeal to the company after its incorporation. It is therefore impossible, in my opinion, to defend the payment which the defender obtained from the vendors, on the ground that it was an indirect way of obtaining from the company payment for his services as originator, promoter, and active director of the concern. That the defender should, out of the proper price of their property, pay the defender for his services to the company is simply ridiculous, although it is conceivable that they might have lent themselves to such a device as is suggested by the stress laid by the defender on these services in his argument, provided the price was increased beyond what they were content to receive to themselves by amount as the defender wished to receive to himself out of the funds of the company. I need hardly say that no Court of law could for a moment countenance such a proceeding.

"The case is important as disclosing proceedings which there is no reason to believe not unfrequently attend the genesis of joint stock companies, and of opinion that they are of an illegal and mischievous character, I have examined and dealt with the case in all the aspects of it which were suggested in argument or have occurred to myself, in order that I might distinctly express and state the grounds of that opinion. The length at which I have entered on this subject is not, however, to be taken as any indication of doubt or difficulty on my part, for, indeed, I regard the case as a very clear and even gross case for the application of a familiar and well settled rule of law. And with respect to the remedy (which I have here given to the extent asked), I desire to say that I am of opinion that the law affords no larger and more complete remedy than depends on the trustee of the profit which he has personally made. If a private individual should discover that his factor or agent had betrayed him into the purchase of property, effected on his advice and through his instrumentality, in pursuance of a secret agreement with the seller to share the price with him, I am of opinion that the remedy is confined to compelling such factor or agent to pay up so much of the price as he had received. On the contrary, I incline, at present advised, to think that any one who discovers that he has been defrauded, may, if so minded, repudiate the purchase altogether, and seek complete redress against both the seller, who seduced his agent, and the agent who faithlessly yielded to the seduction. A company is in no different position with respect to its directors, and if it should appear that a party having power to sell tempted the directors of a company, by personal bribery, to buy it, he

the company's behoof as much money as he got, and so he could not said to have any of their money in his hands. (4) There was no evidence that the company had paid too high a price for what they purchased, and so they had nothing to do with the manner in which the vendors disposed of the purchase money.

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These points distinguished this case from the recent one of Sir John Eyre founded upon by the pursuers.

Argued for the pursuers ;—There could be no doubt that the defender, having received money belonging to the company while acting in an agency capacity, was bound to refund it. This had been settled by a long series of decisions.²

At advising,—

LORD SHAND.—I agree with the Lord Ordinary that there is no doubt as to the general legal principle by which the question here in dispute must be determined, or as to the application of that principle to the circumstances of the present case.

It is clear that as part of the arrangement for the purchase of the Canadian property by the company at the price of £125,000 the defender, a director of the company, stipulated that he should receive £10,000 from the vendors, and that on the sale being completed he received that sum. This payment was made to be made, and was made, without notice to the company. In order to enable the vendors to make the payment they had to stipulate for £10,000 in addition to the sum they were themselves to accept as the value of the property, and the enhanced price to the extent of this sum of £10,000 was thus simply the money of the company paid without the sanction or knowledge of the company, through the vendors of the property, to one of the company's directors.

It was provided by the agreement for the purchase of the property that it would not be binding until adopted by the company. The defender, as a director of the company, was a party to the agreement being adopted, and so was a party to that character to the act of binding the company to its terms.

It would, in my opinion, have made no difference if the arrangement with the vendors had stood entirely on a concluded agreement entered into prior to the formation of the company, it having been part of the agreement that the defender should assume the trust character of a director in order to carry the arrangement out ; but the fact is that in binding the company to make the purchase by adopting the agreement which had been previously entered into, to that effect, with the defender's sanction by Mr James Henderson as a trustee of the intended company, the defender, being then a director of the company, obligated for payment to himself of the sum of £10,000, which, for the reasons already stated, must be regarded as a payment of money truly belonging to the

company, I cannot permit myself to doubt that the company might, on discovery of the fraud, repudiate the transaction, and seek complete redress against all concerned in it."

¹ *In re Canadian Oil Works Corporation* (Hay's case), July 20, 1875, L. R. 10 Chan. 593.

² *York Buildings Co. v. Mackenzie*, May 13, 1769, 3 Pat. App. 378 ; *Aberdeen Railway Co. v. Blaikie Brothers*, July 20, 1854, 1 Macq. 461 ; *Tyrell v. Bank of London*, Feb. 27, 1862, 10 Clark's House of Lords Reps. 26 ; *Parker v. McKenna*, Dec. 14, 1874, L. R. 10 Chan. 96 ; *in re Western of Canada Oil Co.* (Carling's case), July 10, 1875, L. R. 20 Eq. 580 ; 30 and 31 Vict. cap. 61 (Companies Act, 1867), sec. 38.

No. 53. company, and which, according to the ordinary rule arising out of a trust relation stated so clearly by the Lord Ordinary, the defender cannot be permitted to retain.

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The defender, unable to dispute the force and effect of the general rule, endeavoured to justify his receipt and retention of the money on the ground that it was paid to him under an agreement with the vendors that he should render important professional services to the company in preparing plans for their works in Canada, training men to take charge of the company's operations, going to Canada if necessary to see the works started, and pursuing experiments in this country in order to make the most of the manufacture of the company's ores, and that in point of fact these services were rendered to the company. The defence maintained was substantially rested on this, which is represented as making a special case, entirely distinguishable from the case of a director receiving promotion money or shares in the company as a qualification for his seat at the board, in which cases it cannot be disputed the ordinary rule applies. In this defence, however, there are several obvious and conclusive answers.

So far as services are said to have been actually rendered to the company under the alleged agreement it is a sufficient answer to say that it is impossible to refer any services rendered by the defender to the company of which he was a director to an agreement now alleged to have existed, but of which he was not a director of the company, and everyone in the management except the defender himself, was entirely ignorant. If the defender was really rendering, or professing to render, services to the company under an agreement binding on him in respect of remuneration received when the company was formed, it is inconceivable that this should not have been mentioned or disclosed in some way before the claim for repetition of this money was made. The entire absence of knowledge by the directors of any such agreement tends to create a strong impression that the defence founded on it has been reared up on a very slender foundation—the understanding, or promise, at the utmost, it may be, that the defender, like the other proposed directors, would do his best to promote the formation and aid the business of the company, giving also the benefit of his professional knowledge he had. And this impression has not been removed or confirmed by the proof. The defender's connection with the Tharsis mine, which is referred to in the prospectus, and the success of which is said to have been to a considerable extent due to him, is probably of itself sufficient to account for the larger bonus given to him to procure his name and influence in the direction (and so to attract shareholders) than the sums given to other directors, men admittedly with that view. And the suggestion now made of services having been rendered under an agreement antecedent to the formation of the company is in direct variance with the statement in the prospectus issued and being approved of by the defender, to the effect, not that an arrangement had been made, but that it was proposed to make arrangements with him for getting the benefit of his improved processes when fully developed.

It is not, I think, proved that the bonus of £10,000 was paid in respect of any agreement for services to be rendered to the company. Mr McEwan admitted the payment mainly, at least, to the assistance he expected from the defender "in bringing out the company," and that assistance was evidently so great that without it the company would probably never have come into existence. He states that the defender was under no legal obligation to perform the services referred to—a statement which is of course inconsistent with the existence of

It is scarcely intelligible that Mr M'Ewen, which was to be the source of his profit, tender for services to be rendered to the [redacted] after the sale was completed, and after

would, in my opinion, make no difference
t as that which the defender alleges had
eared into between him and the sellers of
holders of the company, after being duly
resolved to adopt it.

under the provisions of the statute 30 and 31
is, I think, precluded from founding on
motors of the company of which distinct

Even if the agreement had been entered into, by a formal contract between the company and the defendant, it could not have taken advantage of it. It mainly prevented his entering into any contract which involved a conflict between his personal interests and those of the company. It is to be noted that if a contract for remuneration for the defendant had been entered into between the promoters of the company and the defendant, it could not have taken advantage of it.

been clearly explained in the prospectus, it
towards subscribing were thereby bound—in

gal obligation against the defender to have in compliance with the provisions of the ment had been made after due notice to the

been bound. Here there was nothing of
could not have demanded and recovered

statement of an agreement made with the
not yet paid for, and upon the evidence which
seems to me to be equally clear that he can

seems to me to be equally clear that he can-
ny's funds, received without their knowledge
reement and services alleged, even if these

ment and services alleged, even if these
thinking to be the case.

at importance, but I really have very little to me that it has been very accurately, ably, and Ordinary. It is very clear that by the

Ordinary. It is very clear that by the
paid out of the price of the subject pur-
must be assumed to have been, just to increase

that amount. That being so, the £10,000
 er name than that of a bribe to the defender

company at that enlarged price, unless before the company was incorporated, the matter had been authorized and approved of by them. Now that

the contrary, knowledge of it was withheld from the company until after the company was incorporated, but until

incorporation took place into the affairs of the
time, became known to the company, and in

proved of and disclaimed. The defender was
and the character of a trustee for the company;

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and it appears to me that the fact of the arrangement having been made by anticipation does not vary the case from what it would have been if he had been a trustee at the time the agreement was entered into. The agreement made by anticipation, and afterwards carried out, just puts him in the same position as if he had done all that he has done after he was actually invested with the character of trustee. It was contemplated from the first that the purchase should be confirmed, and that he was to hold the character which he afterwards held. These views are, as they deserved to be, very fully developed in the note of the Lord Ordinary; and I have only to say that in the whole of that note, from beginning to end, I substantially concur.

LORD MURE.—I have come to the same conclusion; and as the Lord Ordinary has entered very fully into the question, and I entirely concur in his opinion and in what has fallen from Lord Shand, I shall simply state that it appears to me that this is a very clear case for applying the general rule which runs through all the cases on the subject, viz., that parties in the position of trustees are not permitted to make profit by that position. As I understand the arrangement which was here made it was settled from the first that the defender was to be a director in this proposed company, and it was also arranged that, for what he calls certain services to be performed by him as to the formation of the company and other matters, he was to get £10,000. That is borne out by the 3d article of the condescendence, and I think almost as clearly by what was admitted by the defender. He was therefore in the position of a party who was to get £10,000 of the purchase price of this property, provided the company came into existence in consequence of his exertions and those of the promoters, committee and the directors who floated the company. Now, the general principle of law as applicable to trustees, as I have always understood it, as laid down by Lord Lyndhurst in the case of *New v. Jones* (1 Hall and Twells, p. 632, referred to in the case of *Gray*, 12th November 1856, 19 D., p. 5) is that "It is the duty of an executor and of a trustee to be guardian of the estate, to watch over the interests of the estate committed to his charge. If he is allowed to perform the duties connected with the estate, and to claim compensation for his services, his interest would then be opposed to his duty, and in a matter of prudence the Court does not allow a trustee to place himself in such a situation." And he further adds—"It would be placing his interest at variance with the duties which he has to discharge." Some question having appeared in a subsequent case of *Cradock v. Piper*, as to the extent to which the opinion of Lord Lyndhurst in *New v. Jones* was meant to go, Lord Cairns, in deciding the case of *Broughton v. Broughton* (5 De Gex, Macnaghten and Gordon, p. 164), used these expressions when he was Lord Chancellor in 1854—"The rule really is, that no one having a duty to perform shall place himself in a situation to have his interests conflicting with that duty. A case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for them. As the trustee might make the payment to others, this Court says he shall make it to himself." Now, I think, in the circumstances of this case the defender was substantially a trustee, and his duty was to endeavour to acquire this copper mine at as low a price as possible from the parties who were willing to sell it to the company. His duty was to beat down the price to be paid to the best possible figure for which the property could be acquired. That was his duty.

rustee. But, on the other hand, he was only to get this £10,000, as I understand the case, if the company was floated; so that he had a material interest to get the company started, whatever the cost might be to the other shareholders, in order to get the £10,000. His interests were therefore plainly in conflict with his duty; and on that ground alone he is not, as I apprehend, entitled to retain the £10,000.

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LORD DEAS.—There is one observation I wish to make. A good deal has been said about counter claims on the part of the defender. I do not mean to give any opinion about these, but I am very clearly of opinion that nothing can be made of them here, whatever may be made of them in a counter action.

LORD PRESIDENT.—I agree with all your Lordships that this is a case of great importance, and also that it is a very clear and even gross case for the application of the general rule of law which your Lordships have stated. The company was registered on the 1st of April 1872, and in the memorandum of association, in that part of it which professes to state the objects for which the company was established, we find that the leading object, without which indeed the existence of the company would be utterly purposeless, is thus expressed—"To buy and carry out a contract dated the 25th and 26th of March 1872, entered into between John George Long, on behalf of himself and other vendors on the one part, and James Henderson of Glasgow, on the other part, for the purchase of a certain mine in Canada. It is obvious, therefore, from this, without going further, that the company was brought into existence for the very purpose of purchasing and working this particular mine. Now, the preliminary contract by which the terms of the sale were settled was a contract in which the nominal vendor was Mr Long and the nominal vendee was Mr James Henderson. The Lord Ordinary has made a slight mistake, in point of fact, in supposing James Henderson to be the defender. He is the defender's nephew. But that circumstance makes not the slightest difference in my mind upon the general result of the case. There can be no doubt that both these gentlemen were mere names, representing other people. The vendors were the persons who had the true interest in this Canadian mine, and the vendees were the persons who were getting up the company, which was registered on the 1st of April. Now, who then were the vendees? So far as I can see, in the first place, the true vendee was the defender, Mr Henderson; because when the first prospectus was issued he appears as the only director of the company, and the other parties who aided him or co-operated with him in framing the prospectus and circulating it privately were parties who were rather interested on the side of the vendors, particularly Mr M'Ewen, who really was the agent of the vendors in Glasgow. The original prospectus thus framed having been privately circulated, some additional names were procured of persons to act as directors. And it is not material to observe that of the gentlemen who are named in the second issue of the prospectus as it was ultimately issued there are only two who are not, in point of fact, bribed to get up this company for the purpose of selling and giving effect to this sale. No doubt the other gentlemen who received money on account of this service received much smaller shares than the defender, and they have made the best reparation in their power by paying the money to the company, with interest; and the position of the defender is that he received £10,000 for giving his name as a director, and for getting up

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the company along with those other persons, the object or one of the objects at least of these parties in getting up the company being to secure to the vendors the full price of £125,000 as the equivalent for the mine to be sold. Then we have it established by the clearest and most distinct evidence that what Mr Henderson, the defender, stipulated for as the condition of his becoming a director and getting up the company to give effect to this contract of sale was that he should receive from the vendors a certain portion—amounting to £10,000—of the price which was to be paid by the company for the mine. Now, that is enough, I think, for the decision of the case. I think all the other facts may be looked at with advantage in judging of the conduct of the persons who were involved in this transaction, but these are the broad and simple facts upon which I think the decision of the case must rest; and it appears to me that they do close Mr Henderson, the defender, as standing distinctly in this position, and that he was a director of the company at the time that he entered into the arrangement with Mr McEwen and his clients, because the company was not then in existence, but that he stipulated that he should become a director, and so place himself in a fiduciary position for the company, and so assume the duty of managing and protecting the interests of the company when it came into existence, for the very purpose—not perhaps the sole purpose, but for this purpose among others—of compelling the company when it came into existence to adopt and fulfil this contract of sale by which they were to pay that £125,000. I think, therefore, that he just accepted the £10,000 as a bribe to induce him to bring this company into existence, and to make himself a director of the company—he accepted the £10,000 as the consideration upon which he was to perform that office for the vendors of the mine, and thus he placed himself in a position of having a trust duty to perform and a personal interest directly conflicting with that trust duty.

Now, the doctrine of law as applicable to such a case I think cannot be better stated than it is in one passage of the Lord Ordinary's note, in which he says—“Whenever it can be shewn that the trustee has so arranged matters as to obtain an advantage, whether in money or in money's worth, to himself personally through the execution of his trust, he will not be permitted to retain it, but is compelled to make it over to his constituent.” The judgment which the Lord Ordinary has pronounced is just to compel this gentleman to make over the money which he has received to his constituent, the company, and in that judgment, as I said before, I entirely concur.

THE COURT adhered.

FRASERS, STODART, & MACKENZIE, W.S.—MYLNE & CAMPBELL, W.S.—Agents.

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SIR EDWARD HUNTER BLAIR, Bart., Petitioner.—*Lord-Adv. Watson—Kinnear.*

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WILLIAM MACGILLIVRAY (*Curator ad litem* to the younger children of E. H. Blair), Respondent.—*Balfour—Keir.*

Entail, date of—Deed of Alteration—Entail Amendment Act, 1848, 11 & 12 Vict. c. 36, sec. 2.—By deed of entail dated prior to 1st August 1848 the entailer reserved power to alter the destination, and he executed subsequently on 1st August a deed of alteration by which he merely struck out of the entail series of heirs called in the second branch of the destination. *Held* (reversing the judgment of Lord Adam) that the entail was an entail dated prior to 1st August 1848 in the sense of section 2 of the Entail Amendment Act, 1848.

SIR EDWARD HUNTER BLAIR, who was heir of entail in possession of the estates of Brownhill and Blairquhan, in Ayrshire, presented a petition for the disentail of these lands under section 2 of the Entail Amendment Act of 1848. The petitioner had obtained the consent of his eldest son as next heir of entail, who, being more than twenty-one years of age, was entitled to give such consent under 38 and 39 Vict. c. 61, sec. 4. The only question in the case was whether the petitioner was in possession of the estate "by virtue of such tailzie dated prior to the said 1st day of August 1848" as required by the 2d section of the Act of 1848.

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1st DIVISION.
Lord Adam.
B.

The Lord Ordinary remitted to Mr George Dalziel, W.S., who reported the facts as follows :—"The petitioner, Sir Edward Hunter Blair, is heir of entail in possession of the entailed estates of Brownhill and Blairquhan and others, in the county of Ayr, under and by virtue of a disposition and deed of entail dated 27th August 1840, and recorded in the Register of Tailzies 18th December 1847, and a deed of alteration of heirs of entail dated 22d December 1855, and recorded in the Register of Tailzies 17th January 1856. The granter of both deeds was Sir David Hunter Blair, the petitioner's father, who died on 26th December 1857, and after his death both deeds were recorded in the Books of Council and Session 4th January 1858.

The destination in the deed of entail of 27th August 1840 was,—(1) to be in favour of himself, the said Sir David Hunter Blair, whom he (2) to Captain James Hunter Blair of the Fusilier Guards, his second son, and the heirs-male of his body, whom failing (3) to the petitioner, therein named and designed Edward Hunter Blair, ensign in the Regiment of Foot, his second son, and the heirs-male of his body, whom failing (4) to certain other heirs-substitute, to whom it is unnecessary particularly to refer.

The deed of entail, however, contained the following reservation in favour of the entailer, viz.—"Reserving always full power and liberty to me at any time of my life, not only to revoke, alter, or add to the foresaid destination and order of succession, as to all or any of the heirs of tailzie and before specified, and also to revoke or alter any of the conditions, provisions, restrictions, limitations, exceptions, irritancies, declarations, reservations, and others before written, at my pleasure, and to alter this present disposition and deed of entail in whole or in part, but to sell, alienate, wadset, or dispose the foresaid lands and estates, or any part thereof, or to contract debt thereupon, or even gratuitously to burden thereof or burden the same, as I shall think proper, without the consent of my said heirs of tailzie, as fully and freely as if these powers had never been granted by me; and also to empower and authorise any of the said heirs of tailzie, or any other person whom I please, to alter or dispense with the foregoing conditions, restrictions, and irritancies, or any of them, after my death, in the same manner as I could do during my life; all which alterations so to be made during my life by me, or after my death by any other person to be empowered by me, to be understood and taken to be a part of the present deed of tailzie, to be recorded in the Register of Entails, and inserted in the subsequent investitures of the said lands and estates, and registered in the Books of Council and Session as aforesaid, and be as effectual to all intents and purposes as if the same had been inserted herein; declaring that any alteration or revocation of these presents shall not be inferred by implication or construction, but only from an express writing under the hand and seal recalling this present deed, or altering the same in whole or in

the exercise of this reserved power the entailer executed the said

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deed of alteration of heirs, by which he revoked and recalled the nomination of heirs contained in the said disposition and deed of entail, 'in so far as it calls to the succession the said Lieutenant-Colonel (therein designed Captain) James Hunter Blair, my eldest son, and the descendants of his body, whether male or female, and that in every branch of the said destination, in so far as under any of them the said Lieutenant-Colonel James Hunter Blair, or the descendants of his body, whether male or female, would have succeeded, the said Lieutenant-Colonel James Hunter Blair, and the descendants of his body, whether male or female, being now and for ever excluded from succeeding to the tailzied lands and estate under the said deed of entail as if they were dead, or should never exist; and the succession to the said tailzied lands and estate should devolve on the succeeding heirs of tailzie as if the said Lieutenant-Colonel James Hunter Blair, and the descendants of his body, whether male or female, were dead, or had never existed.' This deed of alteration contained an obligation on the heirs of entail to record the same in the Register of Tailzies, a power to the said Sir David Hunter Blair to alter or revoke the same, in whole or in part, at any time of his life, and a reservation of the whole powers reserved to the entailor, under the disposition and deed of entail; but no further exercise of these powers was made by him.

"The deed of alteration affected the whole destination in the entail after the entailor himself, and, in particular, removed from the succession one set of heirs called prior to the petitioner. That deed was therefore so far as the petitioner's right is concerned, an essential part of the entail in virtue of which he is in possession of the entailed estates.

"The entailor, though he recorded both deeds in the Register of Entails, did not expedite infestment thereon in his own favour; and on his death the petitioner made up a title by general service as heir of tail and provision under the deed of entail, in virtue of the deed of alteration and by notarial instrument in his favour, in terms of schedule K of the 'Titles to Land (Scotland) Act, 1858,' an extract of the disposition and deed of entail, and deed of alteration, with warrant of registration thereon, along with the notarial instrument, docquetted with reference thereto, having been recorded in the General Register of Sasines on 28 May 1859."

The Lord Ordinary appointed Mr William Macgillivray, W.S., as curator *ad litem* to the younger children of the petitioner.

The Lord Ordinary pronounced this interlocutor:—"Finds that the petitioner is not in possession of the entailed estates of Brownhill and Blairquhan and others by virtue of a tailzie dated prior to the 1st day of August 1848: Therefore finds that he has no title to insist in the petition, and dismisses the same, and decerns." *

* "NOTE.— . . . These being the facts of the case, the Lord Ordinary is of opinion that the petitioner is not heir of entail in possession of the entailed estates by virtue of an entail dated prior to 1st August 1848, and has, therefore, no title to insist in this petition. He thinks that the deed of 1840 and the deed of 1855 together constitute the existing entail of the estates. It will be observed that the deed of the deed of alteration was essentially to alter the destination of the entail. It removed therefrom one whole series of heirs called prior to the petitioner, and, but for the deed of alteration, he might never have been in possession of the estates. The petitioner has made up his title to the estates in virtue of both deeds, so that, in point of fact, he is in possession of them in virtue of both deeds. But if the Lord Ordinary is right in thinking that the deed of 1855 constitutes an essential part of the entail, then it cannot be affirmed that

The petitioner reclaimed, and argued ;—The date of the entail by which he held his lands was prior to 1st August 1848. All that was done by the deed of nomination was to strike out a series of possible heirs. It brought no new heirs into the destination. The first deed was the only title of the petitioner, and it contained all the proper clauses of a deed of entail. It was true that an heir might have come in by virtue of the second deed who might not otherwise have succeeded, but that would have been by virtue of the words “whom failing” in the first deed. The first deed was the only disposing deed, and although the second deed might destroy the rights of some heirs, it could give right to no new ones. It only provided that certain heirs should not succeed just as if those heirs had been dead. What would now require to be proved in the service of remoter heirs would not be the failure by death, but failure by the extinction of these rights by the entailer himself. There could be only one date of the entail, and that must be the date of the first deed.¹

The *curator ad litem* for the younger children argued ;—The petitioner held the estate in virtue of a tailzie dated subsequent to 1st August 1848. There might be a series of deeds constituting an entail, and the date of the last deed was the date of the entail, because the entail was not complete until the last deed was executed. But for the second deed some of the heirs called might never have succeeded, and as there could only be one date of the entail for all the heirs that date must be the date of the last deed.²

At advising,—

LORD PRESIDENT.—The Lord Ordinary has refused the prayer of this petition on the ground that the petitioner is not in possession of the entailed estates by virtue of a tailzie dated prior to the 1st day of August 1848, and the only question for our consideration therefore is—What is the date of the deed of entail?

The deed executed by the petitioner's father, Sir David Hunter Blair, by which he entailed the estates, was dated 27th August 1840, and was recorded in the Register of Tailzies 18th December 1847, in the granter's lifetime. If he had only that deed to deal with there could, I apprehend, be no question as to its answers to the description of a tailzie dated prior to 1st August 1848. If this deed contained a power of revocation and alteration, and in virtue of that reserved power the entailer executed another deed, dated 22d December 1856, and recorded in the Register of Tailzies on 17th January 1856—that is, a deed subsequent to 1848 ; and so, if the latter be held to be the true date of the

petitioner is in possession of the estates by virtue of an entail dated prior to 1st August 1848.

“The petitioner maintained that the deed of 1840, seeing that it contained conveyance of the estates and the whole fettering clauses of the entail, truly constituted the entail of the estates, and that the deed of alteration was only evidence of the petitioner's right to succeed under it, and the case of *Porterfield Shaw Stewart*, 23d September 1831, 5 W. and S., p. 515, was referred to in support of that proposition. The Lord Ordinary does not think that the case of *Porterfield* has any application to the present case. He thinks that the destination is an essential part of an entail, and that in this case it is only to be found in the two deeds taken together.”

¹ Riddell, Feb. 6, 1874, *ante*, vol. i. p. 462 ; *Padwick v. Stewart*, March 4, 1874, *ante*, vol. i. p. 697 ; *Porterfield v. Stewart*, Nov. 13, 1829, 8 S. 16, H. L. pt. 23, 1831, 5 W. and S. 515 ; *Kenny v. Taylor*, March 19, 1875, *ante*, vol. i. p. 636.

² *Fowler v. Fowler*, Jan. 28, 1869, 7 Macph. 420.

No. 54. entail, the Lord Ordinary's interlocutor is right—if the former, it must be altered.

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The petition is presented under the second branch of the 2d section of the Entail Amendment Act, which permits "any heir of entail, though born before the said 1st day of August 1848, being of full age, and in possession of an entailed estate by virtue of such tailzie dated prior to the said 1st day of August 1848, with the consent (and not otherwise) of the heir next in succession, being then apparent under the entail of the heir in possession, he, the heir-apparent, being born on or after the said 1st day of August 1848, and being of the age of twenty-five years complete at the time of granting such consent, and not subject to any legal incapacity, to acquire such estate in whole or in part in fee-simple by executing under authority of the Court an instrument of disentail as aforesaid, in the form and manner hereinafter provided."

Now, it appears to me that under this and the other clauses of the statute authorising disentailes the expression "date of the deed of entail," and the phrases that occur again and again, "dated prior to the said 1st day of August 1848" and "dated subsequent to the said 1st day of August 1848," are not in any technical sense, but are to be taken in their ordinary meaning, and that there is no peculiar legal construction to be put upon them. I can very well understand that there may be two deeds affecting the settlement of an entailed estate regarding which it may be very difficult to say which is the more important of the two. The estate may be entailed by a deed of entail containing a precept and procuratory of resignation, clauses irritant and resolutive, a disposition to a certain series of heirs, and all the other clauses requisite in an entail; and by a subsequent deed that first one may be so altered, though not revoked, that it is no longer valid to such an extent as to entitle it to be held the more important of the two. In such a case it may be very difficult to hold that the date of the first deed is the date of the entail. Probably in such a case, when the first deed is so far altered, the date of the last deed would be held as the date of the entail, as it contains the more important provisions.

But, on the other hand, I can easily understand this too, that a second deed may be executed which can hardly in any sense be said to affect the deed of entail. Suppose a destination to A and the heirs-male of his body, failing, to B and the heirs-male of his body, whom failing, to certain heirs afterwards to be named, whom failing, to C, and that a deed is afterwards executed by which the destination, left, as I may say, blank in the first deed, is filled up and a series of heirs named, I do not think that the date of any such subsequent deed as that could, in any reasonable sense, be said to be the date of the entail. No doubt this nomination requires to be looked to in order to complete the destination, but there is no conveyance of the estate, nor fetters the destination; it is really nothing more than a deed to fill up the blank in the destination in the first deed, and so render the first deed complete in accordance with the desire of the entailer. To hold otherwise would lead to the most anomalous results, because if the case of heirs claiming under the third branch of the destination in the deed I have supposed entitles an objector to say "I hold under a deed dated subsequent to August 1848," that objection would of course only apply to the heirs called under the third branch of the destination and if the date of the entail with reference to such an heir must be held to be subsequent to August 1848, what shall we say of the case of A and his heirs, B and his heirs, who take under the original destination without reference

deed of nomination at all? The result would be that persons taking the estate under the same deed of entail would be holding it the one under an entail created prior to 1848, the other under a deed dated subsequent to 1848. That decides me that it is not every deed affecting the principal deed of entail that will have the effect of bringing the date of the entail down to the date of the creation of the subsequent deed. In short, I take it that where the subsequent deed is only required to shew that the estate has devolved on a certain heir, and merely evidence that he is entitled to serve as heir, that deed is not such an integral part of the deed of entail as to alter its date.

Now, applying that to the present case, I find that this case differs only from that in which the second deed is a deed of nomination in this respect, that the second deed here is a deed of revocation striking out one branch of the destination and letting in the next branch to take the estate earlier than they would otherwise have taken. The conveyance in the original deed is first to the tailer's "eldest son, and the heirs-male of his body, whom failing, to his second son and the heirs-male of his body, whom failing," to various other heirs. Now, the deed of alteration and revocation simply strikes out the first branch. In point of fact, the eldest son was at this time dead, and the object of the deed is to prevent any possible issue of the eldest son from succeeding under the first deed, and merely to clear the way for the succession of the petitioner as the nearest heir of entail of his father. Now, is that a more unfavourable case than the case where the second deed is a deed of nomination for bringing the date of the first deed to be the date of the entail? On the contrary, I think it is a more favourable case. It is in virtue of the destination in the first deed that the petitioner takes; it is by the first deed that he is called to succession; his name is in the original destination, and in virtue of that destination he has taken the estate. If there had been any one to take under the first branch of the destination he would have been excluded by the deed of alteration, but the petitioner was heir of entail under the first deed, and therefore I am of opinion that the interlocutor should be recalled, and the petition referred to the Lord Ordinary for further procedure, on the footing that the deed of entail, by virtue of which the petitioner is heir in possession of these estates, is dated prior to 1st August 1848.

MR DEAS.—The deed of entail was executed on 27th August 1840, and recorded in the Register of Tailzies on 18th December 1847. The deed of alteration was not executed till 22d December 1855, and the question is whether the deed of alteration can be regarded as a new deed of entail, or has the effect of bringing the date of the entail. I am very clearly of opinion that it has neither the one effect nor the other, and I come to that conclusion on well established feudal principles in our law of conveyancing.

The deed of 1840 is complete in all its clauses, and it contains, *inter alia*, a reservation—"Reserving always full power and liberty to me at any time of me not only to make, revoke, alter, and add to the foresaid course and order of succession as to all or any of the heirs of tailzie and provision before specified, also to revoke and alter any of the conditions, provisions, restrictions, stipulations, exceptions, irritancies, declarations, reservations, and others before made in at my pleasure, and to recall this present disposition in whole or in part." Acting on this reserved power as regarded the course of succession, the tailer, by the deed of 1855, recalled the nomination of certain of the heirs

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No. 54. mentioned in the deed of 1841, leaving the nomination of the others standing as it did, the result of which, no doubt, was to bring in the petitioner at a time when he would not otherwise have come into the succession.

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But the petitioner has nevertheless succeeded under the dispositive clause of the deed of 1840. There is no dispositive clause in the deed of 1855, as it does not require to be. It was the very object of the reserved power to enable the entailor to vary the destination without, in other respects, varying or altering the deed of entail. The effect of striking out certain of the nominees would leave the dispositive clause as if they had never been in, and if, in place of the entailor had added others, the effect would have been the same as if others had been in *ab initio*. This is a fundamental principle in the law of entail. There is here but one deed of entail, and that deed is prior to 1st August 1848. I am therefore of opinion that the interlocutor of the Lord Ordinary must be altered.

LORD MURK declined, as being an heir of entail under the deed.

LORD SHAND.—I concur with your Lordships in holding that the petitioner is entitled, with the consent of his eldest son, the heir-apparent next in line to the entailed estates, to have the estates disentailed under the authority of the Court, as prayed for in the petition.

The petitioner's right depends on the meaning of the words "any deed dated prior to the said 1st day of August 1848," occurring in the 2d section of the Entail Amendment Act of that year. In the 1st section referring to deeds dated after 1st August 1848 the words used are, "where any estate in Scotland shall be entailed by a deed of tailzie dated on or after the said 1st day of August 1848." It appears to me that the words "tailzie" in the 2d section, and "tailzie" in the 1st, are used to designate that instrument or deed by which an entail has been created,—the deed of conveyance executed by the proprietor reserving the destination, and the fettering clauses, or the equivalent conveyance registered in the Register of Tailzies, and which is the origin or foundation of the subsequent investitures of the institute and substitute.

In the present case the only deed which answers this description is the deed of entail by the petitioner's father, dated 27th August 1847, and recorded in the Register of Tailzies in December 1847. If that deed had regulated the subsequent investitures there could be no question of the rights of the heirs of entail under the Entail Amendment Act would be maintained that the effect of the deed of alteration executed under the reserved power by the entailor by which he struck out of the destination the body of his eldest son, was to alter the date of the tailzie, and the entailor and the heirs of entail thereafter hold the estates under a deed dated after August 1848, viz., in December 1855, when the deed of alteration was executed. I am of opinion that this view is unsound. It is true that the deed of alteration has had a material effect on the petitioner's right, or at least it may be assumed to have had such an effect in calling him to the succession as the heir-male of the body of his elder brother, if such heirs existed; but this to be so, the deed of entail under which he holds the estate is the original instrument of 1840, containing the only conveyance of the estate, and the conditions, prohibitions, and fettering clauses by which his position

and defined. The execution of a deed of alteration affecting a part of the No. 54.
 then leaves the original deed operative as the only deed containing the
 substance of the estate and the substance of the entail. It can have no effect Jan. 24, 1877.
 before the date of the original instrument. In ordinary as well as in legal Blair.
 sense the first deed is well described as the deed of entail dated in 1840,
 the later deed as a deed of alteration dated in 1855. It is said the second
 is an essential part of the petitioner's title, and so to him an essential part
 of entail. In a sense it may be admitted this is true. The later deed, im-
 mune though it be, operates, however, not by cutting down or superseding the
 deed of entail, but by taking that deed as a good and subsisting entail and
 the modification only of one of its clauses. However important the deed
 may have been as affecting the destination in the deed of entail so
 as to alter the petitioner's right of succession, it leaves the estate subject to
 the deed as the instrument which conveys the estate, which prescribes
 the terms under which the estate is to be held, and the destination which
 it has effect, except in so far as altered; and that original deed, in my
 opinion, retains, therefore, the instrument or deed of tailzie under which the
 estate is held within the meaning of the statute. It would be otherwise if any
 alteration effected on an entail were carried out, not by a deed of the description
 above, but by a deed revoking or superseding the original entail,
 creating a new conveyance. In that case the new conveyance would
 be the creation of a new entail and the origin of the subsequent
 alterations, and would therefore become the tailzie, the date of which is
 fixed in the statute. The present case, however, is not one of that kind;
 I am of opinion that the execution of the deed of 1855, affecting the
 estate only in the original deed of tailzie, left the estate, in the meaning of
 the statute, in the position of being held under the original deed or instrument
 of 1840, and so under an entail dated prior to 1st August 1848.

THE COURT pronounced this interlocutor:—"Recall the interlocutor:
 Find that the petitioner is the heir of entail in possession of the
 estates of Brownhill and Blairquhan and others, by virtue of a
 tailzie dated prior to the 1st of August 1848; and remit to the
 Lord Ordinary to proceed further in the matter of this petition in
 accordance with the above finding."

A & A. CAMPBELL, W.S.—LINDSAY, HOWE, TYTLER, & Co., W.S.—Agents.

JOHN TAINSH, Pursuer.—*Lord-Adv. Watson—Balfour.*
 MAGISTRATES OF THE BURGH OF HAMILTON, Defenders.—*Asher—*
R. V. Campbell.

No. 54a.

Jan. 24, 1877.
 Tainsh v.
 Magistrates of
 Hamilton.

of Guild—Jurisdiction—Dean of Guild Jurisdiction of Police Magis-
trates for the General Police Act, 1862, sec. 408.—Held (by Lord Curriehill)
 under the 408th section of the General Police Act, 1862, 25 and 26 Vict.
 the magistrates of police of Hamilton, a burgh of regality which had
 before that Act, possessed the powers and jurisdiction relative to buildings
 belonging to the Magistrates or Dean of Guild of a royal burgh in Scotland.

In 1875 the magistrates and town-council of the burgh of Hamilton, Outer-House.
 had previously adopted the whole of the General Police Act of Ld. Curriehill.
 25 and 26 Vict. c. 101, resolved in virtue of the powers conferred Mr Shield,
 Clerk.

No. 54a. by sec. 408 of that Act* to establish a Dean of Guild Court. They subsequently published rules for regulating the procedure thereof, and appointed a clerk and assessor and a procurator-fiscal.

Jan. 24, 1877. Tainsh v. Magistrates of Hamilton.

In 1876 John Tainsh, a proprietor of ground in the burgh, having proceeded to erect a house without applying to the said Court, the procurator-fiscal presented a petition for and obtained interdict from the magistrates in their Dean of Guild Court. Tainsh having proceeded with the building was fined for breach of interdict and contempt of Court.

He then raised the present action of declarator, reduction, and damages against the provost and magistrates of the burgh of Hamilton, the town clerk of the burgh, and the superintendent of police, concluding—(1) That they have it declared that no Dean of Guild Court exists, or has ever existed in the burgh of Hamilton; that neither the defenders, nor any of the burgh authorities, are entitled to establish a Dean of Guild Court in the burgh, or to promulgate or enforce rules of procedure in such Court, or to exercise the powers of jurisdiction of a Dean of Guild Court relative to buildings, or to interfere with the erection of buildings by the inhabitants in the manner specified in the summons; that the rules promulgated by the defenders are *ultra vires* of them, and not binding on the pursuer or any other person, and that the pursuer and all other persons, owners of property within the burgh, are entitled to build thereon, on compliance with the requirements of the 202d, 204th, and 205th clauses of the Act of 1862: (2) For reduction of all the proceedings in the present action of interdict and breach of interdict already referred to: And (3) For damages in respect of the stoppage of his building operations.

The defenders maintained that the proceedings referred to were incompetent, and asked absolvitor—(1) In respect that the burgh of Hamilton is a royal burgh; and (2) That assuming the burgh not to be a royal burgh, it is a burgh of regality, and a parliamentary burgh, and not such, having adopted the General Police Act of 1862, it was and is entitled to exercise through its magistrates the functions and jurisdiction of a Dean of Guild Court as if it had been a royal burgh.

The pursuer maintained that sec. 408 did not confer the *ædile* jurisdiction of a Dean of Guild, but merely a sort of police jurisdiction to punish persons charged with certain petty police offences.

The Lord Ordinary, on 16th November 1876, held that Hamilton was not a royal burgh, but upon the second ground of defence absolved the defenders from the whole conclusions of the summons.*

BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—MORTON, NEILSON, & SMART, W.S.—AGGERS.

* Sec. 408. "The magistrates of police of a burgh under this Act, or any or more of such magistrates, . . . shall have all such and the like jurisdiction within such burgh as any magistrates of a royal burgh, or any dean of a royal burgh, has by the law of Scotland within the royal burgh in or to which he acts as such magistrate or dean of guild."

* "NOTE.— . . . It seems to be clear that the magistrates of the burgh, as magistrates of police, are entitled under section 408 to the same oversight of buildings that the Dean of Guild of Edinburgh, or of any other royal burgh, has in the royal burgh of which he is Dean of Guild. Now, it cannot be disputed that the Dean of Guild of a royal burgh is entitled not only to prevent the owner within burgh from building so as to encroach upon the ground of his neighbours, but also to prevent the erection or structural alteration of any building, unless and until by the exhibition of proper plans, and, if necessary, personal inspection, he is satisfied that the building may proceed with safety to the community. But further, section 408 of the Act confers on the magistrates the same jurisdiction in every respect as is or may be exercised not only by the Dean of Guild, but by the magistrates of any royal burgh. Now, it cannot

GEORGE DUN, Pursuer.—*Lord-Adv. Watson—Scott.*

JOHN BAIN, Defender.—*Balfour—Mackintosh.*

No. 55.

Jan. 24, 1877.

Dun v. Bain.

Reparation—Slander—Innuendo—Issue.—A writer in a newspaper article, professing to describe a visit, after an absence of twenty years, to a farm belonging to a charitable trust, stated—"The fields, which once yielded useful, various, plentiful crops, are now redolent with whin and broom, and betoken the sense of the sluggard." . . . "In short, turn we where we may, the most rant abuse of fields, gardens, orchards, policies, house, and farm-steading is present. We did not ask who farmed the soil, occupied the house, or used the steading, as enough existed to shew that, be he who he may, he is barely worth a place on this fair earth." "The stable and offices . . . bear traces of the most manifest indolence and destructiveness, carelessness and recklessness." "As a matter of course, time works changes; but the short space of sixty years would never have wrought such devastation had the keeping of the place been entrusted to honest, careful, and persevering hands." In an action of damages for slander brought against the writer by the tenant of the farm the pursuer averred that the statements in the article referred to, and falsely and calumniously represented him as "a sluggard, and dishonest as a tenant in the management of said farm, and also as indolent, and neglective, and careless, and reckless in said management and in his business as farmer, and that he has abused and neglected the said farm occupied by him in such a way that he, the pursuer, is barely worth a place upon the earth." He held that the pursuer was entitled to an issue "whether the said article, or thereof, is of and concerning the pursuer, and falsely and calumniously represents the pursuer as being dishonest, or makes similar false and calumnious imputations of and concerning the pursuer, to his loss, injury, and damage." Lord Shand dissenting, on the grounds (1) that the article did not contain a charge of dishonesty against the farmer; and (2) that the innuendo in the issue stated was different from the innuendo upon the record.

It is held that in royal burghs where there is no Dean of Guild the magistrates are entitled to exercise the authority of Dean of Guild. This is laid down by Bankton, iv. 20, sec. 7, where he says:—"In some burrows there is no dean of guild. In such cases those matters that belong to the Dean of Guild Court are within the cognizance of the magistrates, with advice of the council, to whose jurisdiction that of the dean of guild is understood to be annexed, where by the constitution of the burrow no separate Guild Court is established." Erskine also, 2, ix. 10:—"Where the usage is not fixed, the Dean of Guild or other magistrate charged with the police appears to be trusted with a discretionary power of directing the buildings within burgh, subject to the review of the Court of Session." And the law as stated by Bankton and Erskine is fully recognised by the opinions of the Judges in the case of Milne, 4 D. 3, Lammond v. Cumming, 12 W. 784. Indeed, so necessary is it that some such jurisdiction as that exercised by the Dean of Guild in royal burghs should be exercised by the magistrates or governing bodies of populous places, such as burghs of barony and burghs, that the Court has held that the magistrates of Paisley, a burgh of barony, who had immemorially exercised the jurisdiction as to buildings which a guild could have exercised in a royal burgh, were entitled to continue to do so.—Neilson, 7 Sh. 182. And I think that the intention of the Legislature in enacting sec. 408 of the General Police Act of 1862, was to confer upon the magistrates of all burghs of every kind which adopted the system of adiale jurisdiction, which, in the case of Paisley, a burgh of regality, the magistrates had acquired by usage. I am therefore of opinion that the magistrates of Hamilton were entitled to constitute themselves a Dean of Guild, and to issue and enforce the rules mentioned in the declaratory conclusions of the summons. It is indeed asserted in one of the pleas in law for the defender that these rules are unusual and unreasonable; but this point was not insisted on at the debate, and I must say that these rules do not appear to be either unusual or unreasonable."

No. 55.

Jan. 24, 1876.
Dun v. Bain.1st Division.
Ld. Craighill.
M.

THIS was an action of damages for slander brought by George Dun, farmer in Brooklands, Kirkcudbright, against John Bain, Stranraer. The pursuer averred;—(Cond 1) "The pursuer, George Dun of Bradedden, a farmer at Brooklands, in the parish of Kirkpatrick-Durham and stewartry of Kirkcudbright. He has been tenant of the lands and of Brooklands for sixteen and a half years, and his lease thereof expired Whitsunday 1879. The defender, John Bain, resides in Hanover Stranraer, in the county of Wigton." (Cond. 2) "On 28th June 1876, defender wrote and caused to be published in the 'Dumfriesshire Galloway Herald and Register' of that date an article entitled 'A Visit to Brooklands, parish of Kirkpatrick-Durham, Kirkcudbrightshire,' which was in the following or similar terms:—'After an absence of twenty years, we paid a visit to the land of our early associations. I looked in vain for the happy scenes that had gladdened us in the days yore. Not a vestige was left of what once beamed comfort and happiness. All was gone, and the ruthless hand of the destroyer had laid to his work of destruction, and the scene was changed. . . . The once beautiful and well-kept laurel and other evergreens were in a state of moral decay. The avenue is overgrown with moss and grass, and she points her iron fingers to the devastating work she has so determinedly carried out. The hedges which grew and thrived so well are everywhere and there broken down, as if for the convenience of the ingress and egress of cattle to and from the pasture. The snowdrops and lilies which beautified the place twenty years ago seem to have undergone the process of "thinning." . . . The fields which once yielded useful, and plentiful crops are now redolent with whin and broom, and bear the presence of the sluggard. The garden, once the pride of the estate, a joy of life, has all but fallen into disuse. The stables and office-houses at the farm-stead, at one time extravagantly and elegantly fitted and tastefully arranged internally and externally, bear traces of the manifest indolence and destructiveness, carelessness and recklessness. . . . short, turn we where we may, the most flagrant abuse of fields, gardens, orchards, policies, house, and farm-stead, is apparent. We did not know who farmed the soil, occupied the house, or used the farm-stead, but enough existed to shew that, be he who he may, he is barely fit to place on this fair earth. . . . A more glaring corruption of the place was once a privileged place, of what was once an enchanting home, what once possessed all the endearments of a delightful country residence have been obliterated. As a matter of course, time works change, but in the short space of twenty years would never have wrought such deterioration had the keeping of the place been entrusted to honest, careful, persevering hands. Let us ask who is to blame for all this? It is known that the estate of Brooklands was committed to a trust. It comes to us to ask in all faithfulness if this trust has done its duty. We fear if they (the trustees) were "weighed in the balance they would be found wanting." This is a public trust, and we will be excused if we put the question as above in all frankness, and in an honest, candid manner. The revenue of the estate was to be devoted to the education and bringing of orphan children, not children connected with the parish, but those belonging to Scotland and England throughout, and we are right if we ventilate the grounds of our complaint, by asking if the essence of the trust has been preserved? We write from no personal motives, malignant or vindictive spirit. The matter is a public one, and the public in justice ought to have the whole affair thoroughly sifted. Now that we have written freely on the matter, we trust the public will not agitate the question till such times as the issue is favourably divulged."

The third article, as amended in the Inner-House, was—(Cond. 3) "The id article, and the statements made therein, or some of them, have reference to the pursuer, and to the farm of Brooklands occupied by him, and sely and calumniously represent that the pursuer is a sluggard, and dishonest as a tenant in the management of his said farm, and also as in-lent, and destructive, and careless, and reckless in said management d in his business as a farmer, and that he has abused and neglected the d farm occupied by him in such a way that he (the pursuer) is barely rth a place upon the earth, or contain representations in reference to : pursuer in regard to his management of said farm, and in his business a farmer, of the same or a similar kind, and equally false and calum-nias. The said representations were calculated to injure and did injure : pursuer in his business as a farmer. They will tend to prevent him aining the same or another farm when his present lease expires at tuesday 1879."

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The defender admitted that the article was written and published by m, and explained "that the statements of fact in the said article were me, and that the comments thereon were fair comments upon a public mter, and were made without malice, and in the discharge of a public ny."

The defender pleaded ;—(1) The averments of the pursuer are not rele- at to support the conclusions of the action. (2) The said article does t import any slander of the pursuer, and, *separatim*, the same is privi- ed, and having been written and published without malice, the defender ntitled to absolvitor.

The Lord Ordinary approved of the following issue :—"It being ad- ded that, on or about 28th June 1876, the defender, John Bain, wrote caused to be published in the 'Dumfriesshire and Galloway Herald d Register' of that date the article contained in the schedule hereunto nered. Whether the said article, or part thereof, is of and concerning e pursuer, and falsely and calumniously represents that the pursuer was luggard, and so careless and hurtful in his management of the farm of ooklands, in the stewartry of Kirkcudbright, of which the pursuer is the ant, as to be dishonest in the matter of the obligations incumbent on n as the tenant of the said farm, or makes similar false and calumnious ecentations of and regarding the pursuer, to his loss, injury, and age? Damages laid at £500."

The pursuer gave notice of a motion to vary this issue, and proposed following issue (the admission being the same as in the issue approved y the Lord Ordinary) :—"Whether the said article, or part thereof, is and concerning the pursuer, and falsely and calumniously represents t the pursuer was a sluggard, and was not honest and careful in his egement of the farm of Brooklands, in the stewartry of Kirkcudbright, hich the pursuer is the tenant, and that the pursuer had so flagrantly ed and destroyed the whole subjects comprehended in said farm as e barely worth a place upon the earth, or makes similar false and umnious representations of and regarding the pursuer, to his loss, in- y, and damage?"

Argued for the pursuer;—There was here a general charge of dishonesty inst the person who occupied the farm of Brooklands. The pursuer's e of the farm would shortly terminate, and the article would render it eult for him to get another farm.

Argued for the defender;—There was no proper charge of dishonesty the article. The word "honest" no doubt occurred, but in such a con- tion as to shew that the meaning was not "active" or "diligent," and : the ordinary sense of the word. The observations referred rather to the

No. 55. management of the trustees of the charity, who were the pursuer's landlords, than to the pursuer. If this was a slander at all, it was in a matter of the pursuer's business. Any one interested was entitled to say that a tradesman conducted his business badly.¹

At advising,—

LORD PRESIDENT.—I am of opinion that the following should be the issue in the trial of the case :—

"It being admitted that, on or about 28th June 1876, the defender, John Bain, wrote and caused to be published in the 'Dumfriesshire and Galloway Herald and Register' of that date the article contained in the schedule hereto annexed:

"Whether the said article, or part thereof, is of and concerning the pursuer and falsely and calumniously represents the pursuer as being dishonest, or makes similar false and calumnious representations of and concerning the pursuer, to his loss, injury, and damage?"

LORD DEAS and LORD MURE concurred.

LORD SHAND.—I am unable to agree with your Lordships, and the ground of my difference of opinion is shortly this, that I do not think the article complained of, on any reasonable construction of its terms, will bear the innuendo put to it either in the issue as now framed or in the record. The general nature of the article is a statement by the writer of his present observations and feelings, looking in view his early recollections of the estate of Brooklands. It is in high-flown, absurd, and incongruous language—language so absurd that it may, I think, have been well passed over as unworthy of notice. The utmost that, in my opinion, can justly be said of it is, that the farm is represented as being in a state of decay, and allowed to go to ruin. The imputation is one of negligent, slovenly, and reckless farming. It may possibly be said that there is a charge against the tenant that he has violated or failed to fulfil the stipulations contained in his contract with the landlords. It has not been seriously maintained that these imputations will support an issue. The charge complained of in the issue is one of dishonesty; but I confess I see nothing in the article to show that the writer meant to impute fraud or dishonesty. The passage found fault with is that in which it is said that matters would have been different "had the keeping of the place been entrusted to honest, careful, and persevering hands." But that phrase occurs where the neglect of the farm is the only subject of observation or discussion; and, in my opinion, by no straining can it be made to mean more than that the farm was not honestly or diligently laboured,—in other words, that care, perseverance, and honest labour were wanting to bring it into a state of proper cultivation. If the pursuer had asked for an issue on the innuendo that the article charged him with bigamy, or forgery, or theft, he would have asked an issue so obviously extravagant as to be inadmissible. The difference in the innuendo here put. It is a difference in degree only. The issue puts so unreasonable and forced a construction on the article that I think it ought not to be given.

The issue is, I think, open to the additional objection, that, as now framed, the innuendo differs from that put upon the record. The imputation complained of on record is that the pursuer is "dishonest as a tenant in the management of his farm," which, as I understand the language, means dishonest towards

¹ Broomfield v. Greig, March 10, 1868, 6 Macph. 563, 40 Scot. Jur. 299.

diords. The issue now adjusted substitutes for this a charge of general dishonesty, not as a tenant, but as a man in his ordinary dealings. I put it to the pursuer's counsel during the argument whether he could point to any word or expression in the article to support a charge of general dishonesty, and he failed to do so. I think the issue should not be given, and that the article complained of is not actionable at the pursuer's instance.

THE COURT pronounced an interlocutor approving of the issue proposed by the Lord President, and finding no expenses due since the date of the Lord Ordinary's interlocutor.

W. S. STUART, S.S.C.—PEARSON, ROBERTSON, & FINLAY, W.S.—Agents.

JAMES BENNETT, Pursuer.—*Guthrie Smith—Alison.*

JAMES PLAYFAIR, Defender.—*J. C. Lorimer.*

No. 56.

Property—Urban Tenement—Servitude—Common Interest.—Two conterminous proprietors of houses and building stances in a street had under their titles, derived from a common author, a right of free ish and entry to their respective subjects by means of a meuse lane at the back. Held that the one proprietor was not entitled to build a shop over the lane opposite his ground converting it into a covered passage.

JAMES BENNETT and James Playfair were proprietors of conterminous holdings of ground and houses in Holland Place, Glasgow. A meuse lane, eight feet wide, ran at the back of the subjects parallel to the street, the titles of Bennett and Playfair, which were derived from a common author, contained a grant of free ish and entry to the respective subjects of the meuse lane, which the titles declared to be the eastern boundary of each property.

Playfair, who had two steadings, after obtaining a decree of lining in the Dean of Guild Court, built a joiner's shop over the lane opposite the whole length of his stading, upwards of fifty feet, leaving a passage below ten feet high. The whole length of the lane was about ninety-eight feet. Bennett raised this action, concluding for reduction of the decree of the Dean of Guild Court, and declarator that the defender had no right to erect any building over the lane, and for interdict and removal of the shop. The defence was that the pursuer's right of ish and entry was not infringed with.

The Lord Ordinary pronounced this interlocutor:—"Sustains the reasons of the pursuer; repels the defences; decerns in terms of the reductive and declaratory conclusions of the libel: Interdicts, prohibits, and discharges the defender from, and decerns: Further, decerns and ordains the defender forthwith to take down and remove a joiner's workshop or premises, or other building or structure erected by him upon, above, or across the lane mentioned in the summons, at or near the south end of, and all other buildings or structures of any kind erected by him upon, above, or across any part of said lane: *Quoad ultra* continues the decree: Finds the pursuer entitled to expenses," &c.*

*NOTE.—The properties of the pursuer and defender are derived from a common author. They lie between Holland Place and a meuse lane, which, in several dispositions, is given as the boundary on the east. In the titles it is declared that the pursuer and defender shall have free ish and entry to their respective premises by this meuse lane.

The defender has erected over this meuse lane an archway of the entire width of his property, and eleven feet high. The length of the arch is about forty-five feet. The defender does not pretend that he has any right of

No. 56.

Jan. 24, 1877.
Bennett v.
Playfair.

The defender reclaimed, and argued;—The pursuer had a bare right of servitude, which was not interfered with. There was no common interest which was the ground of decision in previous cases where such building had not been allowed.¹

LORD PRESIDENT.—I have never met with a more extravagantly untenable contention than that maintained by the defender. A meuse lane runs between these houses, eight feet wide and apparently ninety-eight feet long. By the titles each of the parties have the use of the lane as an access to their property, and neither of them has any other right to it.

The defender has built over the portion opposite his own steadings about three feet in length, so as to convert the greater part of the open lane into a wall ten feet in height, and this he maintains he is entitled to do because the pursuer has no right but one of access, which it is said is not interfered with. I am very clearly of opinion that the defender's operations are utterly illegal.

LORD DEAS.—This is really not a debateable question. The parties have each the same kind of right, whatever that may be. I am disposed to think it is a right of common interest, because both parties are bound to pave and maintain the lane, precisely as proprietors on both sides of a street are bound to pave and maintain the street, which affords one of the most familiar instances of common interest.

But it does not matter whether the right is a right of common interest or a right of servitude. Each has a right of precisely the same kind, and one party is no more entitled to interfere with the enjoyment of the other in a mutual right of servitude and the mode of exercising it than he has to interfere with his neighbour in a right of common interest. A covered way or tunnel which excludes wholly or partially the light and air may or may not be preferable for some purposes, but certainly is not the same with an uncovered passage.

LORD MURE and LORD SHAND concurred.

THE COURT adhered.

CAMPBELL & SMITH, S.S.C.—D. J. MACBRAIR, S.S.C.—Agents.

No. 57.

Jan. 24, 1877.
Bowman v.
Wright.

WILLIAM BOWMAN, Pursuer.—*Asher—Pearson.*

WILLIAM WRIGHT, Defender.—*Balfour—Alison.*

Foreign—Jurisdiction—Proprietor of Scotch Heritage.—Held that the jurisdiction of the Scotch Courts, founded on proprietorship of heritage in Scotland, ceases when the proprietor grants an absolute conveyance of the subjects, although he has not been feudally divested.

A domiciled Englishman, proprietor of a house in Scotland, in whose

property in the lane, nor does he dispute that the pursuer is entitled to 'pass and entry' by means of it. But he maintains that the arch does not interfere with the pursuer's rights, and that the pursuer has therefore no right to object to it.

"The Lord Ordinary thinks that the defender is wrong. The pursuer is entitled to access to his property by means of the meuse lane. To convert the lane by an arch is, in the opinion of the Lord Ordinary, to interfere with this right of access. As he reads the titles it was intended that the lane should be by an open lane, and the arch would make some legitimate use of the lane impossible."

¹ Mackenzie v. Carrick, Jan. 27, 1869, 7 Macph. 419, 41 Scot. Jur. Glasgow Jute Co. v. Carrick, Nov. 5, 1869, 8 Macph. 93, 42 Scot. Jur. 419.

side), sold his house and removed to England. He signed a disposition of the property on 30th March, which was delivered to the purchaser on 1st April, giving the date of the purchaser's entry. A summons was served on him on 4th April, by leaving a copy and citation at the house where he had been resident within forty days. The disposition was not recorded by the purchaser till 6th April. *Held* that at the date of citation the Court had no longer jurisdiction over the defender in respect of proprietorship of heritable property in Scotland. No. 57. Jan. 24, 1877. *Bowman v. Wright.*

THE following narrative is taken from the opinion of the Lord Justice-Clerk:—"The circumstances of the case are these: The pursuer is an architect in Greenock, and in November 1872 he was engaged by the defender, Mr Wright, to erect for him at Pollockshields a semi-detached house according to plans to be prepared by him and approved by the defender. The work was performed, and for the balance of the price this action has been raised. 2D DIVISION. Ld. Craighill. 1.

"Before, however, the summons was served on the defender he had moved to England. He was by birth an Englishman, and is now again domiciled Englishman, residing in London.

"Before he left Scotland he had sold the villa which the pursuer had built for him. The disposition was signed on the 30th March and delivered to the purchaser on the 1st April 1876. The latter day was the date of the purchaser's entry to possession. The disposition was recorded in the Register of Sasines on 6th April.

"The summons in this action was signeted on 3d April, and on the following day was served by leaving a copy at the villa in question, where the defender had last resided in Scotland, and that within forty days prior to the service.

"The defender had no other heritable property in Scotland at the date of citation, and he has not acquired any since."

The defender pleaded;—(1) The defender not being subject to the jurisdiction of the Court of Session, and, in particular, not having had a domicile nor heritable property in Scotland when this action was raised, the action ought to be dismissed.

The Lord Ordinary repelled this plea.*

The defender reclaimed, and argued;—Though the defender had been

*NOTE.—The question which has been decided is this: The defender was owner of the villa referred to on the record. On 30th March last he disposed of it, with entry as at 1st April, and on 6th April the disposition was recorded. In the interval, however, betwixt 30th March and 6th April the action was raised, and consequently it has come to pass that the plea of no jurisdiction—which is the plea repelled by the foregoing interlocutor—has been presented. The Lord Ordinary is of opinion that this plea cannot be allowed. The defender might have sold the property, or leased the property, charged the property with debt, to any one ignorant of the disposition still unrecorded, and this consideration the Lord Ordinary thinks is enough to shew in the sense in which the words are received, when the application of the law that possessors of heritable estate in Scotland are subject to the jurisdiction of the Scotch Courts is the point to be decided, the defender, notwithstanding the granting of the disposition, continued till it was recorded the possessor of the property. Authorities were cited on both sides at the debate. The defender referred to Erskine, 1, 2, 16, and to Fraser v. Fraser, 8 Macph. p. 400. The pursuer founded on 1 Hunter on Landlord and Tenant, 3d ed., p. 87 (2d ed. p. 81), Bell's Principles, 1181, 1 Bell's Com. (5th ed.) p. 66, and Kirk v. Irvine, 16 S., p. 1200. All that the Lord Ordinary has to observe in these is, that the authorities adduced by the pursuer at least go the length of sustaining the jurisdiction of the Court in this case, the Lord Ordinary is of opinion, and that those brought forward by the defender are not inconsistent with the judgment which has been pronounced."

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proprietor of Scotch heritage, he had divested himself prior to action being raised, which was on 4th April. He had signed the disposition on the 30th March, and given the purchaser entry on 1st April, nothing more was required of him, nor could he personally do any more to sever his connection with the property. He had no power the recording of the disposition, which the purchaser might delay at pleasure. In truth, this was an attempt to make two parties subject to the jurisdiction of the Scotch Courts, in respect, not only of the subject, but of the same right in the same subject, viz., the full right in the property. The foundation of the rule was that heritable property in a fixed subject which could be made available to satisfy the judgment. But that element was wanting here. The defender was totally divested of the delivery of the disposition, and though a bare infeftment stood in his person he had no right or interest in the property which he could make available, except by gross fraud.¹

Argued for the pursuer;—The disposer of heritable property remains absolute owner until divested by registration of the disponee's infeftment.² It was undoubtedly law that the disponee's right, so long as he left it without the protection of the register, could be defeated by a completed adjudication. This was a sufficient test of the right which remained in the disposer, and shewed it was sufficient to found jurisdiction. It was, at any rate, quite as substantial a right as that of a superiority defeasible at the will of the disposer, which had been sustained as a ground of jurisdiction.³ The principle, which jurisdiction in respect of heritable property was founded on, was that the property was a subject which might satisfy the judgment, that the bare connection with land in Scotland inferred allegiance to the sovereign, as superior thereof, and subjection to the Courts established therein. It rested just as much on a fiction as jurisdiction founded on arrestment. And there was no necessity for any more substantial ground of property in the one case than in the other.

At advising,—

LORD JUSTICE-CLERK.—This case raises a question of some importance as to jurisdiction. The Lord Ordinary has sustained the jurisdiction of the Court over the defender, who now disputes the correctness of that judgment.

The circumstances of the case are these :—(After stating the facts as above.) The question is, whether the right or interest which the defender had in the house in question at Pollockshields at the date of citation is sufficient to found jurisdiction over him in this Court.

The Lord Ordinary has repelled the plea of no jurisdiction, on the authority of a variety of cases, in which it was held that a real right in heritable property in Scotland, however slight and valueless that right may be, is sufficient to constitute jurisdiction, and he has held that this case falls under that rule. I am, however, of opinion that we have no jurisdiction here, and that

¹ Ersk. 1, 2, 16, and 18; *Ferrie v. Woodward*, June 30, 1831, 9 S. 854, 14 Scot. Jur. 563; *M'Arthur v. M'Arthur*, Jan. 12, 1842, 4 D. 354, 14 Scot. Jur. 563; *Fraser v. Fraser and Hibbert*, Jan. 14, 1870, 8 Macph. 400, 42 Scot. Jur. 521; *Kirkpatrick v. Irvine*, June 23, 1838, 16 S. 1200, 10 Scot. Jur. 521, 23, 1841, 2 Rob. 475, 14 Scot. Jur. 666.

² *Hunter, Landlord and Tenant*, 4th ed. 1, 87; *Bell, Com.*, 5th ed. 1, 107.

³ *Lord Corehouse in Kirkpatrick v. Irvine*, June 23, 1838, 16 S. p. 1200, 10 Scot. Jur. 523.

ation is ineffectual, the defender having no heritable property in this country, No. 57.
her at the date of citation or now. True, there was in the person of the
fender an infestment standing on record, on the faith of which a second pur- Jan. 24, 1877.
aser might have bought or a tenant might have taken a lease. But the 'juris- Bowman v.
tion founded on the title to heritable property within the kingdom rests not Wright.

a fiction, but on a reality. It is not like jurisdiction founded by arrestment
the debtor's moveable property, which is a fiction introduced for the benefit
commerce. This is clearly pointed out in the case of Cameron v. Chapman,¹
which Lord Corehouse distinguishes between these two kinds of jurisdiction—
jurisdiction which arises from the arrestment of moveables, and of which the
ester alone can avail himself,—and the more general jurisdiction which arises
in the mere proprietorship of heritable property in Scotland.

The only question, therefore, is, was Wright proprietor at the date of citation
any heritage within Scotland, for it is admitted that he has acquired none
and I am of opinion that he was not, for he had sold what he previously
ed, and the right to it was vested in the purchaser, so far at least as he, Wright,
was concerned. I do not think that it matters that under the Act of 1617, cap.
1, the disponee's right might have been evacuated in favour of a second *bona*
purchaser first infest, or might have been burdened by a lease granted
at the date of the disposition. These are rights which the Legislature has
right proper to confer on *bona fide* purchasers, taking advantage of our
system of registration, and upon tenants, but not rights remaining in the original
owner, who has done all he could to divest himself. It comes to this, that any-
thing which the defender could have done to affect the property would not have
been the exercise of a right but the commission of a fraud, and the power to affect
property by the commission of a fraud cannot be treated as a right of property.
Being thus of opinion that this matter is to be looked on according to the
letter and substance of the thing, I am clear that we have no jurisdiction over
the defender, and have no alternative but to dismiss the action. His creditor
may sue him in his proper *forum*.

LORD ORMDALE—The question for the determination of the Court in this
is whether there is jurisdiction over the defender. The pursuer maintains
that it is, in respect that at the date of raising the action the defender had
heritable property, consisting of a villa and some relative ground, in Scotland.
The other hand the defender denies that when the action was raised he had
heritable property in Scotland, the villa and ground referred to having been
previously sold by him.

It cannot be disputed that the fact of a person having heritable property in
Scotland is sufficient to give jurisdiction over him in this Court, not only in all
actions relating to that property, but generally in all actions of a merely pecuniary
nature. The same rule applies to jurisdiction founded by the arrestment of
moveable funds or estate. And the jurisdiction, either in respect of the de-
fender having heritable property, or of his moveable funds or estate being arrested
under the *edictio fundandæ causæ*, is not limited to the heritable property or to the
estate so arrested, but is general, and will sustain pecuniary actions to any amount.
It is of any consequence that the heritable subjects or the arrested funds,
of small or trifling value or amount. It is enough that there is some herit-

¹ March 9, 1838, 16 S. 907, 10 Scot. Jur. 343.

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able property or some arrested funds, however small or trifling. The principle upon which the rule has been recognised is that where there is property, funds, or effects fixed within the jurisdiction which, although not immediately brought into question by the action, and wholly incommensurate with the claim sued for, may be affected by the judgment or decree to be pronounced, that is enough to constitute jurisdiction. And provided there is jurisdiction constituted in one of the ways now explained against a defender, it is of no consequence that he is a foreigner, and is not, and never has himself been, personally resident in Scotland, and may be in complete ignorance of any action that is brought or contemplated against him.

A jurisdiction so anomalous and peculiar is plainly, I think, not to be sustained unless it is made to appear very clearly and unmistakeably to exist; and certainly it ought not to be extended beyond the limits within which it has been hitherto exercised. None of the precedents referred to in the Lord Ordinary's note appears to me to be in point, although they may more or less serve to illustrate the principle.

Now, in the present case, the action was raised on the 3d of April 1877. But the defender had left Scotland and taken up his residence in London in September of the previous year; and he had also sold the villa and ground, the only heritable property to which the pursuer refers as founding jurisdiction against him—and executed a disposition thereof in favour of the purchaser on the 30th of March, which was delivered on the 1st of April 1876, three months before the summons was served by a copy being left at the house the defender had occupied when resident in Scotland. About this state of the facts there was no dispute at the debate. The conclusion, therefore, seems inevitable that when the present action was raised against the defender he had no heritable property in Scotland; and it not being pretended that there was jurisdiction against him on any other ground, his plea of want of jurisdiction ought, in my opinion, to have been sustained, in place of being repelled, as it was, by the Lord Ordinary.

But then it would appear that the purchaser of the defender's villa and ground had not registered his disposition in the Register of Sasines till the 1st of April 1876, three days after the present action was raised; and founding on this circumstance the Lord Ordinary, in the note to his interlocutor, stated that the defender continued till after the action was raised "possessor of the heritable property," meaning the villa and relative ground, and was therefore subject to the jurisdiction of this Court. This, I think, is an entire fallacy. The defender had, previously to the action being raised, parted with the villa and ground. He had not merely sold it to another, but granted and delivered a disposition of it to the purchaser, whose entry to possession was the 1st of April, three days before the pursuer's action was raised. The defender was, therefore, neither owner nor possessor of heritable estate in Scotland at the time the action was raised, and, therefore, there was no jurisdiction over him. It is true that the defender may be said, in a certain sense, to have remained undivested of the formal title to his property till the purchaser registered his disposition; but, as remarked by the Lord Ordinary, he might have resold the property or sold it to another, or charged it with debt to any one ignorant of the sale which had been previously made, and of the unrecorded disposition to the purchaser. He could have done none of those things honestly, and, so far as he was concerned, any of the acts referred to would have been fraudulent and invalid.

possible, therefore, to hold that the defender was in any fair or correct position when the present action was raised, either the owner or the possessor of heritable subjects in question. It is true that a third party acquiring from the defender title to these subjects onerously and in good faith—that is to say, for a valuable price, and in ignorance of the prior sale, and getting his disposition recorded in the public office—that of the prior purchaser—would be, in competition with that former purchaser, preferred as the owner; but no such case has here occurred. The question is not whether jurisdiction might not be constituted against such a purchaser as the proprietor or possessor of the heritable subjects referred to, but whether there is jurisdiction over his author, the defender, merely because he has in certain supposed circumstances have succeeded in perpetrating a fraud. Besides, as the case actually stands, there would be jurisdiction against the party to whom the defender sold the property, and that just shews that it cannot be at the same time, and in respect of the same subjects, jurisdiction constituted against the defender.

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For these reasons I am of opinion that the ground of the Lord Ordinary's decision is erroneous, and that the defender's plea of want of jurisdiction ought to be sustained in place of being repelled.

GIFFORD.—I am of opinion that the defender, William Wright, was, at the date of this action (3d April 1876), and at the date of the citation following, not subject to the jurisdiction of this Court, either in respect of his position as proprietor of heritable subjects situated in Scotland, or on any other ground disclosed in the pleadings. I think, therefore, that the defender's plea that he is not subject to the jurisdiction of this Court must be sustained, and that the action accordingly falls to be dismissed.

The ground upon which it is maintained that the defender is subject to the jurisdiction is that at the date of the action and of the citation the defender was proprietor of heritable subjects in Scotland, that is to say, of a villa and garden at Pollockshields, near Glasgow. The defender, indeed, is designed as proprietor of a villa at Earnvale, Pollockshields, near Glasgow, but it is admitted that he did not reside there before the present action was raised, and that at the date of the action he had no domicile there, either actual or constructive. The ground of jurisdiction, therefore, is that although resident in England he was proprietor of a villa in Scotland. It is not said that the defender had any property or effects in Scotland, and, at all events, none of the defender's moveables having been arrested in order to found jurisdiction the pursuer can only rely upon the defender's proprietorship of the heritable subject.

There is no doubt that the defender was at one time proprietor of the villa in question, but some time before this action was raised the defender had sold it to the pursuer, with entry at 1st April 1876. A formal disposition in favour of the pursuer was executed by the defender on 30th March 1876, and the price was paid and the disposition delivered to the purchaser on 1st April 1876, being two days before the defender was cited in the present action, and two days before the summons was raised or signeted. It is not disputed that the sale was a valid and bona fide sale, that the price was duly paid, and that the disposition was delivered prior to the raising of the action. The disposition is in the usual form; it gives entry as at 1st April, being before this action was raised; and it was intended entirely to divest the defender of all interest whatever in the subjects sold. The defender, after receiving the price and delivering the

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disposition, retained or reserved no beneficial right whatever in the subject, and as in a question with the purchaser he had nothing whatever to do with it.

The pursuer, however, maintains that, as the disposition in favour of the purchaser was not recorded until 6th April 1876, this recording under the revised statutes being equivalent to infeftment, the defender must be held to have been feudal proprietor of the subjects till that date, and was therefore liable to the jurisdiction of the Scotch Courts, not only in the present action, but in all personal actions of any kind in which he might be cited at any time before the purchaser chose to record the disposition, and thus take infeftment in the subjects which he had purchased.

I do not think that the view contended for by the pursuer is well founded. It would lead to very startling results. For, in the general case, a purchaser is not bound to expedite infeftment in any heritable subject which he has bought, and as it might happen that although a person had absolutely and out and out sold his heritable property and left the country, it may be for forty or fifty years he would still be subject to the jurisdiction of the Scotch Courts, merely because the person to whom he had absolutely sold his property so long before had not chosen to complete his title. I think it is impossible to hold this.

It appears to me that the principle on which jurisdiction is founded in respect of heritable property rests not on merely nominal property, but on real and beneficial interest in some heritable subject. It does not rest on what the Lordship has called a mere fiction, but must have something real and substantial in the party against whom jurisdiction is sought to be established. It is in this case that at the date of the action the defender had really no heritable property in Scotland, and as there is no other ground relied on by the pursuer I think the objection to the jurisdiction must be sustained.

THIS interlocutor was pronounced:—"Recall the said interlocutor, and sustain the first plea in law for the defender, and dismiss the action, and find him entitled to expenses, and remit," &c.

J. & J. H. BALFOUR, W.S.—DOVE & LOCKHART, S.S.C.—Agents.

No. 58.

Jan. 25, 1877.
Duke of
Hamilton v.
Buchanan.

THE DUKE OF HAMILTON, Pursuer.—*Gloag—Asher.*
ANDREW BUCHANAN, Defender.—*Balfour—Keir.*

Proof—Lease—Possession—Rei interventus—Missive Offer.—A person made a written offer for a lease of a farm on 14th August. At the request of the landlord's factor he met him, and on 12th September subscribed a second offer appended to printed conditions of lease. The second offer omitted certain alterations in favour of the tenant, and contained new conditions chiefly in favour of the landlord. There was no written acceptance, but possession followed on Martinmas. In defence to an action by the landlord to compel the tenant to execute a lease in terms of the second offer the tenant stated that when he signed the second offer he did so on the understanding that it was relative to and taken in conjunction with the first. Held that the second offer being only binding by the possession which followed upon it, proof must be allowed to sustain whether the possession was referable to the second offer only, or to both.

1ST DIVISION.
Lord Rutherford
Clark.
B.

IN July 1873 the Duke of Hamilton advertised the farm of Flemington to be let. On 14th August 1873 Andrew Buchanan addressed the following letter to Mr Robertson, the Duke's factor:—"I hereby offer to take the farm of Flemington in Cambuslang parish, and presently occupied by Mr Russell, for a lease of nineteen years, the yearly rent of £1200."

ng, with the following understanding, that the landlord alter the present No. 58.
 te so as to array the stalls along side walls, and erect additional byres
 r twenty cows, also to put the remainder of the houses and the fences Jan. 25, 1877.
 a tenatable state of repair. The landlord to drain requisite drainage Duke of
 Government rate when called upon by the tenant." Hamilton v.
 Buchanan.

Mr Robertson replied on the 18th.—“Before submitting your offer for
 e consideration of His Grace the Duke of Hamilton's trustees I will be
 liged by your furnishing me with references as to your means and agri-
 ltural ability for the farm of Flemington.”

On 6th September Mr Robertson appointed a meeting at the Hamilton
 tates Office on the 12th. On that day Mr Buchanan subscribed the
 lowing offer, appended to a copy of the printed conditions of lease used
 the Hamilton estates:—“I, Andrew Buchanan, residing at No. 28
 elgrove Street, Glasgow, do hereby make offer to the trustees of His
 ace the Duke of Hamilton of the sum of £1200 sterling of yearly rent
 a lease of the farm of Flemington, in the parish of Cambuslang, as
 resently let to Archibald Russell, but excepting therefrom whatever
 ound has, previous to my entry under the said lease, been taken off the
 oun, or damaged by pits, roads, railways, plantations, or in any other way,
 r all which I am to have no claim for compensation, and on the under-
 anding that for whatever ground may be taken from the farm for any of
 ne purposes during the currency of my lease I am to be paid at the
 to of £6 p. imperial acre, the lease to commence at Martinmas next as
 the lands for tillage, and Whitsunday thereafter as to the houses and
 tare grass, and to endure for nineteen years; and I agree to the fore-
 ing printed conditions of let, the words ‘one-half of’ on the fifth line
 the bottom of page second being deleted. In witness whereof I
 subscribed this offer at Hamilton the 12th day of September 1873,
 presence of Duncan Campbell Barr, residing at Hamilton, and Thomas
 airhead, residing at North Crookedstone. (Signed) ANDREW BUCHANAN.
 anan C. Barr, witness; Thomas Muirhead, witness.”

Without any further written communication between the parties the de-
 nder entered into possession of the farm at Martinmas 1873 and Whit-
 nday 1874. Disputes arose as to the repairs to be executed by the
 dlord, and the defender refused to execute a lease in the terms pre-
 ted by the pursuer, and withheld payment of his rent.

The pursuer then raised this action, concluding for declarator that a
 id contract of lease had been constituted by Mr Buchanan's offer of
 1 September 1873, and that the defender was bound to execute a formal
 e.

The pursuer set forth the said offer, and averred;—“The said offer was
 pted by the pursuer, and the defender, in terms thereof, was allowed
 nder into possession of the said farm at Martinmas 1873 as to the
 le land, and Whitsunday 1874 as to the houses and grass, and has
 e continued in possession of the said farm.”

The pursuer pleaded;—(1) The defender's offer of 12th September 1873
 ring been accepted by the pursuer, and followed by *rei interventus*, the
 e is binding on the defender, and he is bound to implement the same,
 i to execute a lease in terms thereof.

The defender averred that he signed the offer of 12th September “on
 understanding and believing that he was signing mere conditions
 tive to, and to be taken in conjunction with, his offer of 14th August.”
 e pleaded;—(2) The pursuer having refused to insert in the draft the
 ditions of the agreement, and having failed to implement these con-
 ons, the defender is not bound to sign a lease in the terms proposed.

The Lord Ordinary, on 31st May 1876, pronounced this interlocutor:—

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" Finds, declares, and decerns, in terms of the declaratory conclusion of libel: Finds that the defender is bound to implement the whole conditions and stipulations contained in the offer and printed conditions of the libel, and forthwith to enter into and subscribe a formal and valid lease of the lands and farm of Flemington, in terms of the said offer and printed conditions, and remits to Mr James Moncreiff, writer to the signet, to prepare and lodge in process the draft of the lease so to be executed by the pursuer and defender in terms of this interlocutor, and continues the cause.

On 18th October his Lordship pronounced an interlocutor approving the draft lease, and ordaining the defender to execute a lease in terms thereof.

The defender reclaimed, and argued;—The offer of 12th September 1873 was only a unilateral document, and it was not probative, the writer not being named and designed. If there had been a concluded bilateral contract, inquiry would have been excluded. But this offer might have been accepted or rejected, and it was only made binding by possession. It cannot be said that the possession was necessarily referable only to the offer and not to the other. Both were kept by the landlord, and there was no repugnancy between the two. There were only certain conditions added in the second offer, which sufficiently explains why, in the opinion of the landlord, it was necessary to write a second offer.¹ It ought to be inquiry on what footing the possession was taken and given.

The pursuer argued;—The second offer was quite complete in itself, and fairly read, entirely excluded the idea of being only supplementary to the previous offer. If a previous offer, to which no reference was made, upon which nothing had followed, were to be admitted to modify the terms of a subsequent formal and complete offer, it would be equally incompetent to admit parole evidence and correspondence.

At advising,—

LORD PRESIDENT.—The foundation of the Lord Ordinary's judgment is that there was a completed and binding agreement that there should be a lease in terms of the offer and relative conditions of 12th September 1873. The judgment was pronounced on a closed record without taking evidence. But there was not a completed written agreement in any view of the case. The completion of the agreement, if it was completed, was brought about by the possession which the defender was allowed to take as tenant upon an offer made by him. Therefore, the question whether there was a completed agreement depends, first, on the terms of the offer, and, secondly, on the quality of the *rei interventus*, which consisted in the possession given and taken, and which was said to have operated acceptance of the offer by the landlord.

The circumstances are very peculiar. First, there was an offer by the

* "NOTE.—The offer of 12th September 1873 is complete in itself, and has no reference to any preceding offer. It was not accepted in writing, but possession followed upon it, and such possession is, in the opinion of the Lord Ordinary, equivalent to a simple written acceptance.

"The defender argued that an offer which he had made on 14th August 1873 should be read along with and as part of the offer of 12th September. But he cannot allege that this offer was accepted in writing, or that any *rei interventus* followed upon it. His case is that, when he signed the offer of 12th September, 'he was signing mere conditions relative to, and to be taken in conjunction with, his offer of 14th August.' This is an allegation of error, but it does not entitle the Court to introduce anything into the contract which is not contained in the offer. At last, and, as the Lord Ordinary thinks, the only accepted offer."

¹ Dickson on Evidence, sec. 844.

18th August 1873 in which he offers for the farm as possessed by Russell, but on conditions as to improvements to be executed by the landlord. That offer was never accepted, but also, so far as appears from either the averments of parties or the correspondence, it was never rejected. The answer made by the pursuer's factor was the letter of 18th August, in which he says that in submitting the offer for approval he must have references as to the tenant's means and agricultural ability. So far from rejecting the offer that was actually entertaining it. We do not see from the correspondence or the facts what takes place after that till the meeting of 12th September, which was followed by a letter addressed by the factor to the tenant, dated 6th September, in which it is impossible to read without seeing that there must have been communications in the interval. These may very probably have related to the references demanded as to the tenant's means and agricultural ability, but they may also have had an important bearing on the terms and conditions which were in view of the parties. Be that as it may, the parties met on 12th September, and the defender then signed another offer in the office of the pursuer's factor. It omits any reference to the conditions in the previous offer, and alterations to be made by the landlord; but it imports the printed conditions imposed upon all persons offering for leases on the Hamilton estates. That offer was never accepted any more than the first. In itself it was not being neither holograph nor validly tested, and therefore it was of no effect unless fortified by *rei interventus*. It stood very much in this respect on the footing as the offer of 14th August.

It is not that possession of the farm was given and taken. The parties are at issue as to how it was given and taken, and what were its nature and circumstances.

The pursuer himself brings that out clearly in his condescendence, article 1st—“The said offer was accepted by the pursuer, and the defender, in consequence thereof, was allowed to enter into possession of the said farm at Martinmas 1873 as to the arable land, and Whitsunday 1874 as to the houses and outbuildings, and he has since continued in possession of the said farm.” What is meant by the offer being accepted is that he allowed possession to follow upon it. The averment is relevant only in respect of the words being inserted that the defender was allowed to enter into possession in terms of that offer. The pursuer, therefore, hereby undertakes to prove that possession was given and taken, and was afterwards held under and in terms of the second offer as distinguished from the first—in fact, that the possession was given and can be ascribed only to the second offer. That averment, in point of fact, is absolutely essential to the case of the pursuer. On the other hand, he fairly enough represents in the answer that while that was his view, the defender's allegation was that the possession was specially referable to the offer of 14th August also, or to that offer alone. When we look to the defender's statement, the matter is stated in the same way, except that it is not so clear as it ought to be whether possession was ascribed wholly to the first offer or to both. Thus, on the face of the pleadings, an essential issue of fact is raised material to the case, and without decision of which it is impossible to give judgment. This is a one-sided document, and a matter of fact to be proved before it can be reared up into the position of a contract. If there had been a distinct offer and acceptance, holograph or otherwise, we could not have gone beyond that or have entered upon the consideration of facts and circumstances. The quality of the possession would have been immaterial, for the contract would have been complete without it.

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It appears to me that before we can decide this question we must know history of the case, and I do not know that there is any circumstance attending the possession in its first commencement and continuance that will not be material to the decision. I propose, therefore, that we should recall the locutor, and allow the parties a proof of their averments.

LORD DEAS.—Both these documents were delivered before possession was and taken, and the question is whether possession was so given and taken or both. The doctrine of law applicable to final and formal deeds, that we look at previous correspondence or communings, has no application whatever to this case. Whether the lease was to be in conformity with one of the offers or with both, a formal and final lease would in ordinary course have followed containing a great many stipulations not contained in the informal missive or minute. A document, although informal, which does no more than specify the subject-let, the endurance of the lease and the rent, is sufficient, if followed by possession, to constitute a lease, subject to the right of either party to insist upon execution of a full and formal lease. But it is clear that to such a document the rule above referred to does not apply.

Both of the offers in this case contain all the essential elements of a lease, and I agree with your Lordship in holding that if there had been a written acceptance of the second the parties must have entered into a formal lease on that basis. But the possession, which followed without any written acceptance, must be held to either the one or the other or to both. It would be difficult to hold that the lease was intended to stand on the first offer alone without reference to the printed conditions which were imported into the second. But it seems even more difficult to suppose that the tenant intended or the landlord understood the claim for improvements to be made by the landlord, such as altering the houses and putting the houses in tenantable repair, were to be relinquished by the tenant.

I cannot hold that, because the second document sets out with the words "we hereby make offer," the party is thereby tied down to the words of the offer to the exclusion of all inquiry, however reasonable or unreasonable it may be to suppose that such was intended.

I am of opinion that inquiry is perfectly open in point of law, and in point of justice.

LORD MURE and LORD SHAND concurred.

THIS interlocutor was pronounced:—"Recall the interlocutor of Lord Rutherford Clark of 31st May and 18th October 1876, and allow the parties a proof of their averments, the proof to be taken before Lord Shand," &c.

TODD, MURRAY, & JAMIESON, W.S.—H. & A. INGLIS, W.S.—Agents.

No. 59.

Jan. 25, 1877.
Munro v.
Munro.

DANIEL MUNRO, Pursuer.—*Fraser—Darling.*
AGNES SMITH OR MUNRO, Defender.—*Asher—J. P. B. Robertson.*

Husband and Wife—Divorce—Lenocinium.—Behaviour of a husband had been told that his wife had committed adultery, which was held (by the decision of Lord Curriehill) not to bar him, on the ground of *lenocinium*, from obtaining a divorce on account of a subsequent act of adultery.

Observation (per Lord Justice-Clerk) on the absence of any averment or plea leucinium on record. No. 59.

On 30th September 1876, Munro, who was a spirit-merchant in Dundee, raised an action of divorce against his wife for adultery with a man named Taylor, who had been a shopman of the pursuer's, and who was called as co-respondent. Two acts of adultery were alleged—the first July of that year, within the pursuer's house in Dundee, and the second 19th September of the same year, in the Waverley Temperance Hotel Dundee.

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2d DIVISION.

Jd. Curriehill.

I.

The defender denied having committed adultery on either of these occasions. With respect to the latter she answered the pursuer's averment as follows:—"Denied, and explained that the pursuer asked the defender to see him at nine o'clock on the 18th of September. That she accordingly, in company with her landlord, Robert Tait, mason in Newgate, saw the pursuer in Dundee, and that he detained her and Tait until the last boat, which, leaves Dundee for Newport at ten o'clock, had departed. That she and Tait were thus forced to walk the streets, and having met or been joined by the co-defender, Taylor, who was lately a shopman in the pursuer's employ, and knew the maltreatment she had received from the pursuer's hands, took pity upon her, and accompanied her to the Waverley Temperance Hotel, Union Street, Dundee, where they remained until the departure of the first boat crossing the ferry in the morning. She stated that the defender committed adultery with the co-defender on one of the occasions specified."

A proof was allowed, from which the following facts appeared:—

The parties were duly married on 24th March 1862, and resided together as married persons until 31st August 1876, when the pursuer left his wife in lodgings at Newport, Fife, and returned alone to his house in Newgate, Dundee.

In 1874 Munro engaged the man Taylor, the co-respondent, as shopman, to assist him and his wife in the management of his business in his shop in the Seagate, Dundee. Some time after Taylor had entered his service Munro observed improper familiarities between him and his wife. At first he did not take notice of this; but afterwards, on their being repeated, he remonstrated with his wife, and subsequently he missed Taylor for being too familiar with the defender. Taylor, however, was again taken into Munro's service at the request of his wife; and although Munro dismissed him again and again he was always called back.

In July 1876, Munro, for the sake of his health, went to St Fillans for some time, leaving his wife in Dundee. A short time after his return he and his wife went to Newport in Fife, on the other side of the Tay from Dundee, where they lodged in the house of a man Tait. While they were there Mrs Munro quarrelled with her servant, Mary Robb, who came with them from Dundee; and in consequence—as Robb admitted—of that quarrel she told Munro, on 31st August, that during his absence at St Fillans in July improper familiarities had taken place between his wife and Taylor, and that in particular, on the night of the 26th or morning of the 27th July, she had found Taylor and Mrs Munro in bed together in the house in Cowgate, Dundee. In consequence of this information Munro, on 31st August, left his wife in the lodgings at Newport, and went home alone to his Dundee house. There was no other evidence of this alleged act of adultery, although another witness deposed to seeing improper familiarities before this.

Mrs Munro raised an action for aliment in the Sheriff Court of Dundee, and Munro paid her a sum of £10. On Sunday, 17th September,

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Munro wrote a letter to his wife at Newport,* and at 8 o'clock on evening of Monday, 18th September, Mrs Munro asked Tait, in whose house she was lodging, to accompany her to Dundee to see her husband. Tait went with her, and upon arriving at the pier at Dundee the first person they met was Taylor. Tait and Mrs Munro and Taylor were there about for some time, and at length Tait went up to Munro's shop in the pier-gate, and asked him to come out and see his wife. Munro joined them, and they talked for some time, but came to no definite arrangement, and at last Tait and Mrs Munro started off to catch the last steamer from Dundee to Newport, which left at 10.15 p.m. Munro followed them a distance, and when he saw that they had lost the steamer he joined them again. They all walked together from the pier towards Munro's shop, but Mrs Munro seemed to be looking out for some one, and went back. Munro, who said that he suspected Taylor was "hovering about," seems to have been annoyed at this, and went into his shop, leaving his wife and Tait outside. He afterwards came out again, and offered some money to pay for his bed, which was refused, but he did not see his wife any. He then went into his shop, and when he came out both Tait and his wife were gone.†

Munro stated that he then went home to his house and went to bed, but on account of a suspicion which occurred to him that his wife was with Taylor he rose between four and five in the morning and went out to look for them. After making some inquiries of a policeman he went to the Waverley Temperance Hotel, which was the hotel near

* This letter was not recovered, but Munro in his evidence deposed to the contents of it as follows:—"On the Sunday before the 18th September I wrote to my wife a few lines, saying I wished to see her, to ask if she would leave that man's company—I mean Taylor. I was going to see her. Instead of that she came to the foot of Trades Lane, and sent me."

† Tait's evidence on this point was:—In chief—"When we got to the pier the boat had left. We stood at the quay a little time, and in the meantime I looked round and saw pursuer again. All the three of us then went up the street to pursuer's shop. He entered the shop and shut the door, leaving me and defender on the street." In cross—"We were not more than four, or five minutes at the landing-quay before pursuer again came to me and spoke something about the boat being away. I said we had lost it. I then spoke to go up to his shop. Defender hung back. Pursuer and I went on, and I noticed that defender was looking over her shoulder. Pursuer asked me to come and walk beside him. When she hung back he said 'Is that your wife?' or something like that. When I parted from him at the shop at 8 o'clock he offered me money to pay for a bed. It was defender's proposition we should go to pursuer's shop after having lost the boat. Taylor, when we were going on the opposite side of the way at the steamboat quay, had seen pursuer coming forward before I saw him; and I fancy he had 'ta'en the road.' Pursuer therefore did not see him, for he had disappeared before pursuer reached the steamboat quay. Nothing was mentioned about Taylor having been there. On the way up to pursuer's shop, when defender was looking over her shoulder, pursuer accused her of looking for Taylor. (Q.) Did she go into the shop? No; he would not allow her. (Q.) They had fallen out again before they reached the shop in consequence of her looking back? (A.) Yes, and in consequence of the way she was behaving towards him. When we were standing outside he expected him to come out and join us, and he did come out. He then offered me the money. (Q.) Did he say where Mrs Munro was to pass the night? He said she would look out for a bed for herself, or something of that kind. She and I went away together, and pursuer went into the shop, which at that time was not shut."

re pier, and there he found his wife and Taylor in a bedroom together, which they had obtained after saying that they were married persons. his room contained two beds, but only one had been used. The porter the hotel, Tait, and two policemen were also present when the couple are discovered together. No. 59.
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At the hearing on evidence and debate before the Lord Ordinary the defender's counsel maintained that the pursuer's conduct on the night last question was such as to entitle the defender to plead that he had been ill of *lenocinium*.

On 22d November 1876 the Lord Ordinary pronounced this interlocutor:—"Finds it proved that for a considerable time before the month of September 1876 improper familiarities took place between the defender and co-defender, and that the pursuer was aware of these proceedings: Finds that the pursuer has failed to prove that the defender committed adultery with the co-defender on or about the night of the 26th or morning of the 27th of July 1876: Finds facts and circumstances proved relevant to infer that the defender committed adultery with the co-defender on or about the 19th day of September 1876, within the Waverley Temperance Hotel, Union Street, Dundee: But finds that the pursuer, who was then residing in his house in Dundee separate from his wife, who was then residing in lodgings in Newport, in Fife, invited the defender by letter to come and see him in Dundee, and that the defender accordingly, accompanied by Robert Tait, mason, the landlord of her lodgings in Newport, went to Dundee to see the pursuer about 8 o'clock in the evening of Monday, 18th September 1876: Finds that the defender, along with the said Robert Tait, met the pursuer in Dundee on that evening, and that the interview lasted so long that the defender and Tait missed the last ferryboat for the night, which leaves Dundee for Newport shortly after 10 o'clock at night, and that Tait and the defender were accordingly obliged to remain in Dundee all that night: Finds that the pursuer followed the defender and Tait to the pier, believing that they would be too late for a boat, and that the pursuer, accompanied by the defender and Tait, remained to the shop, a public-house kept by him in the Seagate of Dundee: Finds that after some conversation the pursuer offered to give money to the defender to enable him to procure a bed for himself, but refused to allow the defender to enter his shop or house, and told her that she could look out a bed for herself, but did not offer her money to enable her to provide herself with such accommodation: Finds that the pursuer then went into the shop, and that Tait and the defender left the place and walked about the streets until 1 o'clock in the morning of the 19th September, in company with the co-defender, William Taylor, who had seen and conversed with the defender in Dundee repeatedly in the course of that evening: Finds that after walking for some time with Tait the defender and co-defender left Tait, and went to the Waverley Temperance Hotel already mentioned, where they passed the night together: Finds that the pursuer expected and believed that the defender would meet the co-defender and pass the night with him, and that he was guilty of exposing the defender, wife, to lewd company, in the expectation and with the desire that she would commit adultery: Therefore finds that although the defender committed adultery with the co-defender upon the said 19th September 1876 the pursuer is barred by his conduct from obtaining decree of divorce on the ground of said adultery: Therefore assoilzies the defender from the conclusions of the action: Finds the pursuer liable to the defender in expenses; appoints an account thereof to be lodged, and remits," &c.*

*NOTE.—This is a somewhat difficult and delicate case upon the evidence.

No. 59. Munro reclaimed, and argued;—In order to sustain the plea of *laesum* *nium* it is necessary to prove that the husband had either directly or

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The pursuer, who has a house in the Cowgate of Dundee, and a spirit shop at the corner of the Seagate and St Andrew Street, had a shopman of the name of William Taylor, the co-defender. The pursuer was married to the defender in 1862, and apparently they lived happily together until within the last few years, when the co-defender entered the pursuer's service. Improper familiarities from time to time took place between the defender and co-defender, and, if the pursuer is to be believed, before his face. He says no doubt that he has three times dismissed the co-defender from his service on account of these familiarities, but it is a fact that up till the early part of September 1876 Taylor remained in his service. In the middle of July 1876 the pursuer went to St Fillans for the benefit of his health, and it is alleged that during his absence Taylor spent from the night of the 26th to the morning of the 27th of July at the pursuer's house, and that the defender on that occasion committed adultery with Taylor. This statement is not, I think, satisfactorily proved; it rests entirely upon the evidence of Mary Robb, the domestic servant, who says that she saw the defender and co-defender in bed together, but admits that she did not inform the pursuer of the circumstance when he returned from St Fillans on the 4th of August, nor indeed until the 31st August, when the defender and she had a quarrel. But whether the defender or co-defender did or did not commit adultery upon the night in question I have no doubt that during the pursuer's absence at St Fillans the defender and the co-defender were on terms of familiarity. The pursuer after his return from St Fillans, on the 4th of August, took lodgings for himself and his wife at Newport, in the house of Robert Mason there, and they resided together in Newport until the 31st of August, which day, in consequence of the tale told him by Mary Robb, the pursuer left his wife in Newport, and returned to his own house in the Cowgate of Dundee, and since that time he has never resided with the defender. During the three weeks which elapsed between the 31st August and 18th September the defender was frequently visited at Newport by the co-defender, and, in particular, they seem to have spent the greater part of every Sunday together. The defender's lord, Tait, who is a married man, and who appeared to be a person of respectability, and gave his evidence with great propriety, thought that the defender and co-defender were on terms of too great intimacy, though he never observed any improper familiarities taking place between them. On Sunday the 17th of September, the pursuer wrote a letter to his wife, the defender, asking her to come to Dundee to see him. The letter has not been produced, and it is not very clear what was its import, and whether the pursuer really desired to effect a reconciliation with his wife, or what other object he had in view, it is very easy to make out from the evidence. Be that as it may, the defender requested her landlord, Tait, on his return home from his work on the evening of Monday, the 18th of September, to accompany her to Dundee, for the purpose of meeting the pursuer. On arriving at Dundee they were met by the co-defender Taylor, to the surprise of Tait, who, however, soon discovered that the defender and Taylor had arranged this meeting. He left them together at the foot of Trades Lane, and went to the pursuer's shop in the Seagate, in order to inform the pursuer that his wife was waiting for him. The pursuer and he accordingly went to the Trades Lane, where they found the defender alone. A good deal of conversation took place between the pursuer and defender, chiefly with reference to the intimacy with Taylor. The interview must have lasted for a considerable time, because Tait, who was afraid that the defender and he might miss the boat for the night to Newport, which leaves at 10.15, broke up the interview about ten o'clock, and after saying good-bye to the pursuer, he and the defender left in the hope of reaching the steamer before her departure. The boat, however, left before they reached the pier. The pursuer, believing that he would miss the boat, followed them to the pier and joined them there.

"Now, it is an important circumstance, that when the defender and defender reached the pier, they again met Taylor, who entered into conversation with

need or contributed to his wife's dishonour.¹ The facts of this case No. 59. disclosed nothing of that sort. It would have been impossible for the

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nder. Tait thinks that the pursuer did not see Taylor, who, he says, made off Munro v. Munro.

the moment the pursuer came in sight; but I strongly suspect the pursuer did see Taylor. The defender proposed they should all go to the pursuer's shop, and accordingly the pursuer, defender, and Tait went thither. Taylor appears to have been hovering about the party at some little distance, and the pursuer, if he did not see Taylor, suspected that he was at hand, and accused the defender of leading the way to the shop of looking for Taylor. When the party arrived at the shop, the pursuer says that he invited the defender to go into the shop, and that the defender refused; but in this he is contradicted by his own witness Tait, who says that the pursuer would not allow her to go in. It is proved that the pursuer did go into the shop alone, leaving his wife and Tait at the door. He sometime afterwards came out, and it being about eleven o'clock at night, he offered Tait money to pay for a bed for himself, which offer Tait declined. He did not, however, offer money to his wife to enable her to provide herself with lodging, nor did he offer to take her into his house, or do anything to secure her decent accommodation for the night. In answer to the question, 'What do you expect your wife to do if you offered to give Tait a bed and left her about that offer?' he said, 'I never expected that she would go away. I went into the shop, and coming out, found that she was away. I expected I should see her after I came out. I asked her to go into the shop, but she would not.' (Q.) What did you expect your wife to do, supposing Tait had accepted the offer? (A.) I intended to make her the same offer when I came out. Unfortunately for the pursuer, all this is contradicted by his own witness Tait, who says that the pursuer would not allow the defender to go into the shop, but that the pursuer himself went in, leaving Tait and the defender outside; then he says, 'When we were standing outside, we expected him to come and join us, and he did come out—he then offered me the money.' (Q.) Where did Mrs. Munro go to pass the night? (A.) He said that she looked out for a bed for herself, or something of that kind. She and I went together, and the pursuer went away into the shop, which at that time was shut. Now, I think it is quite plain that the pursuer, by whose invitation the defender had gone to Dundee, and by whom she had been kept in conversation so late an hour that it was impossible for her to return to Newport that night, must, when he offered the money to Tait, and told his wife to look out for a bed for herself, have believed and expected, nay more, desired, that his wife should meet Taylor, and pass the night with him, for he admits that he suspected Taylor was hovering about—I am rather inclined to think that he did it.

Between eleven and twelve o'clock, then, Tait and the defender turned away from the pursuer's shop, and were soon after joined by Taylor, who, in the meantime, had been watching the pursuer's movements. Tait, the defender, and Taylor, walked about the streets of Dundee for some time, and about, or after midnight, the defender and Taylor left Tait, saying they were going to pass the night at the house of Mrs. Lamb, Taylor's aunt. Tait believing by that time that there was something wrong going on between the defender and the pursuer, went to Munro's house to inform him where they had gone to. It was between twelve and one o'clock; but he rang twice, and knocked at the door, and called in vain. The pursuer, who, according to his own statement, had gone home between eleven and twelve, took no notice, and Tait went on and after walking about the streets for some time, took refuge in a stairway in Union Street, about fifty yards from the Waverley Temperance Hotel, where he fell asleep.

The movements of Taylor and the defender after parting from Tait were

¹ Mackenzie v. Mackenzie, Feb. 28, 1745, M. 333; Donald v. Donald, March 1863, 1 Macph. 741, 45 Scot. Jur. 434; Wemyss v. Wemyss, March 20, 1864, 4 Macph. 660, 38 Scot. Jur. 196; Sanchez "De Sancto Matrimonio," disp. 12, sec. 52.

No. 59. husband to have taken his wife into his house for the night, as that would have inferred condonation of the prior act of adultery. She was living

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peculiar. They walked up and down Union Street for about an hour, the pursuer till between one and two o'clock in the morning, in such a manner as to induce the policeman on the beat to believe that they were waiting the arrival of a mail train from Glasgow, which is due about that time; and it is proved that as soon as that train had arrived they applied at the Waverley Hotel for admission, representing themselves to be married persons, just arrived from Glasgow by train, and requesting to be accommodated with a single bedroom. They were accordingly shewn to a bedroom in which it is impossible to doubt from the evidence that they passed the night together in the same bed.

"But the proceedings of the pursuer are no less remarkable. He says that on going from his shop to his house he retired to bed, but that 'I was wakened up about four or five o'clock the next morning, because I had a suspicion that my wife would be with Taylor. Nobody suggested to me to go to the Waverley Hotel, but I suspected that they would be there, because it was the nearest hotel to the boat.' He also says that on his way he met Inspector Parr, a constable named Gaffney, and told them what he wanted, and was informed by them that his wife was with Taylor in the Waverley Hotel. It is somewhat remarkable that although on his way to the hotel the policeman took him to Tait, who was then sleeping in the stair referred to, and although he spoke to Tait, he says he did not think of asking Tait what had become of his wife, or the evidence of the policeman Gaffney is still more strange. He says that about midnight he saw Tait, the defender, and Taylor walking about the streets, that two men, whom he did not know, came up to him, and, pointing to a woman, told him that she was Munro's wife. He then describes his seeing the defender and co-defender, after they had parted from Tait, walking up and down the street for a considerable time, and ultimately entering the Waverley Hotel. Then he says that at a later hour in the morning the pursuer came to him and asked him about his wife, 'and when the pursuer asked me about her, from the information I had received, I said I had seen her go with Taylor to the Waverley Hotel.' I must say that this appears to me to be a story full of suspicious circumstances, and I am inclined to suspect that the pursuer was not in his house at all that night in question, but that he was on the streets of Dundee, either watching the movements of the defender and Taylor, or causing them to be watched by the two men who addressed the policeman. Now, whether the object in sending for the defender from Newport was to throw her in the way of the co-defender, or whether the idea had occurred to him when he found that the defender could not return to Newport that night (and these are the circumstances which we have no means of solving), I think it cannot be doubted, after a study of the whole evidence, that at the final interview between the pursuer, his wife and Tait the pursuer deliberately resolved that she should wait in the streets of Dundee during that night, and that his expectation was that she might speedily meet Taylor and pass the night with him, and so enable him to establish against her a case of adultery sufficient to entitle him to a divorce. Having been the occasion of his wife leaving her respectable home in Newport and coming to Dundee, and being detained there until it was too late to return to Newport, it was clearly the duty of the pursuer to provide decent accommodation was provided for, or at least offered to his wife, either in his own house or in some respectable lodging. But instead of that, allowing her to hanker after Taylor, and that great and improper familiarity already taken place between them, and believing him to be in the neighbourhood hovering about and watching her footsteps, the pursuer deliberately sent his wife from his door to seek a bed wherever she pleased, and thus thrust her into the arms of her paramour. The case therefore appears to amount to *lenocinium* on the part of the pursuer, and indeed, to be exactly of the kind stated by Bankton, 1, 5, 130:—'If the husband was guilty of exposing his wife to lewd company, whereby she was ensnared to the commission of adultery, it would bar him from a decree on that head, it being a kind of

parate from him, and was a free agent. Both acts of adultery were clearly proved. The fact of the second act following so soon after the first, and the various improper familiarities, served to corroborate the evidence of the first as to the first act.

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Argued for Mrs Munro;—The offence of *lenocinium* consisted in the husband neglecting his duty in shielding his wife from temptation if he knew of its existence. In this case he knew, or, at all events suspected, that Taylor was "hovering about" his wife, and he should have deterred her from his solicitations. Contrivance was not necessary to sustain the plea; wilful neglect which conduced to the act was sufficient.¹ The evidence, however, there was some appearance of contrivance on the part of the husband. He wrote to her to come, he detained her on the boat, and then he left her on the street exposed to the advances of her seducer, and for all he knew without the means of going for shelter. The very fact of his searching for his wife in order to find her in Taylor's company shewed what he expected and would happen. There was reason to suspect from the evidence that he dogged his wife all night in order to get proof of her guilt.

JUSTICE-CLERK.—In this case we have had an able argument.

The case presents some features of considerable interest, and it belongs to a class of which not many appear upon the records of this Court. The ordinary has given great attention to it, and had the advantage also of seeing the witnesses, which in a question of credibility is always of importance. If it were not for the opinion arrived at by the Lord Ordinary, I should not have doubted what our judgment should be.

That the guilt of the defender is clearly proved on two occasions, and that there is no evidence of the pursuer conducing to or conniving at the miscarriage of his wife.

I go over the facts shortly as they appear to me. It is quite plain that the pursuer had reason to complain of his wife and his shopman. This couple had lived unhappily, owing to the levity of the wife's behaviour. The pursuer himself had seen familiarities between Taylor and his wife, although it is left unexplained, it is at least possible that the wife excused herself to the husband, and promised not to give occasion for complaint in future. Matters were in this state when the pursuer went to Stirling for a fortnight, when, according to the servant, Mary Robb, something occurred which left no doubt of the wife's guilt. It is said that Robb's evidence is not to be believed, because (1) she did not at once tell her master what she had seen, and (2) that when she did tell it was because of a quarrel with

him, and presumed done of design.' Upon this passage of Bankton the Justice-Clerk (Ingles) observed in the case of *Wemyss*, 20th March 1866, A. 660—'That is quite in consistency with the law in the present day.' He said that the defender has not, in her pleas in law, stated any defence on the ground of *lenocinium*, but the averment by her in her defences fairly raised the case, and the facts disclosed in the proof establish these averments. I therefore, that although the defender and co-defender undoubtedly committed adultery on the night of the 18th or morning of the 19th September, the pursuer is not entitled to decree of divorce, seeing that by his treatment of his wife on that night he exposed her to the lewd solicitations of the defender, and was thus the occasion of her committing the adultery. The pursuer will therefore be assoziated, with expenses."

Groves v. Groves and Thompson, July 2, 1859, 28 L. J. Mat. Cases, 108.

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her mistress. I see nothing suspicious in either of these circumstances. Very often in such cases the servants are unwilling to tell what they have observed, and very often they do tell if a quarrel ensues. But it is also said that her evidence stands alone and uncorroborated. But the testimony of other persons who were witnesses both of previous familiarities and of the subsequent adultery amounts to competent and strong corroboration. These facts throw a light upon the first act as to leave no doubt of the defender's guilt. When Robb told the pursuer what had taken place he left the defender at Newport where they were then living, and went to his house in Dundee, and never returned to her.

After some time, it seems, for some reason—returning affection for his wife—some other cause—he wrote to the defender saying that he wished to see her. We have not that letter here. The pursuer says he merely said in it that he wished to see her, and that he himself meant to go to Newport for that purpose. At all events, she came to Dundee after getting that letter, and I have no doubt she took the opportunity of making an assignation with Taylor. Her husband did not expect her. She took her landlord, Tait—who appears to have been a respectable man—along with her. When they got to the pier the first man they met was Taylor. Tait and the defender and Taylor talked together some time, and then Tait goes for her husband, and Taylor goes away. The husband and wife have a conversation, in which he urged her to go with Taylor, but no satisfactory conclusion was come to. Then a quarter of eight before the last boat for Newport that evening, which sailed from a pier (according to the pursuer, who is the only witness asked as to this), five minutes from the place where they parted, Tait and the wife go off, and the husband watches them to see if they catch the boat. They fail to catch it, and the pursuer again joins them, and the husband and wife, and Tait start to return to the pursuer's shop. On the way there the wife hangs back and looks over her shoulder, evidently looking for some one. The husband noticing this, and seeing whom she is looking for, gets very angry, and a quarrel ensued. The husband went into his shop and left his wife standing in the street along with Tait. She then joined her paramour, Taylor, and went with him to the Waverley Hotel where, at 4 A.M., she is discovered by her husband and other witnesses in a position which left no doubt of her guilt.

This guilty wife now says that her injured husband is not to succeed in getting rid of her, because he connived at her fall, partly owing to his behaviour before that night, but especially in consequence of his not taking her from his own house or otherwise providing for her on that night, and so throwing her into the arms of Taylor, her seducer. We have had a learned argument as to the bearing of these facts. I cannot, however, see anything to indicate that the pursuer ever wished his wife to do anything but what was right and proper.

The behaviour of the pursuer before he went to St Fillans, although peculiar, was after all only remiss and foolish. But at last, finding that his wife, at a very moment when he was trying to persuade her to give Taylor up, was going for him, he grew naturally very indignant.

The idea of the argument for the defender is that he purposely left her in the street, hoping that she would yield herself to Taylor's solicitation. One thing is clear, that he never meant anything of this sort, up to the last moment of the events. It is also clear that he thought she was looking out for Taylor.

could not take her to his own house for the night, otherwise he might have been said to have condoned her former offence. Is it to be said that he ought to have looked out for, and taken her to, suitable lodgings? But he left her in the company of his friend Tait, and had no reason to assume that she could not find lodgings for herself. I cannot, on this evidence, convict him of one of the most sturdily actions of which human nature can be accused.

It was suggested in argument that the pursuer, instead of going home as he says he did, walked about for the greater part of the night watching his wife. I see nothing in the evidence to shew that. It seems to me quite easy to account for all that happened. He may have awakened and felt that he had been treating his wife harshly, and when thinking of her have considered where she was, and becoming jealous when he recollected about Taylor, risen and gone to find them together as he did. There is not a fact in this part of the case which needs to be cleared up. When the pursuer left his wife in the street he was too angry to look after her or to make any arrangement for her.

That being my view of the facts the questions of law do not arise.

With regard to the authorities quoted as to what constitutes such conduct as will found the plea here taken, there can be no doubt that corrupt intention is necessary. There must also be such utter recklessness as to amount to enough to raise the insuperable inference that the corrupting of his wife was in the pursuer's mind.

It must also be kept in view in this case that the parties were living separately, and that in consequence of the previous misconduct of the wife. When she was Dundee that night she was her own mistress.

On the whole matter I cannot say that I can discover in anything that the pursuer did grounds for the plea which has been sustained, or which has a tendency in that direction. I am therefore for recalling the Lord Ordinary's interlocutor, and pronouncing decree in terms of the libel.

LORD ORMDALE.—Two acts of adultery are libelled in this case, and they are, to a certain extent, to be dealt with separately, but not necessarily without the evidence relating to the second act being looked at in considering the first.

With regard to the first act of alleged adultery there is only one witness who speaks directly to it, and if the case had stopped there I should have been inclined to say, that as, according to our law, one witness was not sufficient, the alleged act of adultery had not been established. But we have not only one witness to that first act of adultery, but also a second act completely and factorily established—indeed, not disputed. Now, where there are two acts of this nature, separated not by a very long time, the Court is entitled to hold that both are established, although there is only one witness who speaks directly of them.

It is Mary Robb, the only witness who speaks to the first act of adultery, who is believed at all? For myself I see no sufficient reason for disbelieving her. Her conduct is subject to observation, and her evidence must be carefully scrutinised. It is true she did not communicate what she had seen for a long time, and only did so when she had quarrelled with her mistress; and accordingly it is suggested that what she then told was out of vindictiveness, and is not to be believed. That is a common observation in such circumstances, and is not always easily to be got over. But here, I think, it may and ought

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to be got over, having regard to the mass of corroborative evidence which is to support the witness Mary Robb's testimony. That being so, there is good and sufficient evidence in a legal point of view to establish the first act of adultery although there is only one witness who directly speaks to it.

In regard to the alleged second act of adultery and the plea of *lenocinium* set up against it, it is important to keep in view that the pursuer had left his wife, because he believed, from the information he had received from Mary Robb, that she had been guilty of adultery with his shopman in his absence from Dundee. There is some obscurity as to the way in which the meeting took place between the pursuer and his wife in the course of the evening before the second act of adultery was brought about; but I have little doubt that your Lordship's account of it is the correct one.

The husband being possibly desirous of getting reconciled to the wife, whom he had been married for many years wrote her a letter with that object in view, which has not been recovered. But he says he did not in that letter ask her to come to Dundee. Be that, however, as it may, she did come to Dundee, and stayed at Newport, where she was then living, and found Taylor, the co-respondent, waiting for her on the pier. I must say it seems odd that she, coming to meet her husband at Dundee with Tait,—whom every one seems agreed in calling a respectable man,—should have made an appointment—for she must have done so—with her paramour Taylor to meet her there on her arrival. She soon after her arrival had an interview on the street with her husband, the pursuer, the result of which was not a reconciliation; and he retires to his house. It is said that he shut the door in her face, and that that was wrong, as by doing so he exposed her to the seductive arts of Taylor, and other lewd company. I think if he had done anything else but shut the door on the defender, believing as he then did that she had been unfaithful to him, and about to raise, as he then did, an action for divorce against her on the head of adultery, he would have acted very foolishly and inconsistently. I asked in vain the counsel for the defender what else could he have done in the circumstances. He could not have entered into his house without barring his contemplated action of divorce, and he was not entitled to put her under restraint or to coerce her in any way. She was a free agent, and could go where she pleased. The pursuer's conduct, if it had taken her into his house, would have been founded on against him as a defence to condonation.

So far therefore as the plea of *lenocinium* can be held to have arisen in consequence of the pursuer's conduct on the occasion referred to I see no ground for it.

A good deal was said in the course of the argument as to what constitutes *lenocinium*; and the authority of Sanchez was cited in support of the defender's exposition of it. But for my own part I prefer the statement of the doctrine as given by the Lord President (then Lord Justice-Clerk) in the case of *W. Munro v. W. Munro*. His Lordship in that case took occasion to say,—“It is not necessary to define *lenocinium* precisely. It is safer to keep to general description; but I think that I have not the least doubt that when a husband is accessory to the commission of adultery by his wife, or is participant in the crime, or is the direct cause of her lapse from virtue, he will be obnoxious to the plea of *lenocinium*.” This recommendation of itself to me as a fair definition of what constitutes *lenocinium* as far as anything like a definition of the plea, depending so much, as it necessarily must, upon the particular circumstances of each case in which it is put forward as a defence, can be given. But, taking it as given by the Lord President

able to hold that the plea is supported or can be given effect to in the proved facts and circumstances of the present case. Neither can I concur with the Ordinary in thinking that the *dicta* quoted by him from Bankton can be applied to apply.

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Munro

The result is that, as the adultery of Mrs Munro on the second occasion, if the first,—I think on both,—has not only been proved, but so conclusively not to be disputed by her counsel, and as the plea or defence that the husband sinned to her dishonour, conduct than which nothing can be figured more base and contemptible, has not in my opinion been established, the interdict reclaimed against must be recalled, and decree pronounced in favour of the pursuer as concluded for in the summons.

LAD GIFFORD.—I have come ultimately and without any difficulty to the same conclusion. I think it necessary to distinguish sharply between the evidence of the adultery and the evidence of the alleged *lenocinium*. The pursuer must of all establish by sufficient evidence the fact of adultery, the whole *onus* of which of course lies upon him, and it is only after the adultery has been proved that it becomes necessary to consider the question of *lenocinium*, which the defender must prove. The *onus* of establishing the *lenocinium* lies upon the defender. She must shew that her husband himself concurred to or was to blame for her infidelity. The adultery falls to be proved first. Now, on this point of the case I have no doubt that both the alleged acts of adultery have been fully proved. Certainly the first act rests on the testimony of only one witness, and is supported by very slender corroborative evidence; but then the second act is clearly proved, and, indeed, is hardly disputed, and there is no need to establish also grossly improper familiarities, and these throw a reflex light on what went before, for where there is one witness to a direct act, and a second act and loose conduct is also clearly proved, the first act must be held proved likewise, although, if it had stood alone, the evidence might have been insufficient. But next comes the second question in the case,—was there *lenocinium*? And it is here alone that there is really any difficulty. In considering this question I cannot help remarking on the absence of the defender from the witness-box. She was a competent and protected witness, not bound to answer any question tending to prove her own guilt. Nay, such questions, if asked to, could not even be put to her. But without approaching her own conduct she might have told of her husband's conduct on which this part of her case is founded, and it is difficult to explain why she was not examined on points as might have tended to establish fault on the part of the husband, as her want of money on that night in Dundee when her husband left her in the street, and whether she had any friend in Dundee to whose house she might have gone for shelter, or what means she took to procure a lodging in Dundee. She would have been the best witness to say whether she was exposed by her husband to temptation. She would not have been obliged to say whether she yielded to temptation or not. But really there is no case at all here against the husband of *lenocinium* or improper connivance. The worst that can be said of the husband is that he was very lenient—perhaps too lenient and too ready to forgive. He seemed prepared to condone her first offence, and to overlook even those acts of indecent familiarity which he had himself seen. Even on that point in Dundee he seems to have been not indisposed to have taken back his wife and forgive everything. But condonation is certainly not *lenocinium*, and

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it is difficult indeed to read overtures for reconciliation as equivalent to consent to continued transgression. To my mind there is not evidence of *lenocinium* at all. I do not see what course the husband could have taken in the circumstances excepting that which he adopted. He could not receive her into his house. She was in the very act of communicating with and signalling to her paramour. If she had money to provide herself with lodgings, could her husband be blamed for leaving her to go where she pleased. He could not control her. The argument is that he offered Tait money, but he made no such offer to her. But she did not ask it, and, what is more to the purpose, she does not come to say she had no money. I am afraid whether money had been given her or not, it would have gone with Taylor to the Waverley Hotel, or wherever else he chose to take her. If, then, the questions be, did the husband by his own conduct cause or conduce to his wife's guilt, or did he connive at or consent to it, I have no hesitation in answering these questions in the negative.

LORD JUSTICE-CLERK.—There is here no plea or statement on record which raises this question. I make this remark in order that such an omission may not occur in any subsequent case.

Counsel for Mrs Munro moved for the expenses of her defence. Counsel for the pursuer did not object to the motion being granted, but asked that decree for all the expenses of the action be pronounced against the co-defender Taylor.¹

THIS interlocutor was pronounced:—"Recall the said interlocutor. Find that the principal defender committed adultery with the principal defender on the occasions libelled, and decern in terms of the conclusions of the summons: Find the co-defender liable to pay the pursuer in expenses, as well those incurred by the pursuer himself as those for which the pursuer may be liable in respect of the expenses of the principal defender: Further, find the pursuer to pay the expenses incurred by the principal defender, and to the Auditor to tax the expenses now found due as between agent and client, and to report, and decern."

DEWAR & DEAR, W.S.—DAVID MILNE, S.S.C.—Agents.

No. 60.

Jan. 26, 1877.

Colquhoun's
Trustees v. Orr
Ewing and Co.

JOHN COLQUHOUN AND ANOTHER (Sir James Colquhoun's Trustees) Pursuers.—*Lord-Adv. Watson—Kinnear—Mackintosh.*
ARCHIBALD ORR EWING AND COMPANY, Defenders.—*Balfour—Moncreiff—Jameson.*

Navigable River—Title to Sue—Public Right.—The public have a right to object to any erection being made in the *alveus* of a public navigable river whether it is proved to be detrimental to the navigation or not.

Navigable River—Obstruction.—A bridge was erected across the river by the proprietor of both banks, two of the piers being built in the water. The river had been from time immemorial navigated by small vessels between Clyde and Loch Lomond. The part where the bridge was built was not affected by the flow of the tide. It was doubtful on the evidence whether one of the piers was or was not an obstruction to the navigation. *Held* that the river was a public navigable river, that no person had a right to execute any works which would obstruct the navigation, and that at the instance of any member of the public such work might be removed.

¹ *Andrews v. Andrews*, Feb. 7, 1873, 11 Macph. 401, 45 Scot. Jur. 2.

Navigable River—Tidal River—Alveus.—In navigable rivers, where the tide ebbs and flows, the *alveus* belongs to the Crown; but where the tide does not ebb and flow, the *alveus* belongs to the proprietors of the banks.

Navigable River.—*Observed*, that the right of the public in a navigable river where the tide does not ebb and flow is analogous to a public right of way.

River—Road—Public Place.—A large inland lake surrounded by a considerable population, several villages, and the estates of different proprietors, is a public place in a question of right of way.

No. 60.

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Colquhoun's
Trustees v. Orr
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THIS was an action by the trustees of the late Sir James Colquhoun of 1st DIVISION.
ss against Archibald Orr Ewing and Company, calico-printers, Leven- Lord Ruth-
rk, in the county of Dumbarton. The conclusions were for declarator furd Clark.
that the river Leven, throughout its course from Loch Lomond until it B.
falls into the river or firth of Clyde at Dumbarton, is a navigable river,
and open to the public; that the defenders have no right to execute
any works which will in any way interfere with or obstruct the naviga-
tion thereof or the free use of its banks, and of the towing-path along the
bank of the said river, for the purposes of navigation; and that the de-
fenders have no right to erect any bridges, piers, or other works therewith
connected, which will in any way injuriously affect the rights and in-
terests of the pursuers as proprietors of salmon-fishings in the said river
Leven and in Loch Lomond; and . . . that the bridge over the said
river which the defenders are at present erecting at or near to Dillichip,
in the said county of Dumbarton, and the piers or supports thereof, and
any works therewith connected, do at present, and will when completed,
obstruct the free navigation of the said river, and the use of its banks and
towing-path, to the injury of the pursuers, and will also injuriously affect
the rights and interests in the salmon-fishings in the said river and
Loch; and that the defenders should be ordained to remove the bridge.
The pursuers, who were proprietors of land on the banks of Loch
Lomond and of salmon-fishings in the Leven, averred that the pillars of a
bridge which the defenders were erecting across the Leven interfered on
one side with the towing-path, and on the other side, where the pillars
were placed in the bed of the river, that they obstructed the passage of
boats: that the erection of the bridge would materially interfere with
the transmission of the produce from their farms and of goods to them,
which would now have to be carried at greater expense by road or rail.
The pursuers pleaded;—(1) The river Leven being a public navigable river,
the defenders have no right to make any erection in the channel of the
river; on its banks, or on the towing-path, which will in any way inter-
fere with the free navigation thereof. (2) The pursuers, their predeces-
sors and authors, having by themselves and by their tenants and others
hitherto the free use of the river and its banks and towing-path, for
the purposes of navigation and floating timber, the defenders are not entitled
to do anything which will impede or obstruct the said uses hitherto had
in them.

There were also pleadings as to injury to salmon-fishings, but no evi-
dence was offered on that point.

The defenders averred that the river had been dedicated to manufac-
turing purposes for forty years; that sufficient room was left for a towing-
path; that the navigation was not obstructed, because the main span of
the bridge was ninety feet, extending over the whole of the water avail-
able for boats; and that the pier in the water chiefly complained of was
in line with the catch-water wall of an intake or lade a little lower down,
so that boatmen would have to avoid that spot at any rate. Further, that
James Colquhoun had assented by letter to the erection of the bridge.
The pursuers pleaded that the pursuers' averments were irrelevant. (3) The

No. 60. river Leven having been for upwards of forty years dedicated to manufacturing uses, and the bridge in question being necessary for the proper conduct and enjoyment of the defenders' works, and constituting no interference or material interference with any uses claimed by the pursuers, the defenders are entitled to absolvitor. (4) Acquiescence. (5) None. The pursuers' interests being injuriously affected by the operations complained of, they are not entitled to sue the present action.

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The following facts appeared on a proof:—The bridge, which was finished shortly after the action was raised, was built by the defenders over a part of the river above the flowing of the tide, and at a point where they were proprietors of the land on both sides, to connect their works at Levenbank with the North British Railway on the opposite side. It was constructed of iron girders laid on four stone piers of five feet diameter. Two of these were on the right bank, and the evidence went to shew that the towing-path, though altered, was at least as convenient as before. The other two were in the river, towards the left bank, the nearest to the channel being nearly in a line with an intake a short distance farther down. There had always been regular navigation, by means of small vessels called scows or gabbarts, between Dumbarton and Loch Lomond. They were towed up, and came down with the stream. The evidence was conflicting as to whether the one pillar was or was not an obstruction to the boats descending. The import of it is sufficiently given in the following opinions. On 14th May 1872, when the bridge was in contemplation, Sir James Colquhoun's factor wrote to the defenders' engineer to say that Sir James "would make no objection, provided his fishing and other interests were not interfered with."

The Lord Ordinary pronounced this interlocutor:—"Finds and declares that the river Leven, throughout its course from Loch Lomond to where it falls into the river or firth of Clyde at Dumbarton, is a navigable river free and open to the public, and that the defenders have no right to erect any works which will in any way interfere with or obstruct the navigation thereof, or the free use of its banks, and of the towing-path on the bank of the said river, for the purposes of navigation, and declares that the piers recently erected by the defenders in the bed of the said river, near to the east bank, are an obstruction to the navigation thereof: Therefore decerns and ordains the defenders forthwith to remove the said piers: Finds the pursuers entitled to expenses subject to modification," &c.*

* "NOTE.—The pursuers ask to have it declared that they have a public right of navigation in the river Leven. The defenders, on the other hand, contend that the river is private, and that no public right of navigation exists.

"It is certain that for a long period of time the river has been navigated by a particular class of vessels called scows or gabbarts. They descend the river by the force of the current; but they are towed up by horse haulage. There is a towing-path on the right bank. It ends about 800 yards from Loch Lomond, after which the boats are poled up to the loch.

"The river has been thus used for the purpose of carrying to the Clyde the produce of the lands on Loch Lomond side, and of bringing to that district the necessaries of life. This use was required by the proprietors and their tenants. An attempt was made in the opinion of the Lord Ordinary, unsuccessfully, to shew that the navigation had been carried on for a more general purpose.

"This traffic was carried on to some extent by boats belonging to the proprietors or tenants on Loch Lomond side, but chiefly by boats belonging to persons who kept them in readiness for hire. It was formerly more considerable than it now is. But though it has been diminished by the railways, it is not altogether unimportant. It is probable, however, that loaded boats will not be taken to

The defenders reclaimed, and argued ;—This was not a public navigable river. That term was applicable only to a river where the tide ebbcd and

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and that the navigation in that direction will be confined to empty boats, and to bring down a cargo.

The Lord Ordinary is of opinion that a public right of navigation exists in the river Leven. That it is navigable is proved by the fact that it has been used as a natural channel of communication between an extensive tract and the Clyde. It is within the definition of a public or navigable river given by Erskine, 2, 6, 17, and by Bell in his Principles, sec. 648.

The defenders contended that no right of public navigation could exist when navigation could not be carried on in both directions without the use of a horse haulage. For this proposition no authority was cited, and it is not supported by the dicta of the institutional writers. Whether the public have a right to use the bank of a navigable river for traction the Lord Ordinary did not stop to inquire. Such a right has existed for time immemorial in connection with the navigation of the river Leven, and it does not appear to be doubtful whether it depends upon common law or on usage.

The Lord Ordinary is right so far, the next question is, whether the bridge is an obstruction to the navigation. The pursuers make two complaints; first, in regard to the alteration of the towing-path, and, second, in regard to the piers which are placed in the bed of the river. The Lord Ordinary does not think that they have any well founded cause of complaint as regards the former, but the latter, in his mind, presents a very serious question for consideration.

The piers are situated in what must be considered the bed of the river. The defenders do not doubt that the site on which they stand had originally formed part of the bank, which was removed to form the lade of the distillery. But this is at the best no more than a conjecture. At any rate the lade has been in use to flow over the site beyond the memory of man, and the lade had at one time formed part of the bank, it must, as the Lord Ordinary thinks, be taken to be a part of the *alveus* of the river.

The defenders maintain that the piers do not obstruct the navigation. The evidence on this question is very contradictory. On the whole, the Lord Ordinary prefers that of the pursuers. The witnesses for the defenders give a very intelligible account of the manner in which they have been accustomed to use their boats between the piers and the right bank of the river. One witness, however, is very evident, that in descending the river a boat will have less time to clear the bridge than to clear the obstruction presented by the defenders' catch-water dyke.

The defenders further maintained that they were not encroaching on the rights of the public, even though the piers were to be considered to be an obstruction. They argued that the river had been employed for other uses than navigation, and that, if a reasonable space was left for the exercise of navigation, the public had no right to complain though the navigation might be less convenient than before. They rely on the case of *Grant v. Gordon*, 1870, where regulations were made for the floating of timber down the river and salmon-fishing by means of cruives.

The Lord Ordinary has not been able to adopt that view. He thinks that the defenders cannot place in the bed of the river any obstruction which materially obstructs the navigation, and that they cannot appeal to what has hitherto been done as any sanction for such an act. It is to be presumed that the uses of the river or its bed has been put do not injure the navigation, or if it is found that the public have lost their right to object. But prior encroachment will not, in the opinion of the Lord Ordinary, justify further encroachment.

The case of *Grant* is a peculiar one. It related to the regulation of two different rights in the river, the one of floating down timber, and the other of salmon-fishing by means of cruives. It had been previously decided that fishing by means of cruives was a lawful mode of fishing, and it was certain that it had been so for time immemorial. It is true that the pursuers alleged that in

No. 60. flowed. In a public navigable river the *alveus* belonged to the Crown, and no one had a right to make any erection upon it, whether it was proved to be an obstruction or not. But above the flow of the tide the *alveus* belonged to the proprietors, like the rest of the soil of Scotland. There was no reason *prima facie* why they should not erect anything pleased on their property.¹ Accordingly, the Leven not being a public navigable river, any right the pursuers possessed fell under the ordinary ways. It must be a right analogous to a right to use a highway, or a lesser right of a servitude of passage. It was not a highway, because it did not connect two public places. It was not, however, denied that the proprietors round Loch Lomond had a servitude right of passage over the water; but then a servitude must be used in the way least burdensome to the servient tenement, and it was only established by usage. *Talis præscriptum quantum possessum*. If there was a real obstruction to navigation as formerly used it must be removed; but there was none. The pier was in a line with the catch-water dyke of the intake, and the boatmen had always been obliged to steer out in order to avoid it, and had not to do so more now than before. The ground of decisions such as *Bicket v. Morris*² was that the opposite proprietors had a common intention. Further, Sir J. Colquhoun had consented to the erection of the bridge, and no injury was done to his rights.

The pursuers argued;—A public navigable river was defined as a river on which floats might be carried.³ And the river connected two public places—Dumbarton and Loch Lomond, where Luss and Glasgow had for centuries been market towns. It might be the law of England that the *alveus* of a navigable river belonged to the Crown only so far as the tide flowed. That was not the law of Scotland, and even if it were the water might be public property, though the soil was private property. And moreover, it was settled by the case of *Bicket v. Morris*, that even when the *alveus* was private property, one proprietor was entitled to oblige the proprietor *ex adverso* making any erection in the *alveus*, even on his own side, and when no injury or prospective injury could be proved. It was therefore not necessary to prove an obstruction to the navigation. But it had been proved that the pier was an obstruction. The right was not analogous to a servitude road. It was a public right, and there was a great difference between even the lowest kind of public highway, a right of way and a servitude road.

At advising,—

LORD PRESIDENT.—The pursuers of this action complain that the defendants in erecting a bridge across the river Leven, at a part of that river where the proprietors on both sides, have built the piers of the bridge in such a way in the *alveus* of the river as to interfere with the navigation, and also to obstruct and interfere with the pursuers' right of salmon-fishing. As regards the latter

recent times alterations had been made on the dykes which impeded the navigation. But with both these co-existent rights the Court could do no more than regulate the possession of both. This does not, in the opinion of the Lord Ordinary, justify the introduction into the bed of the river Leven of a new obstruction to the navigation.

“No case was made as to the alleged obstruction of the passage of salmon.”

¹ *Hale, de Jure Maris*, App.; *Hall on Sea Shore*, App. p. 5; *Craig*, 1, 10, Stair, 2, 1, 5; *Angell on Watercourses*, 552, 560.

² May 20, 1864, 2 Macph. 1082, 36 Scot. Jur. 529—July 13, 1866, 4 Macph. H. L. 44, 38 Scot. Jur. 547.

³ *Ersk.* ii. 1, 5, ii. 6, 17; *Bell's Prin.* 648, 651.

ed injury no evidence has been given at all to support the averments of the No. 60.
 and that part of the case, therefore, is no longer before us.

The first defence which is made—at least the defence which requires to be Jan. 26, 1877.
 considered—is a plea of acquiescence. It is said that the pursuers of this Colquhoun's
 as representing the late Sir James Colquhoun, are barred from insisting, Trustees v. Orr
 as he consented to the erection of this bridge, or acquiesced in its being Ewing and Co.
 and therefore if he had been alive now he could not have been here to
 claim. If I thought that defence well founded of course I should come to
 a conclusion that the pursuers were not entitled to insist, and that the action
 to be dismissed. The conclusions which alone the pursuers now insist in
 conclusions which they maintain as representatives of the public, because it
 public use of the river as a navigable river that they seek here to vindicate
 set up. And even if the pursuers were excluded from suing this action,
 the action were dismissed, it would not prevent any other member of the
 from taking up the complaint and insisting in it. But if they are not
 from suing this action by acquiescence, then we must take it that the
 are here as the proper representatives of the public, and not in any
 capacity. I am of opinion that there is not sufficient evidence of ac-
 quiescence. The letter which has been founded on by the defenders in support
 of the plea, dated 14th May 1872, by Sir James Colquhoun's factor to some
 representing the defenders, merely says that, referring to a recent conver-
 sation, the writer is directed by Sir James Colquhoun to say that he will make
 no objection, provided his fishing and other rights are not interfered with. Now,
 I suppose that by "other rights," as mentioned in that letter, it was not
 intended to embrace the right of using this river for the purposes of navigation
 and with all the subjects of the realm; and if it turns out that those
 rights are interfered with, then no plea of acquiescence can be founded upon
 it. The other evidence which was attempted to be brought in support
 of the plea I do not think requires any particular notice. I am very clearly of
 opinion that the pursuers are not barred from insisting in this action, and that
 they are entitled to insist in it as members of the public, and as representing
 the public interest.

That being so, the question is, whether there is here an obstruction or
 alleged obstruction to the navigable river; for that is the case presented
 by the pursuers. It has been contended that this is not in any proper sense a
 navigable river, and our attention has been very properly called to the
 distinction which exists between navigable rivers of different kinds—between a
 salt-water river where the tide ebbs and flows and a proper fresh-water river, which
 is undoubtedly is at the part of the river with which we have to deal.
 The distinction between the two is very important as regards legal principle,
 where the tide ebbs and flows the *alveus* of the river is the property of
 the Crown for public purposes as well as the banks of the river, and in such a
 case that the rights of the Crown are much more extensive than they can be
 in a proper fresh-water river. The Crown, acting through the
 proper department of State, would be entitled to deepen a river where the
 tide ebbs and flows, and to perform any operation upon the *alveus* of the river
 conducive to the improvement of the navigation. Not so with a fresh-
 water river. The *alveus* of a fresh-water river is the property of the proprietors
 of the banks, just as the *alveus* of a stream which is not navigable is the pro-
 perty of the proprietors upon the banks. But notwithstanding of that distinc-

No. 60. tion, which is a very clear one, there may be a public use of a fresh-water river for the purposes of navigation, and although the rights of the Crown for the benefit of the public are not the same there, nor by any means so extensive. Jan. 28, 1877. Colquhoun's Trustees v. Orr Ewing and Co. in the case of the estuary of a river where the tide ebbs and flows, you doubtlessly there may be public rights of navigation, and public rights of navigation which are capable of being defended very much in the same way as they would be in any other case. The right of the public over a river of this class is not like a right of way than the right of the public which is protected by the Crown in the case of a navigable river where the tide ebbs and flows, and I am very much disposed to deal with this case as if it were just a right of way along a river, by means of this river, where it is fitted for purposes of navigation.

Some reference was made to casual remarks which I made in charging a jury in the case of the Duke of Buccleuch v. Cowan, Dec. 21, 1866, 5 Mac 214, and I am sorry to observe that those remarks were rather loosely made, that they suggested a view of the law in that respect which I am not by any means prepared to maintain,—thinking, on the contrary, that the exposition which I have now given is a great deal more accurate than what I appear to have stated in the course of that trial.

But it seems to be contended further, on the part of the defenders, that there is a very inferior sort of navigation of which the river Leven at this part of it is susceptible,—as if the legal rules applicable to a subject of this kind varied according to the extent to which a river is navigable. But I rather think that if a river is navigable at all, and has been enjoyed and used as a navigable river by the public, the rights of the public must be judged very much according to the same rule, whether the river be capable of being navigated by vessels of one kind or another, by vessels of large or small dimensions. The legal principle which I apprehend, would be entirely the same, and the question therefore comes to whether this is a fresh-water river, at the part of it with which we have to do, which has been used by the public as a navigable river beyond the memory of man. Upon that question of fact I entertain no doubt whatever. I think the evidence upon that subject is perfectly conclusive, and it appears to me that the attempt to represent Loch Lomond as being not a public place is perfectly hopeless. The river Leven affords access to and from Loch Lomond, which we all know is one of the largest sheets of fresh water in this kingdom, and is the boundary between two counties for a long distance—for somewhere, I think, about thirty miles. There are four very large parishes which abut upon its shore, and it is surrounded by the estates of, I think, eleven different proprietors, some of them very extensive proprietors, and others of them small proprietors. There are many inns and cottages upon the banks of Loch Lomond, and there are villages. These villages are said to stand upon the private estates of some of those large proprietors; surely that does not prevent this loch from being surrounded by a considerable population, who represent, and are, in fact, the public of that district of country; and therefore to say that Loch Lomond is a private loch, as much as if it were a small loch in the middle of a landlord's policy, appears to me to be perfectly monstrous. Therefore I do not entertain the smallest doubt that the navigation of the river Leven, having been carried on past the memory of man in the manner which has been described in the evidence, makes the Leven a public navigable river to all intents and purposes, so far as a fresh-water river can be so made.

In these circumstances, it follows that the public having such rights of

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are undoubtedly entitled, and any one of the public is entitled, to vindicate and protect those rights against any encroachment upon the bed of the river. The Lord Ordinary's findings, I think, are quite satisfactory in so far as they establish that this river is "a navigable river, free and open to the public, and that the defendants have no right to execute any works which will in any way interfere with or obstruct the navigation or free use of its banks, and of the approach along the bank of the said river, for the purposes of navigation;" I need only say, with reference to that last finding, that I should have been inclined to make it a little more extensive than his Lordship has done, because it seems to imply that in order to enable the public to complain they must be enabled to shew that the operations of which they complain do in point of fact, and at the present time, interfere with or obstruct the navigation. I do not think the burden upon the pursuers in an action of this kind is so heavy as his Lordship supposes. On the contrary, it rather appears to me that if any person builds a bridge over such a river as this, fixes its piers in the channel of the river, he is in point of fact committing what is an illegality in itself. No man has no right to build in the *alveus* of the river. No man is entitled to build in the *alveus* of a small stream, at least without the consent of all the proprietors who are interested in that stream, and I think, *multo magis*, no man is entitled to build anything in the *alveus* of a stream in which the public has a right of navigation. In short, I am inclined to be of opinion that the principle which was firmly established in the case of *Bicket v. Morris*, 2 Macph. 1 Macph. (H. of L.) 44, is quite as applicable to a river of the description now dealing with as it was to a private stream. The principle of that case seems to be, that where there are other parties besides the party complained of who have an interest in a running water it is illegal to build *in alveo*. It is not, I think, to say, in defence of the operation complained of, that it does no harm. It may be that at the present moment the injury may not be done, and yet it may occur, because nothing is so wilful and capricious (if I may use the expression) as a stream of running water, and it is almost impossible to foresee what the effect may be of any interference with the navigable channel of such a stream as regards the proprietors further down the stream, or as regards the proprietors opposite to the place where the operation is carried out. In like manner, in the case of a navigable river like this, where there is an abundance of water, and where the deep part of the channel is but narrow, there is nothing to spare in the way of room for navigation, it is very difficult to foresee what the effect of any operation of this kind may be in times of flood or drought, or in various states of the river. The deep water channel of a river like this may shift and vary by the operation of causes with which we are very imperfectly acquainted, and which even experts of the highest skill are unable to foresee. And therefore to put down the pier of a bridge or any building in the *alveus* of a river of this kind appears to me to be what I call a dangerous operation as regards the navigation, even though it cannot be shewn that at the present moment it constitutes an absolute obstruction to navigation.

I have made these observations because I have some little difficulty in saying that the evidence before us shows the preponderance or weight of the evidence in favour of the pursuers upon the question of fact whether the piers of this bridge at the present moment constitute an obstruction to the navigation. It is not clear to me in that respect, and if the pursuers were under the burden of

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proving, as matter of fact, that at the present moment there is an obstruction to the navigation caused by the existence of those piers I should hesitate to assent to that proposition. But then the view which I take of the law is most materially strengthened when I find that men of skill, and men of practical knowledge, well, upon the part of the pursuers, have expressed their strong opinion even as the matter stands at present they consider this to be an obstruction to the navigation. Supposing them to be wrong in that respect, they cannot be so far wrong but that a very slight change in the condition of this river will make that an obstruction to the navigation which at present perhaps is not.

The law upon which I think this case falls to be decided was, as I said, very firmly established in the case of *Bicket v. Morris*; but it was not, I think, for the first time made the law of Scotland by that judgment. On the contrary, it appears to me that in the two earlier cases which were reported by Lord Kerran—the cases of the Magistrates of Aberdeen v. Menzies, 1748, M. 1. 1. and Farquharson v. Farquharson, 1741, M. 12,779—the very same doctrine was laid down with regard to streams not navigable, and in one of those cases certainly a stream of very considerable size, the river Tay, although at a distance of the Tay not very far from Loch Tay. But that the doctrine itself is well established, and is applicable to a case of this kind, I think may be made very clear by citation of one or two passages from the opinions of the Judges in this case, and in the House of Lords in the case of *Bicket v. Morris*, and the result being, to my mind, so very important, I take the liberty of closing my remarks with these. Lord Benholme says—"Without my consent," meaning the consent of the proprietor on the other side of the river, "you are not to build your building in the channel of the river, for that in some degree must obstruct the natural flow of the water. What may be the result no human being can with certainty know; but it is my right to prevent you doing it, and when you do me an injury, whether I can qualify damages or not." Lord Brougham says—"Neither can any of the proprietors occupy the *alveus* with solid structures without the consent of the others, because he thereby affects the use of the whole stream. The idea of compelling a party to define how it will affect upon him, or what damage or injury it will produce, is out of the question." The Lord Chancellor (Lord Chelmsford) says, after quoting these opinions, "These views appear to me to be perfectly sound in principle, and to be supported by authority. The proprietors upon the opposite banks of the river have a common interest in the stream, and although each has a property in the *alveus* on his own side to the *medium filum fluminis*, neither is entitled to use the stream in such a manner as to interfere with the natural flow of the water." Lord Westbury, who seemed to think that the case was entirely new, and did not recognise the cases which I have mentioned as reported by Lord Kilgour, in really establishing this doctrine, says—"This is a case of very considerable importance, because, so far as I know, it will be the first decision establishing an important principle that a material encroachment upon the *alveus* of a stream may be complained of by an adjacent or an *ex adverso* proprietor, and the necessity of proving either that damage has been sustained, or that it is likely to be sustained from that cause." And he goes on—"I have felt some difficulty upon it, because undoubtedly a proposition of that nature is somewhat at variance with the principles and rules established on the subject by the law. I am, however, convinced that the proposition, as it has been laid down in the Court below, and as it has received the sanction of your Lordships,

ordinance, is one that is founded in good sense, and ought to be established by the authority of law." No. 60.

Now, it must be observed that the interest which was there held to be violated by the erection *in alveo* was the interest of a proprietor on the banks of the stream, and in that respect, but in that respect alone, I think the case there held differs from the present; because here the party complaining has not the interest of a proprietor, but only the interest of one of the public. I do not think that the case of Sir James Colquhoun's Trustees is really based upon the notion that they have a private right here as distinguished from that of any member of the public. But it appears to me that the distinction is one of consequence in the application of the legal principle. The proprietor on the banks of a stream has an interest to prevent an erection in the *alveus*, because he may interfere with his rights—it may interfere with the flow of the stream and so injure him. But it is not because he is a proprietor on the banks of the stream, but because, being a proprietor on the banks of the stream, he has an interest in the water, that he has a title to complain, and it is because he has a right in this water that they, I think, have a title to complain. The title is not so much that of proprietorship as of interest in a running stream; and in that respect the title of the complainers here and the title of the complainer in *Bicket v. Morris* are identical in principle.

I am therefore, of opinion that the pursuers are entitled to prevail in those instances of the summons which are directed to the removal of the piers of the river, as an interference with the *alveus* of a navigable river.

PLEAS.—There are two classes of public navigable rivers, the incidents of which are different—those in which the tide ebbs and flows, and those in which there is either no ebb and flow of the tide, or which have a navigable stream, and where that ebb and flow extends. The Lord Ordinary finds that the River of Leven, now in dispute, throughout its course from Loch Lomond to the mouth of Clyde, is "a navigable river, free and open to the public," but he distinguishes—at least not in express terms—to which of the two classes of navigable rivers he holds the river to belong—whether that portion of the river at or near Dumbarton, where the tide ebbs and flows, or that portion of the river where there is no ebb and flow of the tide, on that portion the works now complained of are constructed. Over the whole course of the river from the sea to Loch Lomond the pursuers have maintained the argument that the character of the right of navigation is one and the same, and that it belongs to them in common with the whole public.

If the character of the right in question were the same above as below, and flow of the tide there could be no doubt at all that the works in question would be illegal, without the necessity of proving that injury to the navigation does or may actually result from them. The *alveus* of the tidal river belongs to the Crown for behoof of the public, and it is too clear that no *novum opus* could be lawfully constructed by an individual on that part of the river. Nor does the summons or record really raise any question. The declaratory conclusions, the averments, and the pleas, are all directed exclusively against works which do or are calculated to obstruct or interfere with or obstruct the navigation of the non-tidal part of the river, or the use of the banks and towing-path in connection with that navigation. It may be conceded that the right of navigation in that part of the river

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with the right of navigation in the tidal part of the river. But it does not follow from this that works on the *alveus* of the non-tidal part of the river are objected to as illegal simply because they would have been illegal if they had been in the tidal part of the river. The public right of navigation in the tidal part of the river is different in its origin and character from the public right of navigation in the other part of the river, and there is a corresponding difference in the incidents of those rights. The right of navigation where the tide does ebb and flow arises from use only, and depends upon the nature of that use. The right where the tide ebbs and flows requires no use or allegation of use. The Crown holds the *solum* of the tidal part of the river as trustee for the whole public, but in the remaining portion of the river the proprietors of the banks are the proprietors of the *solum* of the river, and the right of navigation on the part of others requires use to found and support it. In the present case, therefore, I think it incumbent on the pursuers to make out that the works objected to do or may cause obstruction to the kind of navigation which has been prescriptively practised by members of the public; but, on the other hand, I think that the proof sufficiently preponderates in that direction. I do not intend to go into the details of the proof. In some respects it is difficult; but upon the whole I think the burden of the proof is in favour of the respondents there being a certain degree of obstruction at present, and I think that it is events impossible to say that there is no ground for apprehending obstruction in future. Either of these reasons is quite sufficient to entitle any member of the public interested in the navigation to object to such an erection as that here, and consequently to justify the conclusion at which the Lord Ordinary arrived.

LORD MURE.—I have felt this case to be one of considerable difficulty in reference to the question of the obstruction of the navigation. Putting aside the question of salmon-fishing, which has been practically given up by the pursuers, it appears to me that the action depends exclusively upon whether the bridge has here been done will have the effect of obstructing the navigation of the river. The object of the action is to have the bridge, which was completed before the action was raised, removed, upon the ground that it obstructs the navigation of a navigable river. In looking at the summons and record and pleadings, I find that that is the special and only objection, apart from the alleged infringement of the right of salmon-fishing, which is taken to the proceedings of the respondents and the interest which the pursuers have is set forth as matter of fact in the summons and the record of the condensation. The bridge, therefore, is not, I think, challenged upon an abstract ground (as I read the record) that the erection of a bridge over a navigable river, the piers of which bridge rest on part of the bank, or on the bed of the river, is in itself an illegal act, to which the pursuers are entitled to object, and which they are entitled to have removed; but the action is now brought to be laid on the ground of actual injury to the pursuers' rights of navigation, and their right of salmon-fishing. In this view it is unnecessary to go upon the question relative to the distinction between the tidal and non-tidal part of a navigable river, as regards the rights of proprietors along the banks of a river to deal with the banks and *alveus*. I may, however, state that at this point I see no reason to differ from the view of your Lordship and Lord of Session that there is a distinction between the tidal and non-tidal part of a river.

and I am disposed to think that the proprietors of the ground on either side of the non-tidal part of a river would be entitled to do things which the proprietors on the banks along the tidal part would not be entitled to do, and as a distinction not in favour of the pursuers. But the question which is raised is a simple question of fact—Will the erection of this bridge be injurious to the navigation and thereby injure the pursuers' rights? In the condescendence, where it sets forth the interest the pursuers have to raise this question, the most material interest stated is "the effect which the bridge, as it is constructed, will have on the value or return from the estate under their control." The erection of the bridge will, it is said, materially interfere with the production of the produce from the farms, and of goods to them. The action has therefore been laid on very special grounds; and I think the letter to which the Lordship has referred, from the factor of the late Sir James Colquhoun, in 1812, may account for its having been so laid, for that letter, as I read it, sets the case on a somewhat different footing from that in which it would have been had the question been raised by one of the public insisting on the propriety of a pier in the *alveus* of a navigable river. It appears that so early as 1812 the defenders had in view the building of a bridge at this place, and they had for long been proprietors on the one side and had recently acquired a right of property on the other. They communicated with the factor of Sir James Colquhoun on the subject; and in the factor's letter to them the late Sir James Colquhoun is, I think, given to the erection of a bridge at this place, provided his fishing and other patrimonial rights were not injuriously affected. Now, we have it in evidence that in the course of this river, between Loch Lomond and Loch Lomond, there are five bridges, some of them in the tidal part of the river; so that the mere fact of piers being put upon the banks, or in the *alveus*, cannot be of itself an obstruction to the navigation. There is, as to a stone bridge at Dumbarton, with several piers in the river; and as regards the others, it is in evidence that the piers are brought down to the edge of the stream, and are even on the *alveus* of the river—one of the piers, I understand, belonging to Sir James Colquhoun himself. After that, I do not very well see how a person so assenting to the erection of a bridge, the piers of which must to some extent rest on the shore or bank of the river, could seek to have the bridge removed, even if it had been erected over a tidal navigable river, whatever any other member of the public might be entitled to do, unless the person so assenting could instruct a case of interference with his own patrimonial rights, as alleged in the condescendence. In dealing with this case it has been argued on the part of the pursuers, that there is no distinct plea to that effect in the record, that there was no interference with the rights of the public. It is not unimportant, therefore, to keep in mind that every endeavour appears to have been made by the defenders to satisfy the public on the matter, and that long before they began to build the bridge. It appears from the proof that the other two largest proprietors on Loch Lomond, Mr Smollett and the Duke of Montrose, were communicated with,—that the Loch Lomond Steamboat Company, who were also deeply interested, were likewise communicated with,—and that after due consideration no objection was made by any of them to the proposal. The fact that the company had at first some difficulty as to the height of the bridge, and that it was at once removed by the defenders agreeing to raise the bridge to the height required by the steamboat company; and it also appears that when

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No. 60. some of the boatmen objected to the way in which the towing-path at the bridge was to be formed that objection was also removed; and it was not until Jan. 26, 1877. the bridge had been almost completed, and a great part of the heavy expenses Colquhoun's Trustees v. Orr incurred, and any objection raised on the part of the public given up, that Ewing and Co. pursuers interfered to stop the erection of the bridge, and to endeavour to have it removed.

In these circumstances does the evidence shew that the pursuers' rights have been interfered with? Now, in the first place, it has not been shewn that any damage, direct or consequential, has been occasioned to the pursuers by the bridge; or that the patrimonial interests of any of the proprietors on the banks of Loch Lomond will be injuriously affected. Mr Wylie, who was for many years factor on the estate of Luss, and who only ceased to hold that office in May 1875, when this bridge was in course of formation, is quite distinct on that point. He says it will do no harm to the sale of wood on the banks of Loch Lomond. Mr Murray, factor to the Duke of Montrose, is still more distinct. The Duke is the largest proprietor on the banks of the loch, and the question was deliberately considered by Mr Murray, who consulted the Duke on the subject, and his evidence is that the bridge will not do any harm to property or to the sale of wood. Mr William Edmond, a large wood merchant who makes considerable purchases of wood on the banks of the loch, says he has not the slightest apprehension that the bridge will impede the navigation of the river, or make any difference in the price offered for wood on Loch Lomond. Mr Smollett and Mr Mackenzie, both proprietors on the banks of the loch, say the same thing; and I think that any evidence brought by the pursuers on that point is of very little weight as compared with the evidence of the witnesses for the defenders.

It is, however, alleged that the obstruction to the navigation will indirectly affect the pursuers' rights and the value of the Luss estate, so that the question to be determined just comes back to this: Is there any reason to think that the navigation will be obstructed? Now, in dealing with that question it is important to attend to the condition in which the river was, and to the state of the navigation before 1875, at the place where the bridge was to be erected. The main channel is proved to be from 25 to 30 feet to the west of the pier of the bridge. This is proved by Mr Neilson and various witnesses whose experience was examined for the defenders. Mr Copland, the engineer examined for the pursuers, concurs substantially as to this. He says it is not more than 20 to 25 feet west; some of the witnesses say from 26 to 27; and some say as far as 30 feet. This deep part of the channel is about 16 feet broad, and is proved by one of the witnesses examined for the pursuers. Now, the screw boats which navigate the river are—the largest of them—about 60 feet long, 15 feet wide, and do not draw much water. In that state of matters, and before the bridge was put up, there was a catch-water or intake a short distance below the bridge, which required to be carefully avoided in the course of the navigation. That is distinctly proved by one of the principal witnesses examined for the pursuers, Dugald Macfarlane: "Before the bridge was built many a time found a difficulty with the mouth of the intake at Dill Bridge. There was a risk of running the boat into the lade or upon the catch-water. It was a nasty place for a boat to go down, but still we did it in order to avoid the lade we had to keep the channel. (Q.) If you kept the channel did that keep you clear of the catch-water? (A.) When the water

we had no other place to go than the channel. (Q.) When was it that we had a risk of going upon the catch-water? (A.) When the water was too high. It was the current that took us in there. We kept ourselves clear by putting the boat out into the stream. If we go to the west side of the east piers of the bridge we keep clear of the intake and catch-water. If we steered straight on the piers we would certainly go on the catch-water." Now, that being the position of matters before the bridge was built, it is plain that if, in coming down the river, a scow got into the place where this pier is placed, it would go on into the intake. The witnesses for the defender, Mr Neilson of the steamboat company, George Macfarlane, and others who have taken boats up and down before and since the bridge was built, all concur upon this point. As to the condition of matters before the piers were put up, what has been alleged? The piers, we have it in evidence, come a few feet further into the river than the post which indicates the top of the catch-water wall; but this wall slopes down a few feet into the river, and substantially, I think, the piers are placed in about the line of the catch-water wall, taken as a whole. The state of matters the pier is put down, and it occupies a spot which all boats have avoided before the bridge was built. That is distinctly proved by Mr Neilson, who has been for a very long period connected with the steamboat company and who was consulted by the steamboat company as to whether they objected to the erection of the bridge; by George Macfarlane, John Macfarlane, and other witnesses of great experience examined on the part of the defenders, and who, it is of importance to observe, are the only parties who have gone down the river in charge of boats since the bridge was built. A witness for the pursuers, Walter M'Gregor, who gives evidence to the contrary. He was referred to as having objected strongly to the bridge, but he says: "I cleared the pier on the three or four occasions I have gone up and down since it was built, but I had plenty of water to come and go. If I had not had the water I would have run more risk. I worked past the pier with the helm. (Q.) You did not need to exert yourself very much? Not very much, but I had water to spare. When we have plenty of water we keep further off the pillars. (Q.) You have never had any difficulty in passing off them any time you have come down? (A.) No. (Q.) When you have plenty of water is the whole of the Leven rather dangerous? (A.) There are one or two witnesses for the pursuers who say that if they were to go against this pier with a barge they might get into trouble; but skilful men will take care to keep away from this place. They have avoided it. They have nothing to do but to follow the same course which they have hitherto followed, and avoid a spot which they have all their lives avoided by going down the stream. I ask, therefore, that the pursuers have failed to prove that the erection of the pier at this particular place obstructs the navigation or is calculated to be dangerous in any respect; and there does not appear to be any serious apprehension on the part of those who are interested in the matter that there will be any danger done to the patrimonial interests of proprietors on the banks of Loch Leven in respect of any difficulty in passing down the river, where there will be a water-way between the east and west piers of about 80 feet. On these facts I am unable to come to the conclusion that the navigation of this river is injuriously affected by the defenders' operations. It, on the contrary, appears to me upon the evidence that the navigation will be improved,

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No. 60. because a pier has now been put down which is calculated to act as a kind of beacon, at a place where there was formerly great danger of boats getting in the intake, and from that danger the navigation is now protected. I have referred to the evidence of the engineers who were examined, because I do not think that they differ materially. Mr Stevenson and Mr Leslie are of opinion that boatmen might perhaps have to pole so as to get into mid-channel 50 feet sooner now than they would have had to do before the bridge was built. But they were not aware that before the bridge was built the boatmen began to begin to pole at the very place where they may have to begin now; and for this reason, that they were afraid of getting into the intake if they allowed the boats to go down to the place where the bridge now stands. Then there is a question as to the towing-path, which was not pressed in argument, and on which the Lord Ordinary appears to be with the defenders. My impression is that the towing-path has been improved by the bridge, for the preponderance of the evidence goes to shew that the horses have greater command over the boats on the river being narrowed at this point, and those who have gone up and down since the bridge was put up say that there is no difficulty in getting past on the towing-path.

So standing the facts, I do not think that the possibility of some future danger entitles the pursuers, on the authority of *Bicket v. Morris*, to say that the bridge must come down, because whatever an individual member of the pursuers might be entitled to maintain upon that point I do not think that a party who gave a qualified assent to a bridge in 1872, which necessarily involved the participation of, or interference to some extent with, the banks of a navigable river, and never objected till the bridge was put up, can raise any such question. The letter which has been referred to conveys this to my mind, that unless it is proved that there was a direct injurious interference with Sir James Colquhoun's rights of salmon-fishing, or with the navigation in which he was interested as proprietor on Loch Lomond side, he would not object to a bridge being put up. I think the pursuers have failed to prove any such injury, and that they are therefore not entitled to insist upon the application of the principle which was laid down in *Bicket v. Morris* with reference to proprietors immediately affected by the obstruction complained of. The pursuers, in respect of that letter, and the terms of their own record, have, I think, laid upon themselves the burden of shewing that there would be a direct obstruction to the navigation by the bridge, and that there would also be a direct interference with their patrimonial interest. This the pursuers have, in my opinion, failed to do, and I am therefore compelled to differ from the view which has been expressed by your Lordships. I think that the fifth plea in law for the defenders should be sustained, and that they should be absolved from the conclusions of the action.

LOED SHAND.—I concur generally in the opinions expressed by the majority of your Lordships. I think the finding of the Lord Ordinary, that this is a point of fact a public navigable river, is fully warranted by the evidence in the case. Though the navigation has been always attended with considerable difficulty it is proved that the Leven has been used from time immemorial for the conveyance of goods and merchandise in scows or gabbarts—a peculiar kind of flat bottomed boat used and suitable for the navigation between the Clyde and the banks of Loch Lomond. It rather appears from the old case *Colquhoun v. The Magistrates of Dumbarton*,¹ which was referred to in

¹ June 18, 1801, 4 Pat. App. 221.

use of the discussion, that at the end of last century the river was of that character. That case no doubt had reference to a question of salmon-fishing, the pleadings in the case shew that the river was then treated by both parties as a river in use for public navigation. But, apart from this, I think the proof here shews that this river possesses all the qualities which necessary to make it a public water highway. You have two public rivers,—at one end the river Clyde, with all the public navigation upon it, the town of Dumbarton, and at the other end Loch Lomond, which in the evidence appears to have been from time immemorial navigated by public without objection on the part of any one. There is a large tract of many miles of country along the borders of Loch Lomond, and the boats to which I have referred have constantly resorted to all the different villages and uses on the banks. The river has not only been used by the tenants of particular owners on the banks of the loch and of the river, but there have constantly been persons who obtained their living by keeping boats on the river for use for the transport of goods, using the river not as a favour obtained from any owner, but as a public right, and employing horses which were kept by other owners who made their living by tracking the boats up the river and between various places on its banks.

I have therefore no difficulty in holding with your Lordships that this is in fact a public navigable river. It appears, no doubt, that in later years there has been considerably less use of the river than there was formerly, very much because of the existence of the railway which is now upon its banks; but I think this must be taken as an accidental circumstance, and be disregarded in question like the present. The railway has been there only for a time. It is produced, it may be, a temporary effect. Other causes may operate again to resume the navigation, and therefore I think that is not an element that can be taken into view in this question at all.

While, however, the river is public and navigable, it appears, on the other hand, that the bridge which has been put up by the defenders, and is now completed, is erected at a place at a considerable distance, about a mile and half, I think, above the point where the influence of the tide is known. It is true that the defenders are the proprietors on each side of the river, and thus a right of property in the banks, and this part of the river being free from the influence of the tide they have also a right of property in the river as far as it extends throughout its whole extent. The question that arises between the parties is in this position, therefore, that, on the one hand, the defenders are the proprietors of the river bed, but, on the other hand, the public have a right of navigation throughout the course of the river, including the portion of which this bridge is built. It so happens that this right is beyond question, because it has been established by use; but I should like to say that, so far as I am concerned, I am not satisfied that the public right of navigation of a river of this kind is necessarily dependent upon its past use. On the contrary, my opinion is, that if a river be navigable, and a natural highway between various places, even though it may be that it has not hitherto been used, the public would be entitled to vindicate a right to use it. But that question does not arise here, and is not involved in the decision of this case.

The next question that arises is, Whether there has been here an injury done to the public right of navigation by the erection of this bridge? The injury complained of is two-fold. One complaint is that a towing-path has been

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advanced to a certain extent into the river bed, to the injury of the navigation the other is, that certain piers have been put down in the *alveus*, also in the way of the navigation.

In regard to the first of these matters I concur in the opinion expressed by Lord Mure and the Lord Ordinary. A proprietor is fairly entitled, in dealing with a servitude right of this kind, to change to some extent the course of a towing-path, provided there is no substantial injury done to the right. He may do so in order to make his own property available. He may not, however, materially or seriously interfere with the public right. But in the present case I think the evidence shews, in the first place, that the change which has been made on the towing-path is one which gives the horses a more direct pull on the boats they are tracking than they formerly had; and again, that even if it were not so the portion of the river bed into which it is said the horses were to go, in order to get the benefit of a full pull upon the boat, is still open, and so I do not think that any injury exists from that cause.

With reference to the river channel certainly a more difficult question arises. The fact is that the east piers of the bridge have been put down in a part of the channel which is deep enough for navigation at many states of the river, and there can be no doubt that the piers would be an obstruction, and create a material and present injury to the navigation of the river, but for the catch-water to which reference has already been made, the existence of which, as I have said, makes the piers no additional obstruction. The piers are about 5 feet in diameter, and are solid blocks of masonry, distant from 36 to 41 feet from the river bank; and there is no doubt they are in a depth of water that would be sufficient for navigation. But then it is said that though they would be an obstruction to a great part of the water-way if there were no catch-water there, they are not in point of fact, because you must take the river as it has existed from time immemorial; and that is, I think, a reasonable contention on the part of the defenders. The catch-water is about 30 feet below the bridge, and extends for some distance in the river to within a few feet of the line in which these piers are; and there is a considerable amount of evidence to shew that many of the boatmen who were in the habit of navigating the river downwards (because these piers are in the way of the navigation downwards, the upward navigation being carried on the other side of the river) took care, in taking the sweep of the river at that part, to avoid the portion of the water upon which the piers now stand. It is worthy of observation that the witnesses speaking to a matter of this kind were dealing with a broad sheet of water, and it is not easy, when a stone pier has been put down in the position in which these piers are, for the men to say with any degree of accuracy that this particular point was a point they did or did not pass over, and I think their evidence must be received with that qualification. They say they did not pass over it, because if they had done so their boats would have drifted into the lade; but I am not satisfied that they can rely upon that evidence to the extent of a few feet either way. The result of the evidence on this subject, as it appears to me, is, that taking the piers as they are, and taking the catch-water as it exists, it has now become necessary that the boatmen shall use greater care,—that they must navigate their boats with greater anxiety than was the case before. I think Mr Leslie is right when he says (and he is one of the defenders' witnesses) that the boatmen will need, as a matter of precaution, to begin to pole their boats higher up, imposing, it may be, a slight burden upon them, but still a difficulty that did not exist before.

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secondly, I think it a matter of some importance that if boats do not clear space of ground now, they are apt to go against a very dangerous obstacle. And now a solid block of masonry of the size I have mentioned. It appears that now at times when it is navigated sometimes runs at the rate of six miles an hour; and if the river carries down a boat against one of the piers, in consequence of the current, or of the boatman ceasing to pole, or not taking care, the boat will encounter a very dangerous obstacle at this place which was not there before. Taking these elements into account, I am not prepared to agree in the view that there is no present injury to the navigation. It has been suggested by some of the witnesses that the pier is a beacon to warn boatsmen to keep off the intake below. In one sense that is true; but it is one which, if struck by a loaded barge going down at the rate of six miles an hour, will produce much more serious consequences than if the barge had struck upon a wooden pole further down the river. Therefore, upon the whole, I am of opinion with the Lord Ordinary that it has been proved that there is here a material obstruction to the navigation of the

river. And that is my opinion on the question of fact, I do not think it in the present necessary, so far as I am concerned, to rest the decision of the case upon that view; because I agree with those of your Lordships who have expressed the opinion that it is not necessary that the pursuers shall make out that there is a present danger to the navigation—a present obstruction of the kind I referred to. There are certain distinctions between that kind of navigable river which is under tidal influence and that which is not under tidal influence. Your Lordship in the chair has pointed out the most material of these. In the first place, a tidal river is under the guardianship of the Crown; the soil of the river is in the Crown, and the public are entitled not merely to pass and repass in navigation, but, it may be, to execute operations upon the river to improve the navigation. It is different with a river that is not tidal; the question of obstruction of the navigation, I do not think there is any difference between the right of the public in the one case and in the other. That the proper party to vindicate the right of the public in a tidal river is the Crown, and the Crown only; but so far as regards an obstruction of a river which is navigable, and which the public are entitled to keep open, in my opinion is that the public right to have it removed is substantially the same, whether the obstruction be within or above the tidal part of the river. As to the nature of that right, I concur with your Lordships in thinking that the principle which was applied in the case of *Bicket v. Morris*, in which it was only given to what had been settled in three different cases that had previously occurred, really applies here. That case arose between conterminous owners, and it was settled that a heritor is not entitled, even on his own property, to erect any obstruction *in alveo*, if no present injury does not appear to have been thereby caused. The reason your Lordship has explained, that in dealing with an element like water it is impossible to predict what changes may occur from operations *in alveo*, or from the course of the river changing from time to time. In that class of cases, there is a different kind of interest from that with which we have here. The proprietors have there what may be regarded as a proper common right in the stream. Here the proprietor has the right of the river banks and bed, and the interest of the public is the right merely to have the stream

No. 60. kept in a navigable condition for their use. But still that is an interest in the water

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and an interest in a subject of such a nature that if the subject be once interfered with the consequences cannot be predicted. Accordingly, I think that the public interest here is necessarily different from the interest of a conterminous proprietor, the same rule must be applied. The water must not be interfered with in either case, for you cannot tell what injury to the public in the one case or to the conterminous proprietor in the other may arise. Just so in the present case. Suppose this river had should, through the action of a winter torrent, entirely change its course, and that what is now the deep part of the river should become shallow, it would have been of the utmost importance to have had these piers away in order to leave the space useful for the purpose of navigation. Or suppose, as may quite well be conceived, that the catchway in time is removed either wholly or partially, it might then be of great importance to the navigation of the river that there should be no piers, and yet the piers would be there to block the public from the use they would otherwise have had. These are illustrations which occur to one's mind to show that the absence of present injury is not conclusive of a question of this kind. I say that while I observe that *Bicket v. Morris* decides only the special case of conterminous proprietors, in England its authority has been used as directed applying distinctly to navigable rivers. There were two cases—*The Attorney-General v. Earl Lonsdale*, May 1868, *Law Reports*, 7 *Equity Cases*, 32, in which Vice-Chancellor Malins gave a very full judgment, proceeding entirely upon the Scotch case; and *The Attorney-General v. Terry*, *Law Reports*, *Chancery*, 423, in which I find that the decision of the Master of the Rolls, again proceeding upon the case of *Bicket v. Morris*, was adhered to by the Court of Chancery, with the Lord Chancellor and the Lords Justices sitting. I read a passage from the opinion of the Master of the Rolls in that case, showing how completely the case of *Bicket v. Morris* was considered as applying to the case of the public right of navigation—"I am of opinion that this is a material obstruction to the navigation, and would be indictable at law as a nuisance. It was necessary to rest my decision on that I should have no difficulty in doing so; but I do not think it is necessary, for there is another ground also, a ground of very great importance, upon which I say that the informant is entitled to a decree, and that is this, that no man has a right to put an obstruction in the bed of a navigable river. As I understand the law, it is not an answer to say that at this moment the obstruction is not a nuisance; it may become so. And accordingly some piles that had been put into the river with a view to the building of a wooden pier, though they extended only three feet into a breadth of sixty feet of navigable water, were ordered to be removed. It is true that was within tidal influence, but for the reason I have explained I do not think there is any difference upon this question of obstruction, as to the rights of the public, whether the obstruction be in a part of the river under tidal influence or not."

I therefore think that the Lord Ordinary's interlocutor should be adhered to. I may say in reference to one point referred to in the opinion of Lord M'Alister that it appears to me too critical a view of this action to regard it as an action calculated to try only the question whether there is an obstruction in the river which presently impedes or interferes with the navigation. The conclusions of the action are to the effect that the river is a public and navigable river, and the pursuers ask a decree of declarator that the defenders have no right to put up any erections, not "which do obstruct or interfere with the navigation."

which will in any way obstruct or interfere with the navigation," and I cannot read those words, giving them their fair interpretation, as being limited to a case of actual present obstruction. Even if they were to be so read I am of opinion that the proof is sufficient to shew there is actual obstruction, but I think it not to say that I do not read those conclusions in that narrow sense.

In regard to the letter of 14th May 1872, by Sir James Colquhoun's factor, of the alleged acquiescence, I agree with your Lordship in the chair in thinking that the defenders' plea must be repelled. What is it that Sir James Colquhoun said to? He says that he will make no objection "provided his fishing and other rights are not interfered with." The fishing right is out of the case. What are the other rights there referred to? The only other rights that could have been in the mind of the writer of that letter are the rights of navigation. There is no other right suggested to which the expression "other rights" would refer. That right of navigation was not any patrimonial right of Sir James Colquhoun, but a right which he in common with all other members of the public had. It may be, and it is the case, that Sir James having large quantities of wood upon his estate, might require to use this river much more than other members of the public. It was not because of any private right he had, but because this is a public navigable river which he as a member of the public required or might require to resort to frequently that he had rights which he was entitled to have preserved. He says he will be satisfied if those rights are not interfered with. But the bridge is now up, and his trustees allege that his rights are interfered with, and I think this is proved. The proof shews that there is a present material obstruction; but whether that is so or not, if the bridge may at a future time come to be a block in the way of navigation, its existence is inconsistent with the pursuer's present right, for that right is to prevent any obstruction which now impedes, or which may impede, the navigation of the river. I therefore think that the letter founded on does not maintain the present action. I think the right of navigation was reserved to the fullest extent; and if it be shewn to have been injured either by an obstruction which now causes injury, or which causes apprehension of injury, the pursuers are not barred by anything in that letter from maintaining their action to have that obstruction removed.

THE COURT adhered.

TAWSE & BONAR, W.S.—JOHN CARMENT, S.S.C.—Agents.

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E. A. LUCAS AND OTHERS (Beresford's Trustees), Pursuers.—
Lord-Adv. Watson—Balfour—J. P. B. Robertson.
JAMES GARDNER, Defender.—Kinnear—Asher.

No. 61.

Jan. 27, 1877.
Beresford's
Trustees v.
Gardner.

Issue—Fraud—Essential Error.—In an action of reduction of a lease brought by the landlord against the tenant the pursuer averred that the lease had been obtained by the fraudulent representations of the defender's son, who was not for the pursuer, in pursuance of a fraudulent conspiracy between the defender and his son, and that it was signed by the pursuer under essential error, induced by the said representations. The Court held (1) that the pursuer was not entitled to a separate issue of essential error; and (2) that to the issue "Whether the pursuer was induced to execute the lease by fraudulent representation made by the defender" (being the issue adjusted by the Lord Ordinary), he was not to have added the words "or by his son on his behalf."

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1st Division.
Lord Ruther-
furd Clark.
B.

THIS was an action by the trustees of Sir George Beresford, for re-
tention of a lease signed by them of the Ballachulish slate quarries
favour of the defender, James Gardner.

The pursuers averred as follows :—In May 1873 the defender, Lady Beresford, one of their number, to give him a lease of the quarry on the expiry of the current lease held by Alexander Pitcairn at Walsbury Sunday 1874, and she agreed to a lease for fifteen years, upon the distinct stipulation that it was to be in the same terms as that held by Pitcairn. (Cond. 13) "In November 1873 George Gardner, agent and solicitor for the pursuers, a son of the defender, produced and requested the pursuers to sign a document, which he represented to be a lease of the quarry in favour of the defender, such as Lady Beresford had agreed to grant above mentioned; and he distinctly stated to the pursuers that it was the same terms as the lease held by Mr Pitcairn, except that it was for thirty years instead of fifteen years. Upon their stating that they would not grant a lease for a longer term than fifteen years he wrote and handed them a letter which he assured them would have the effect of limiting the duration of his father's tenancy to that period. Upon the representations and assurances thus made the said pursuers were induced to sign and did sign the said lease." (Cond. 20) "The execution of the said lease was obtained from the pursuers by the fraud of the defender and of the said George Gardner. The said pursuers were induced to sign and grant the said lease solely by the false and fraudulent representations of the said George Gardner, made by him to the pursuers who were his agents. The said lease was prepared in the terms in which it stands, and the said representations were made by the said George Gardner in pursuance of a fraudulent scheme and conspiracy formed and between him and the defender to obtain by such representations a lease in the said terms. When the said George Gardner made the said representations he well knew that they were false, and the defender, he obtained the said lease and entered into possession under it, well knowing that it had been obtained by such representations, and signed by the pursuers in the belief that it was in the same terms as Mr Pitcairn's lease. The said lease was signed and granted by the pursuers under the essential error that it was in the same terms as Mr Pitcairn's lease. The essential error was induced by the foresaid statements and representations made by George Gardner as to the tenor, and effect of the said lease."

They pleaded ;—(1) The lease libelled having been obtained by the pursuers as condescended on, it ought to be reduced, and decree of removing pronounced against the defender. (2) *Separatim*, the pursuers are entitled to have the said lease reduced, in respect it was granted by them under an essential error, induced by the false and fraudulent representations of the defender condescended on.

The pursuers proposed the following issues :—" (1) Whether the pursuers, or any of them, in executing the lease dated, &c. were induced by an essential error as to the substance and effect of the said lease, induced by the defender, or by George Gardner, writer in Glasgow, on his behalf. (2) Whether the said pursuers, or any of them, were induced to execute the said lease by fraudulent representation made by the defender, or by the said George Gardner on his behalf?"

The Lord Ordinary disallowed the first issue, and adjusted the second as follows :—" Whether the said pursuers, or any of them, were induced to execute the said lease by fraudulent representation made by the defender?"

The pursuers reclaimed, and argued that there was a case of essential error.

distinct from fraud, but that at all events, the words "or by George No. 61.
 on his behalf" ought to be added in the other issue.

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THE PRESIDENT.—I think there is no doubt that there is only one case pre-
 sented on record, namely, a case of fraudulent representation.

On the issue of fraud, as adjusted by the Lord Ordinary, does not, I think,
 properly represent the pursuers' case. It is clear that the representations are
 to have been made by George Gardner and not by the defender, and yet
 the Lord Ordinary puts it that they are made by the defender. If that means
 George Gardner's representations must be taken to be those of the de-
 fender, I differ. If the defender put forward George, that may make his state-
 ment equivalent to those of the defender, though in the construction of such
 statement even that would be a doubtful question, for I remember a not dissimilar
 case in which Lord Justice-Clerk Hope ruled that the fraud of the agent did not
 render the principal liable, and his charge was sustained by the Second Division.¹
 The matter should not be left in doubt, and I think it is sufficient if
 the representation is here made on behalf of the defender, not on his employ-
 ment. Therefore I think we should give the issue proposed by

THE DEAS.—There is no case made in the record of essential error, except as
 to fraud.

As to the phraseology of the issue, it is true that in modern practice, in adjust-
 ments for the reduction of settlements, and in various other cases, what is
 done has been done by the defender includes what is done by everybody else
 on behalf, and I should be sorry to say anything to disturb that practice.
 The parties stood to each other in a very peculiar relation. The per-
 son who was agent for the pursuers is alleged to have acted in the interests of
 the defender, who was his father. I therefore think that the ordinary practice
 should have better not been followed in this case, especially as neither party can
 be at the least disadvantaged from the proposed deviation.

THE JUDGE concurred.

THE LORD SHAND.—I distinguish this case from those in which a separate issue of
 error has been given, in this respect,—George Gardner only is said to
 make the representations which induced the pursuers to execute the lease.
 The representations could not have been made in error. If made at all they
 have been made fraudulently, for it is distinctly averred that George
 was acquainted with the terms of Pitcairn's lease, and that he procured
 the pursuers' signature to the lease in question on the false and fraudulent
 statement that its terms were the same as those of Pitcairn's lease.

There are two possible cases covered by the averments on record. Either the
 father and son were both guilty of the fraud, or the father may have been
 innocent of the fraud which it is said the son committed on his behalf, and to
 obtain pecuniary benefit. The objection to the issue as adjusted by the Lord
 Ordinary is that the pursuers would only get the benefit of the first of these

I am of opinion that even though the father, the defender, was ignorant
 of the fraud, the pursuers are entitled to succeed if it be proved that his son
 committed the deed as alleged; for I think the defender was not entitled to get

¹ *Pardon v. Rowat's Trustees*, Dec. 1856, 19 D. 206, 29 Scot. Jur. 99.

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or to retain a benefit so procured in his interest, a benefit for which it is alleged that he had stipulated in his agreement with the pursuers, and the pursuers undertake to shew was procured through fraud.

I think, therefore, the words "or by his son, George Gardner, writer in Glasgow, on his behalf," ought to be added to the issue as adjusted by the Ordinary in order to provide for this latter case.

LORD DEAS.—I wish to reserve my opinion on the last point mentioned by Lord Shand, whether, if there was fraud by George Gardner, and his father ignorant of the fraud, the pursuers may nevertheless be entitled to succeed.

THE COURT appointed the following to be the issue in the case:

"Whether the pursuers, or any of them, were induced to execute the lease dated, &c. by fraudulent representations made by the defender, or by his son, George Gardner, writer in Glasgow, on his behalf?"

TODS, MURRAY, & JAMIESON, W.S.—ADAMSON & GULLAND, W.S.—Agents.

No. 62.

Jan. 27, 1877.
Alexander v.
Stuart.

JOHN ALEXANDER, Complainer.—*Brand.*

JOHN STUART, Respondent.—*M'Kechnie.*

Bill of Exchange—Value—Proof—Mode of Proof.—In a suspension charge at the instance of the drawer of a bill the Court allowed a proof in answer *prout de jure*, in respect that the charger admitted that the bill was obtained by him in circumstances out of the ordinary course of business.

Bill-Chamber.
2D DIVISION.
R.

JOHN ALEXANDER having been charged on 28th November 1876 at the instance of John Stuart to make payment of a bill for £35, with interest under deduction of £18, 6s. 6d. said to have been paid to account, presented a note in the Bill-Chamber to have the charge suspended.

He averred that he, along with a friend named Roger had, on 14th June 1876, accepted a bill for £35, drawn by Stuart on them, solely on understanding and agreement that the contents of the bill, after it had been discounted, were to be handed to Roger for his own use, under deduction of a sum of £5 owing by Roger to Stuart, and on the understanding with Stuart that he was not to be liable in relief except to the extent of one-half of any sum which Roger might fail to pay. He also averred that he received no value for the bill, and that Stuart discounted the bill but retained the money so obtained for his own uses and purposes, and did not hand any to Roger. He denied that any payment of £18, 6s. 6d. was ever made in respect of the bill as stated in the restricted charge.

Stuart in answer stated that prior to the transaction in connection with this £35 bill he held a bill accepted by Roger for £14, 5s. which had fallen due and had not been retired by Roger. (Stat. 3) "The respondent frequently pressed Mr Roger for payment of the said bill, but was always unsuccessful, being put off by promises which were never implemented. The respondent ultimately threatened Mr Roger with personal diligence upon the said bill, and the result was that, at a market held at Keir on 14th June 1876, Mr Roger met the respondent, and on condition that he should not do diligence against him in the meantime on the said bill, offered him a bill at four months by the complainer in favour of a friend named acceptor. The bill had £35 in the corner, and was signed by the complainer. The respondent, it was proposed by Mr Roger, and ultimately agreed to, was to retain the bill for £14, 5s. This offer was considered by the respondent, and the result was that he agreed to accept the £35 bill, with the complainer as acceptor, only on the condition that

Mr Roger should also be an acceptor, (2) that he should retain the £14, 5s. bill until the £35 bill was paid, (3) that he should discount the bill and have the use of the money in the meantime, and (4) that the £14, 5s. bill, with interest, being paid, he should hand over the £35 bill. In point of fact the £35 bill was a collateral security for the £14, 5s. bill, and was granted by the complainer and received by the respondent only on that footing. The complainer was present, and agreed to these conditions. The £35 bill was granted for that sum by Mr Roger, and the complainer, who was really Mr Roger's cautioner, to induce respondent to postpone diligence against Mr Roger, and in consequence of being granted he did postpone such diligence." He explained that deduction of £18, 6s. 6d. made in the charge was the difference between the £14, 5s. bill and interest thereon, and the £35 bill, which hence, he said, he had paid to the bankers who discounted the bill, that neither Roger nor the complainer had made any payments towards it.

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The complainer denied all knowledge of this £14, 5s. bill at the time he accepted the bill for £35.

Respondent pleaded;—(3) In any view the suspender's statements, so far as disputed, can only be proved *scripto vel juramento* by respondent.

On 14th January 1877 the Lord Ordinary on the Bills (Adam) refused to do so, with expenses.

The complainer reclaimed, and argued, that the circumstances under which the bill was granted, as they appeared from the respondent's own statement, were such as to entitle him to a proof *prout de jure* of his rights as to value, &c.¹

And for the respondent;—The complainer's averments could only be proved by writ or oath of the respondent. An admission that a bill had been granted for more than the value received did not deprive the holder of the privilege of having proof limited to writ or oath.²

THE JUSTICE-CLERK.—The statements and admissions of the respondent here make this a case for inquiry, and place it outside the rule of law that proof of this nature is to be limited to writ or oath. He has stated that his debt was only £16, 13s. 6d., but he has failed entirely to explain how he came to accept a bill for £35 in payment of a debt so much smaller.

As regards the two cases quoted to us in support of the respondent's contention, I think they were quite rightly decided, but the facts here are much different.

I think that we should remit to the Lord Ordinary to pass the bill, and allow a proof *prout de jure* before answer.

MR ORMDALE.—I concur. It may, in ordinary circumstances, be a salutary rule of law that no party who appears *ex facie* debtor in the contents of a bill should be entitled to resist payment of his written obligation on evidence other than the writ or oath of the creditor, but care must be taken that the rule is not turned into an engine of oppression.

Coming to the conclusion that there should be investigation in the present case, I am influenced by the charger's own statements. It is clear from what he has obtained the bill charged on in circumstances entirely foreign

¹ Anderson v. Lorimer, Nov. 21, 1857, 20 D. 74, 30 Scot. Jur. 50.

² Black v. Newlands, Nov. 11, 1863, 2 Macph. 71, 36 Scot. Jur. 38; Mercer

Black v. Livingstone, Dec. 21, 1864, 3 Macph. 300, 37 Scot. Jur. 144.

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to those of an ordinary bill transaction. The suspender exhibited his name on a blank piece of stamped paper, and the charger filled it up for £35, attaching the bill for which he says it was intended to come in the place of a bill of acceptance for only £14, 5s. But although in this way he obtained the bill for £35, the charger also retained the old bill, and discounted the new bill at his bankers. Now, it is clear that if the charger had not taken up, saying he had been unable to take up, the £35 bill, so discounted by him, the suspender could have compelled the suspender to pay every farthing of it, although, on the shewing and admission of the charger, he was in reality debtor in it only to the extent of little more than £14.

On the ground, therefore, that on the charger's own shewing it is clear that the bill charged on was not granted in the ordinary course of business, or of bill transactions, I am of opinion there should be an inquiry before further answer, and that for this purpose the case should be remitted to the Lord Ordinary to try the bill of suspension.

LORD GIFFORD.—I do not differ, as this bill seems to have been obtained in the ordinary course, and when there are circumstances so peculiar as those which are found in the present case, I do not think that the holder of the bill can complain if the facts are allowed to appear in a proof before answer.

But I do not wish to trench on the now recognised rule that it will not weaken the privileges of a bill that the holder admits that only partial value was given for it. The balance will still be held as a proved debt against the drawer and as to this balance the *onus* will not be changed, and the rights of the drawer or holder will not be impaired, any farther than his own admission.

THIS interlocutor was pronounced:—"Recall the interlocutor and explain of, and remit to the Lord Ordinary on the Bills to pass a note and allow a proof before answer *prout de jure* of the facts and circumstances set forth by the parties, and decern."

WILLIAM OFFICER, S.S.C.—THOMAS CARMICHAEL, S.S.C.—Agents.

No. 63.

Jan. 27, 1877.*
Wallace v.
Fraserburgh
Harbour Commissioners.

1st Division.
Lord Shand.
B.

GEORGE WALLACE AND OTHERS Pursuers.—*Trayner—Hunter.*
THE FRASERBURGH HARBOUR COMMISSIONERS, Defenders.—*Ash—*
J. P. B. Robertson.

Harbour—Dues—Wreckage.—The Fraserburgh Harbour Commissioners were empowered by a private Act to levy dues on goods, merchandise, or commodities imported into the harbour, in any ship or vessel out of any ship, coming into the harbour, or landed within the precincts of the regality of Fraserburgh, besides tonnage dues on vessels coming into the harbour. Jurisdiction to determine any dispute regarding the amount of the duties was conferred on the chief magistrate.

A vessel was wrecked in the harbour, and the wreckage partly drawn ashore and was partly brought ashore within the precincts of the harbour. With the exception of a few empty barrels and a small quantity of cargo the wreckage consisted of the materials of the vessel. The harbour commissioners charged dues upon the whole. *Held* (1) that the chief magistrate had no jurisdiction to determine whether dues were leviable; (2) that the commissioners had no right to exact dues on wreckage.

PEARSON, ROBERTSON, & FINLAY, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

JAMES HOULDSWORTH, Pursuer.—*Balfour—Mackintosh.*

WILLIAM BAIN AND OTHERS (Alexander Brand's Trustees), Defenders.—

Asher—Moncreiff.

No. 64.

Jan. 27, 1877.
Houldsworth
v. Brand's
Trustees.

Minerals—Special obligation to remove on notice—Reasonable time to effect removal.—The tenants of a colliery were bound to cede possession on receiving intimation from their landlord that he was dissatisfied with the working, and on being paid for their plant at a valuation. The landlord gave intimation on 3d February 1874, but the tenants, holding an erroneous notion of the meaning of their contract, retained possession till 11th November when they were ordained by the Court to remove. It was afterwards held that they were liable to the landlord in damages as for breach of contract for wrongful retention of possession. *Held* that the tenants were entitled to a reasonable time for making the necessary arrangements for ceding possession, for the closing of their colliery engagements, disposal of surplus stocks of coal, dismissal of employees, and valuation of plant; and in the circumstances, from 3d February to 15th May 1874, was a reasonable time.

Breach of Contract of Lease—Minerals—Measure of Damages.—Estimating the damages in the above circumstances, *held* (1) that the pursuer should be placed as nearly as possible in the same position as regards the lease would have been had there been no breach of contract; and that with the question as a jury question, on the one hand, the profits lost or might fairly be held to have resulted from the tenant's operations during the period of wrongful possession, and on the other, the loss of the lease, which it might be inferred the landlord would have received if the lease which he might have granted, were to be taken as elements of consideration; (2) that in estimating the tenant's profits allowance was to be made for tear and wear, and interest on cost, estimated generally, not for depreciation in the market value of, their machinery.

Previous report, January 8, 1876, *ante*, vol. iii. p. 304.

2D DIVISION.
I.

A part of the agreement between the late Mr Houldsworth of Coltness (the pursuer's father), as proprietor, and the late Robert Brand, as tenant of the Greenhead Colliery on the estate of Coltness, that "in the event of the death of the said Robert Brand during the currency of the lease, the landlord is hereby empowered, if he so wishes, to enter on and resume possession of the colliery and other subjects of the lease, at a time as afterwards provided for, if he should at any time be dissatisfied with the working thereof by the representatives of the said Robert Brand."

Robert Brand died on 26th January 1873, and was succeeded in the lease of the colliery by his son, Robert Brand junior, who, dying also in 1873, was succeeded by his uncle Alexander Brand.

Alexander Brand died in November 1873 and left the lease of the colliery to William Bain and others, his trustees.

James Houldsworth (the pursuer), having become dissatisfied with the management of the colliery, on 3d February 1874 intimated to the trustees that he had resolved to resume possession thereof in accordance with the power to that effect contained in the minute of agreement between his father and Mr Brand. He also intimated that he had placed the lease in the hands of the arbiters mentioned therein for the purpose of having the plant valued and taken over by him as provided for.

The trustees disputed the landlord's right to resume possession of the colliery as proposed by him, and a litigation ensued, which ended in Mr Houldsworth obtaining decree of declarator and removing against the trustees on May 17, 1875, *vide ante*, vol. ii. p. 683).

After Mr Houldsworth raised the present action, in which he con-

No. 64. cluded against Brand's trustees for violent profits, and, *separatim*, damages, for their wrongful retention of possession.

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The Court, on 8th January 1876, found "that the defenders had wrongfully retained possession of the colliery in question after the period at which they were bound to remove, are liable to the pursuer in reparation for such injury as has been thereby occasioned to him; and, to further answer, allow a proof to both parties in regard to the amount of damages thereby incurred: Find the defenders liable in expenses to the date of the interlocutor reclaimed against, reserving in the meantime all other questions of expenses."

Instead of proceeding with the proof allowed by this interlocutor the parties agreed upon a joint minute of admissions and relative states, renouncing farther probation.

These relative states were so constructed as to shew in a tabular form the output, profit, expenses, &c., connected with the colliery at various dates between 3d February 1874 and 11th November 1875. As the Court by their final judgment fixed 15th May 1874 as the date at which the defenders ought to have ceded possession, the result of the states in reference only to that date are given in the following narrative. The defenders did actually cede possession on 11th November 1875.

From the minute and relative states it appeared (1) that the income of the colliery from 15th May 1874 to 11th November 1875 was £17,892, 5s. 9d., and the expenses of working, including materials, fuel, and lordship, £14,981, 18s., leaving nett profit £2910, 7s. 8d.; there were, however, other expenses connected with the carrying on of the defenders' business, which amounted during the same period to £1500 3d., exclusive of wear and tear of machinery and interest on capital employed; (2) that the value of the plant, engine, and machinery of the colliery, as at 15th May 1874, was £4450, and their value at 11th November 1875, when the same were taken over by Mr Houldsworth and paid for by him under the agreement with the late Robert Brand senior £2671, 0s. 8d., conform to valuations made at or about the respective periods by Messrs M'Creath and Frew, mining-engineers, Glasgow; and that the difference in the value of the plant, between these dates, except in so far as attributable to ordinary wear and tear, was caused by the fall in the market; (3) that the pursuer, Mr Houldsworth, let the Greenhead Colliery to Mrs Jessie Brand, widow of the late Robert Brand senior, conform to the offers dated 31st January 1874,* and acceptance dated 3d February 1874.

* "Edinburgh, 31st January 1874.—Donald Beith, Esq., W.S., Clerk of Court.—Dear Sir,—Referring to my interviews with Mr Houldsworth and me as to Greenhead Colliery, I hereby offer on behalf of my sister, Mrs Brand, a lease of this colliery as follows, viz :—

"1st. A lordship of 2s. 6d. per ton of 22½ cwt. (being 1s. 3d. per ton than that fixed in the current lease) on round ell coal.

"2d. A lordship equal to that fixed in the current lease, and 1d. on the dross.

"3d. To accede to the other conditions in the current lease with the modifications and additions stated by Mr Houldsworth.

"4th. To assume all risk and any expense that may be occasioned in running the lease.

"5th. To take all risk of the valuation which falls to be made under the minute of agreement by which Mr Houldsworth has power to resume possession of the lease.

"The proceedings for the resumption to be at Mr Houldsworth's risk and in his name, but at Mrs Brand's risk and expense.—I am, yours very truly,

"J. M. ROBERTSON."

74,* and that she entered into possession thereof on the defenders No. 64.
 ding possession at 11th November 1875, and still possessed the col-
 ry under this lease; (5) that the lordship payable under this lease Jan. 27, 1877.
 Mrs Brand would have exceeded the lordships payable under the Houldsworth
 se under which the defenders claimed right to possess the colliery for v. Brand's
 e period from 15th May 1874 till 11th November 1875 by the sum of Trustees.
 448, 3s. 4d.

Argued for the pursuer;—(1) The pursuer was entitled to damages from
 e date at which his intimation to the defenders to remove was given,
 3d February 1874. They might be entitled to a reasonable period
 effect their removal. But from that date they were accountable to
 for the profits made. (2) The next question was, on what principle
 e damage to be estimated? The argument was to be taken on the
 ting that the defenders had committed a breach of contract in not
 ting possession at 3d February 1874. By doing so they had wrong-
 ly made a profit to themselves and had wrongfully prevented the pur-
 suer from making a profit. The proper estimate of damages therefore was
 e amount of profit made by the defenders during their wrongful posses-
 sion. It was maintained on the other side that the pursuer would have
 let the colliery but for the defenders' wrongful action, and that therefore
 e was only entitled to such additional lordship as he would have
 gained from a new tenant, and that the defenders were entitled to retain
 out's profit. But the consideration of the pursuer's intention was
 irrelevant. He might intend to relet, and might even have arranged to
 do so, but with that the defenders had no concern. They were bound to
 give over to the pursuer the whole profits made, otherwise they would be
 making a profit by their own breach of contract. Under the law of Eng-
 land it formerly stood a trespasser in such circumstances had to pay
 the whole value without deduction even of cost of working. The Court
 in *Chancery* had recently modified this strict rule in the case of *United*
Edinburgh Collieries Company.¹ In that case the whole prior authorities
 were reviewed, and the decision fixed (1) that the owner, where the tres-
 passer was innocent, was entitled to the value of the coal at the pit mouth,
 less the expense of severing and raising it; (2) that no allowance was to
 be made for the cost of sinking workings, erecting machinery, profit on
 the coal engaged, trade allowances, &c. In such cases the Court would
 refuse to go into the question of the capital expenditure of the tenant.
 It, therefore, the pursuer was entitled to was the gross value of the
 coal, less lordship, wages, and value of materials only, but not interest
 on capital, wear and tear of machinery, and other expenses incidental to
 carrying on of the defenders' business.

Argued for the defenders;—(1) A reasonable time must be allowed the
 defenders to remove before damages could begin to run. (2) Even in
 such cases there was a difference between innocent trespass and breach of
 contract. Where there was trespass of any kind there was still a linger-
 ing of the older and stricter law. In cases of mere breach of contract a
 different view was taken. There was no reason why the measure of dam-
 ages should be different in this particular breach of contract from what it
 was generally understood to be in ordinary cases of breach of contract.

¹ *Edinburgh, 3d February 1874.*—Dear Sir,—I duly received your letter
 of the 1st ult., and, as authorised by Mr Houldsworth, I hereby accept the offer
 therein contained, and shall forthwith proceed to have the arrangement formally
 completed. A copy of your letter is subjoined.—Yours truly, DONALD BEITH.
 J. M. Robertson, Esq., Writer, Glasgow.
 November 14, 1872, L. R. 15 Eq. 46.

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Admitting that the owner was to be put in the same position as if he himself severed and raised the coal, and even that he was to have the benefit of the pit already sunk with the tenant's capital, still he must have paid for machinery. Had he been working on his own account he must have deducted tear and wear, and loss of interest on money sunk in machinery before he could have estimated his profits. The defenders, in estimating the amount they were to pay the pursuer were entitled to a similar deduction. But farther, by delaying to cede possession from 15th May 1874 to 11th November 1875 the defenders had suffered and the pursuer had avoided a serious loss. Had the pursuer taken over the machinery at 15th May 1874 he would have paid £4450 for it. As at 11th November 1875 he, or Mrs Brand for him, only paid £2671 owing to a fall in the market value between these two periods, the difference being £1779. Now, the pursuer could not have made the profit which he claimed without the plant, and he was not entitled to the high price which was made without allowing for the corresponding high price at which the machinery stood at 15th May 1874, or in other words for the loss which the defenders made on their machinery between May 15th and November 1875. He could not take the profit as from May 15th and postpone the valuation of the machinery till November 1875. The defenders were therefore entitled, besides an allowance for ordinary tear and wear and interest, to deduct the depreciation of their machinery between 15th May 1874 and 11th November 1875 from the profit. (3) If this view were not accepted then the defenders were entitled to ascertain if possible what was the true loss suffered by the pursuer in the circumstances. Now, in the present case there existed elements for determining exactly the true damage done to the pursuer. He had actually entered into a new agreement of lease, and therefore his loss was not the difference between the lordship he would have received under the old lease and the lordship he actually did receive. Either, then, the true profit of the defenders or the true loss of the pursuer must be taken as the measure of damages.

At advising,—

LORD ORMDALE.—The principle upon which the damages in this case are to be estimated or assessed has been, to some extent, already determined. It has been by our interlocutor of 8th January 1876 been determined that the defenders were not liable in the penal consequences denoted by the technical expression "loss of profits," but merely in the damages which it can be shewn the pursuer lost by being detained through their breach of contract, as fully explained in the opinions of the Judges as reported in the 3d volume of the fourth series of Court of Session Cases, 304.

Before, however, entering into the inquiry as to the amount of damages to be necessary to fix the date of their commencement, or in other words, the date at which the defenders' wrongful retention of the colliery is to be held to have commenced,—a point which was left undetermined by the Court when the case was formerly before them, in the expectation that the parties would by this time otherwise have furnished some more certain data than then existed for the Court to make a satisfactory judgment regarding it. The Court must now, however, decide the matter as they best can on the materials before them, just as a jury would do—and the whole matter is of the nature of a jury question.

Two matters of fact are clear, 1st, that the pursuer, in terms of the agreement of 5th October 1869, under and in reference to which the whole dispute has arisen, gave the necessary notice to the defenders that their lease of the

to terminate as on the 3d of February 1874; and secondly, that by the agreement the pursuer was then entitled to get possession of the colliery plant and others connected with the same, including waggons, belonging and leased by the second party, as soon as the value of the latter can be ascertained, and the amount paid to the second party or his representatives—that is, the present defenders. What, then, is to be held as a reasonable time to be allowed the defenders for ceding possession of the colliery plant valued after the pursuer's notice that the lease was to terminate on 3d February was given? They were certainly not entitled to any time which might be pleased to take or might find most advantageous for themselves, in continuing to work out the pursuer's coal; nor, on the other hand, do I think they could at once and immediately on 3d February, when they received the pursuer's notice, be held bound to desist from all further operations to, it may be, their great loss and damage. They were, I think, entitled to a reasonable time in which the necessary and unavoidable preparations for ceding possession of the plant could be made and completed. By their agreement with the pursuer they were to have their plant valued and paid for before ceding possession; but this was a very important matter which required care, attention, and was not satisfactorily accomplished. Neither could the defenders be expected, without some time and opportunity being afforded them for making the necessary arrangements in connection with the discharge of their engagements and closing their colliery engagements, to give up possession. What time and opportunity was really requisite for all this it is difficult for the court to say in the state in which the matter has been left by the parties. I think, however, that to allow the defenders to the term of Whitsunday, the 5th of May 1874, which is little more than three months after 3d February; is unreasonable or such as either party can justly complain of. I am therefore, to hold that the calculation or estimate of the damages ought to be made and to proceed as from the 15th of May 1874 till the 11th of November 1875 when possession was ceded by the defenders, and I have acted accordingly in ascertaining the amount of damages in which the defenders are liable to the pursuer.

The next question is whether the criterion of the damages to which the pursuer is entitled is the lordship which he would have received from Mrs Brand had she proposed lease to her, assuming it had been entered into, as on 15th May 1874, or the profits which have been shewn, or may be reasonably held to have resulted from the defenders' operations from that date till 11th November 1875 when possession of the colliery was ceded by them. I have come to think that the more reliable criterion in the circumstances is the latter, and have accordingly been chiefly guided by it. It is difficult indeed to hold that any lease proposed by Mrs Brand was actually completed. That one might have been completed, and possession of the colliery had been got at Whitsunday 1874 is highly probable, but as matters then stood the lease appears to me to have been left incomplete, and possibly Mrs Brand might have resiled, and been entitled to recover the lease money ever completing it. It is by keeping this in view that I have held that the proper course is to hold that it is chiefly for the damages which have resulted, or may be fairly held to have resulted, from the colliery operations from the 15th of May 1874 to the 11th of November 1875, when they ceded possession, that they must now account to

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the pursuer. At the same time I am not to be understood to have thrown tirely out of view as an element for consideration the gain which, in all circumstances, and having regard to the established facts, it may be inferred pursuer has been deprived of, under a lease of the colliery to Mrs Brand or other party, or from working it himself, if possession had been given up by defenders on 15th May 1874 in place of being wrongfully retained by the a year and a half after that date:

But taking it to be so, there are still some points of nicety and import which must be attended to, and which I have not overlooked, in regard to deductions or allowances to which the defenders are entitled in ascertaining profit or balance for which they are accountable to the pursuer. Although are not to be held liable in "violent profits" or other penal consequences they had by violence or positive fraud held retention of the colliery beyond date when they ought to have ceded possession, they are bound to make to the pursuer the damage or injury he has sustained by the wrongful retention from him of possession of the colliery; or, to put it differently, the pursuer is entitled to be placed in the same position, as nearly as possible as to profits, as he would have been in had there been no breach of contract by the defenders.

Now, the parties have by their minute of admissions shewn the amount output of the coal from 15th May 1874 till 11th November 1875, and the expenditure in producing that output. But whether more coal might have been put out at less expenditure is a different question, and, in point of fact, whether the defenders are, besides the expenditure referred to, entitled to deductions or allowances claimed, 1st, for certain law expenses, 2d, for depreciation and tear of machinery and plant, and 3d, for interest on capital invested, is another question about which the parties are not agreed.

In regard to the first of these claims I have been unable to see any sufficient reason for giving effect to it as in a question with the pursuer.

On the other hand, an allowance or deduction for tear and wear of machinery I think, be resisted by the pursuer, for it is clear, for anything that has been said or shewn to the contrary, that if there had been no wrongful retention of the colliery, and had the pursuer obtained possession of it on 15th May 1874, his machinery and plant must, if made available at all, have been subjected to tear and wear to some extent. And so as regards an allowance or deduction in respect of interest on capital invested. The only question in connection with these claims that can fairly be said to raise any difficulty is the question of the machinery or plant, and the amount of capital on which the deduction for wear and tear and interest are to be calculated. Is the estimated value of the machinery and plant as at 15th May 1874 or 11th November 1875, or some other and what date or dates, to be taken as the amount on which the percentage for tear and wear and interest of capital is to be calculated? Is the percentage claimed by the defenders for the whole period of their wrongful retention of the colliery to be assumed as correct? The parties have no mind in their minute of admissions given any precise or perfectly satisfactory data for an answer to these questions. They have merely specified the value of the plant and the value of capital as at certain dates on the assumption that the value of the plant and the value of capital and the percentage are to be taken as throughout the same. I have liked if the parties had agreed upon a scale shewing how and how often, monthly or quarterly, or at what other dates, the value of the plant and

the amount of estimated capital had varied, according to the rise or fall in the stock, between 15th May 1874 and 11th November 1875. But as the parties have not furnished this information I have been left to come to a conclusion on the subject as I best could without it.

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Having now adverted to what have appeared to me to be the leading considerations to be attended to in determining the amount of damages sustained by the pursuer, Mr Houldsworth, through the wrongful retention of the colliery by the defenders, it only remains for me to say that, according to the best of my judgment, and dealing with the matter as I believe a jury would do, and be entitled to deal with it, the amount of the damages ought to be assessed at £2000.

JUDGMENT.—The sole question remaining in this case is the assessment of damages, and the Court are to make such assessment precisely as a jury would have done answering an issue of damages upon evidence laid before them. The joint minute contains the proved facts upon which the jury must be assessing the damages.

If the question had been referred to a jury on an issue and upon this issue what the jury would have done would have been to find for the pursuer to assess the damages at a certain amount, naming the amount at which they had arrived. I think we must do the same, and I propose, agreeing with your Lordships, that we should find for the pursuer and assess the damages at £2000.

Perhaps I might stop, for a jury never gives, and is not bound to give, the result of the calculations upon which the estimate of the damages proceeds. The verdict of the jury is not subject to review, and although on a motion for a new trial the verdict may be set aside if the damages awarded are excessive, extravagant and beyond what any reasonable view of the evidence could justify, yet the burden of shewing this rests upon the party attacking the verdict, and it is always a very difficult matter to instruct inordinate or excessive damages.

Although acting as one of a jury I am not bound to explain the data upon which the calculation of the damages rests. I have no objections to do so, and shall do so as shortly as possible.

Where damages are due for breach of a mercantile contract the object is to place the pursuer in as good a position pecuniarily as if no breach of contract had been committed. The supposition to be made is that the contract had been fully implemented, and then the inquiry will be what would have been the value of the result to the pursuer. What could he have made by or through the contract, and then the difference between this amount and the amount which the pursuer actually has realised, after or notwithstanding the breach, is the amount of loss which the pursuer has sustained by and through the breach of contract complained of.

In order to reach this result, and to fix what loss the pursuer has sustained, there are two leading lines of inquiry which the jury may take and to which evidence should be directed—1st, it may be shewn speculatively what the pursuer might have done, and probably would have done, if the contract had been exactly observed and fulfilled, and the fair amount which the pursuer might have gained or realised had he followed an ordinary and reasonable course will be the amount which the defenders must make up to him for

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having, by their breach of contract, wrongfully prevented the pursuer from securing the amount supposed. But, 2d, another course may be taken, instead of inquiring, or besides inquiring, what the pursuer has lost, and probably lost, by the breach of contract, the jury may ask quite fairly what the defender gained by and through his wrongful failure to implement his contract, and it will very often happen, I think it happens in the present case, that the defenders' gain through the breach, when compared with the estimate of what the pursuer might possibly have himself made, will lead to an equal estimate of his damage. Thus, in the present case, when the question is, what has the pursuer lost by reason of not getting back his colliery at a given time, a very great assistance will be got by finding what the defenders have made or gained by keeping and working the colliery wrongfully and after the date at which they ought to have given it up, for it may be fairly held that the pursuer would have been able to make as much of the colliery if he had got it at the proper time as the defenders have actually made during their undue retention of it.

No doubt the amount of the defenders' gain or net profit will not necessarily limit the pursuer's claim, for the pursuer might be able to satisfy the jury that if he had got possession of the colliery at the time fixed by the contract, he would have made more of it than the defenders have actually done. He may shew that he could have worked it more profitably, or relet it on better terms, and so as to give him a better return than the defenders have actually made, for it is always the pursuer's loss which is to be sought for, and not merely the defenders' illegal gain. Still the defenders' actual realised gain is always the most important and a most relevant element to lay before the jury.

I am of opinion that the jury are entitled to look at the question in all its aspects, to take both into account, and to draw therefrom a reasonable conclusion. As a juryman I have done so, and it gives me some confidence that I cannot be far wrong in the amount of damages which I have assessed; that the results of the two views do not very greatly differ, although the sum which the pursuer would have got from Mrs Brand as new tenant seems larger than the actual gain realised by the defenders, at least if the deductions claimed by the defenders are allowed.

But in estimating the damages according to either view the jury must fix the period of time or date at which the defenders ought to have ceded possession of the colliery to the pursuer, for this also is, I think, a jury question. It has been fixed that the pursuer was entitled to resume possession of the colliery on a valuation "if he so wishes," and if "at any time he should be dissatisfied with the working thereof by the representatives of the said Robert Brand." Under this clause the pursuer, on 3d February 1874, gave notice of his intention to resume, but it is plain that resumption of an extensive colliery under such a clause could not be effected in a day. Reasonable time must be allowed for obtaining and adjusting the valuations and for completing the arrangements necessary for the cession by the defenders of the going colliery, and for the assumption as a going colliery by the pursuer. Workmen or miners, machinery, above-ground and under-ground, and all the necessary officials, had to be arranged with, dismissed or transferred, current orders provided for, accumulated stores or undisposed of coal had to be removed or sold, pumping arrangements had to be kept up without interruption, and many similar details had to be attended to and adjusted. We have no special evidence before us as to the

question as to what is a reasonable time is simply left to the jury to dispose of it best may. In this state of matters, and approximating as best I can to what would be fair and reasonable in the circumstances, I fix Whitsunday 1874 as an equitable date at which the defenders ought, in consequence of the notice given on 1 February 1874, to have fully and completely ceded possession to the pursuer. Jan. 27, 1877.
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In thus allowing the defenders three months to clear out I give them the fullest allowance possible. Perhaps a shorter time would have sufficed, but going to the terms of the lease and agreement, and the references therein to the terms of entry and removal, I think it not unreasonable to give the defenders till the Whitsunday term instead of fixing upon some intermediate and nearly arbitrary date.

Coming, then, the period from Whitsunday 1874 till Martinmas 1875, and taking as I best can the evidence both of what the pursuer might have made by working the colliery himself, or by a new lease to Mrs Brand or to anybody else, and also what the defenders have actually made by wrongfully continuing to work during that period, and making all reasonable deductions for working expenses, tear and wear, interest of capital, and incidental costs, I estimate £2000 as being as nearly as I can estimate the damage to which the pursuer is entitled.

In reaching this result I attach great weight to the pursuer's bargain with Mrs Brand. I think that if the pursuer had got possession of the colliery at Whitsunday 1874 Mrs Brand would then have entered, as in point of fact she did, at Martinmas 1875, and the pursuer would have got from her the new and enhanced lease, and then the pursuer would have had no working or other expenses to pay. In the other view—that is, what profit the defenders themselves have made—I do not allow the defenders the full amount they claim for working expenses, for I think some of the items claimed are inadmissible, or partially admissible—for example, the accounts paid to the defenders' lawyers. Interest on capital again cannot be dealt with precisely; it involves considerations not only as to market value of money, but also as to whether the pursuer would not have been saved all outlay in consequence of his agreement with Mrs Brand, who was to take the whole concern over at the same amount as was valued over at to the pursuer.

I think it right to add also that I do not give much weight to the alleged variation in the value of the machinery between Whitsunday 1874 and Martinmas 1875. The loss from depreciation to a large extent arose from the variations in the value of iron, and whether there is to be ultimate loss or not on that ground can hardly be ascertained till the plant comes to be actually sold by the pursuer or his assignees. Besides, it seems to be sufficiently established that the pursuer had little interest in this question, for Mrs Brand had taken over the whole plant at whatever sum it was valued at to the pursuer, be the value more or less. Even if Mrs Brand were not held tenant, it is obvious the pursuer might have made a similar lease with some other person who would have taken over the plant as at Whitsunday 1874 at its then value, that is, precisely at the value which the pursuer himself was to pay for it. These details, however, must be dealt with, and necessarily only approximately dealt with, by the jury. I have tried to take everything into due consideration, and my verdict is for the pursuer—damages assessed at £2000.

THE LORD JUSTICE-CLERK concurred.

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THIS interlocutor was pronounced :—" Having resumed consideration of the cause, with the minute of admissions for the parties, heard counsel, find the defenders liable to the pursuer in the payment of £2000 in name of damages for the injury sustained by him by the defenders having wrongfully retained possession of colliery in question after the period at which they were bound to remove therefrom : Find the pursuer entitled to expenses from the date of said minute of admissions, including the expenses of said minute ; and remit to the Auditor to tax the same and report, and find no expenses due to either party after that date decern."

MURRAY, BEITH, & MURRAY, W.S.—ALEX. MORISON, S.S.C.—Agents.

No. 65. GRACE CHARLES OR GRAY AND OTHERS, First Parties.—*Lord-Adv. W.*
—*Jameson.*

Jan. 27, 1877.
Gray, &c. v.
Gray's Trustees.

ROBERT MATHESON AND OTHERS (James Gray's Trustees), Second Parties.—*Moody Stuart.*

Trust—Powers of Trustees—Agreement modifying Trust Purposes—Tuition of New Trust—Alimentary Provision—Nobile Officium—Special.
—A testator left his estate to trustees, with directions to pay an annuity to his widow as the preferable purpose of the trust, and to distribute the residue as far as consistent with securing the widow's annuity, among his daughters by half-yearly payments, which he termed "annuities," but which really were payments out of the capital of the estate which would have exhausted it in a few years. From these annuities he excluded the *jus mariti* and right of administration of his daughters' husbands, and declared them strictly alimentary. After four years it was found that the trust had become unworkable, the moveable property was exhausted, and that though power to borrow out of the herbage was conferred, no further distribution could be made to the daughters without borrowing in a way prejudicial to their real interests. The herbage still remaining in the trustees' hands was considerably in excess of what was required to secure the widow's annuity.

The mother, and the daughters, who were all of full age, being the only persons beneficially interested in the estate, and the trustees, entered into an agreement for the conveyance by the trustees to the daughters of the remainder of the trust-estate, and for the creation by them of a new trust, securing the widow's annuity, and providing for the distribution of the property among the daughters as an alimentary fund, and exclusive of the *jus mariti*.

A special case was then presented to the Court to determine whether the trustees had power to carry out this agreement. The Court, in respect of a clause in the original settlement declaring the daughters' "annuities" alimentary and excluding the *jus mariti*, but without deciding as to the effect of the clause, declined to sanction a conveyance of the estate to the daughters inasmuch as the whole parties beneficially interested in the estate were not parties to the agreement, authorised a conveyance by the trustees direct to new trustees for the purposes of the trust proposed in the deed of agreement, and added a clause declaring the fund alimentary and excluding the *jus mariti* similar to that contained in the original settlement.

Trust—Alimentary Provision.—Question, whether a clause declaring the fund alimentary an "annuity" which was in reality a series of periodical payments out of the capital stock of the estate was effectual.

2D DIVISION.
R.

THE late James Gray died on 5th April 1873, leaving a trust in his estate, and a settlement, dated 3d April 1871, whereby he conveyed his whole estate to Robert Matheson and others as trustees his whole estate. Mr G

ived by his widow, Mrs Grace Charles or Gray, and by one son, No. 65.
 ander Gray, and by seven daughters. The truster's widow and his
 n daughters, with the husbands of those of them who were married, Jan. 27, 1877.
 g the only parties beneficially interested in the trust-estate, so far as Gray, &c. v.
 in the hands of the trustees, were the first parties to this special case. Gray's Trus-
 he trustees under Mr Gray's trust-disposition and settlement were tees.
 second parties to the case.

y his settlement Mr Gray directed his trustees to pay an annuity of
 0 to Mrs Gray, and also gave her the liferent of his dwelling-house
 furniture, the annuity to commence at the date of the testator's
 h, and to be paid half-yearly in advance out of the personal estate
 interest thereof, so long as these should be sufficient for that purpose
 for the other purposes of the trust to which the moveable estate was
 e specially applied, and thereafter, out of the rents of the heritable
 te, or, if need be, out of the heritable estate itself, or of a sum to be
 rowed on the security thereof. This annuity to Mrs Gray was declared
 be the primary and preferable purpose of the trust. Further, the trus-
 e were directed to pay out of the personal estate and revenue thereof,
 l thereafter, on exhaustion of the personal estate, out of such sum as
 uld be borrowed by them on the security of the heritable estate, an
 nity of £450 to each of five of Mr Gray's daughters, and an annuity of
 0 to each of the other two. These annuities were to commence at the
 of Mr Gray's death, and to be paid so long as the funds lasted.

ter the widow's death, and on the truster's daughters being reduced
 to, the residue of the estate was to be realised and divided between
 no surviving daughters.

he trust-deed also contained the following declaration:—"And I
 he provide and declare that in all cases in which any female shall
 e any right, in virtue of any part of these presents, the provision or
 put-matter of such right shall be exclusive of the *jus mariti* and right
 administration and curatory of any husband she may have, and shall
 purely alimentary, and shall not be assignable or liable to be attached
 toment or other diligence at the instance of the creditors of my
 daughters or their husbands or other parties; and in all cases the
 ists of any females, without their husbands' concurrence, shall be
 l and effectual discharges."

he trustees entered upon the management of the estate, and realised
 part of it was personal. The proceeds thereof, however, only
 ed for the payment of the annuities to the truster's widow and
 lters for the first four years after his death. There remained herit-
 property to the value of about £14,000. But it was found by the
 es to be impossible, if they adhered strictly to the letter of the
 deed, to make any further distribution of the trust-estate, con-
 ntly with preferably securing the widow's annuity, without borrowing
 manner prejudicial to the interests of the other beneficiaries. At the
 time, it appeared to them and to the beneficiaries that a further
 ibution of the trust-estate might be effected, consistently with
 ing the widow's annuity, were certain alterations made on the pro-
 ns of the trust-deed.

he parties of the first part accordingly, being the whole parties inter-
 l beneficially in the trust-estate, and being all of full age, entered
 an agreement with the trustees, the parties of the second part,
 rebly (1) the whole parties agreed to concur in bringing an action or
 ial case into the Court of Session for the purpose of having it found
 declared that the daughters of the said James Gray were now entitled
 ie whole balance and remainder of the estate absolutely, Mrs Gray's

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tees.

rights being secured in manner hereinafter set forth, and on grant discharge to the trustees under the said trust-disposition and settlement were entitled to receive a conveyance or conveyances to the same; (2) in the event of the said action or special case being successful parties of the first part bound themselves to execute a deed of assigning and conveying to the parties of the second part as trustees whole remaining estate of the said James Gray for certain purposes. These purposes were such as the first parties were agreed would carry substantially the intentions of the truster in a way which would make the trust workable. The trust-deed was also to contain a provision similar to that in the original trust-disposition and settlement, excluding the *jus mariti* and right of administration of the husbands of the first parties to the deed, and rendering any sums to which they had an alimentary.

This deed having been executed, the parties presented this special case to the Court, stating that the parties of the first part, being the only parties beneficially interested in the estate, were desirous of having the residue of the trust-estate handed over to them for the purpose of being administered in terms of the deed of agreement in a way conducive to the interests of all concerned, but that the trustees, the parties of the second part, had doubts as to whether they were entitled to divest themselves of the trust-estate in the manner proposed, and declined to do so without judicial authority.

The question of law submitted to the Court was:—"Are the parties of the first part and daughters of the deceased Mr James Gray entitled to obtain from the parties of the second part a conveyance of the whole remaining estate of the said Mr James Gray, upon the parties of the first part granting to the parties of the second part a discharge of all claims against the said trust-estate?"¹

At advising,—

LORD JUSTICE-CLERK.—This case stands in a somewhat complicated position. It is a case for the opinion and judgment of this Court, presented by the parties of the first part as trustees under a trust-settlement and the trustees acting under the settlement.

I may at once say that we are not in a position to give any final judgment on the matter. It is necessary that the parties should revise their case, and only state that they are willing to execute the deed of agreement upon the terms of the case, but they must actually execute the deed, instead of merely proposing to do so.

No doubt the period mentioned in the settlement has not arrived, and the parties say they represent all material interests under the settlement, and that circumstances render it inconvenient for the trust to continue. The inconvenience arises owing to the unusual provisions of the deed, by which payments are to be made to the beneficiaries at certain times, which payments are called annuities in the deed, but are in truth payments to account of the income of the estate alone, and not out of the capital. These payments are not to be out of the income of the estate alone, but out of the capital also. It turns out that the affairs of the trust have already at this position, that the personal estate left by the truster will do not meet the annuities falling due in April next, being only four years from the truster's death. There is heritable estate in the hands of the trustees, and

¹ *Authorities referred to.*—Lewis v. Anstruther, June 11, 1852, 14 D. Scot. Jur. 514, and Dec. 17, 1852, 15 D. 260, 25 Scot. Jur. 172; Allan v. Allan and Others, Dec. 12, 1872, 11 Macph. 216, 45 Scot. Jur.

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empowered to borrow. But as the annuity to the truster's widow is for a purpose of the trust, sufficient of the heritable property must be mortgaged and unburdened to secure that annuity. Accordingly the available borrowings at present is but small, and it appears that after another year or so the trustees must cease paying the annuities to the truster's daughters, and that a considerable amount of the capital of the estate must be locked up until the death. The object of the special case is to ascertain whether the trustees in safety to accede to a family agreement which the parties interested proposed as a means of obviating the result above mentioned.

I shall shortly advert to the clauses of the trust-deed. The fourth direction to the trustees is to pay out of the moveable estate, and thereafter, on its exhaustion, out of such sum as should be borrowed in manner after provided on the security of the heritable estate, and out of the interest on such borrowed money at the time of borrowing, to each of five of the testator's daughters an annuity during their respective lives of £450 per annum, and to the remaining two daughters an annuity of £100 per annum, payable in advance, "declaring that on the death of any one or more of my daughters, the annuity payable to her or them as aforesaid shall be paid amongst my whole surviving daughters," "which payments shall be made out of my moveable estate and the interest or other revenue thereof, and after the foresaid sum to be borrowed by my trustees as aforesaid, with interest to accrue thereon, shall be sufficient for that purpose," "but subject to the preferable annuity to my wife as aforesaid."

In the seventh head, with regard to the income of his heritable estate, the testator directs his trustees, until the death of all his daughters except two, to do the same, after deduction of feu-duties, &c., and any sums required, if any, to be, for the foresaid annuity to his wife, to his five first mentioned daughters, and the survivors of them equally, excluding the issue of any of them either before or after him and leaving issue.

In the last place, the testator directs his trustees, on the death of his daughter, or on his daughters being reduced in number to two, to realise the residue of the heritable and moveable, and divide it among the two surviving daughters to the exclusion of the issue of any predeceasing.

It is also an important provision that in all cases in which any female is entitled in right under the settlement, "the provision or subject-matter of such entitlement shall be exclusive of the *jus mariti* and right of administration and curatory which the husband she may have, and shall be purely alimentary, and shall not be subject to be attached by arrestment or other diligence at the instance of the creditors of my said daughters or their husbands or other persons."

In this settlement, beyond what I have read, there are no ulterior provisions whatever. There are some small legacies, it is true, but these are subject to the provisions which I have referred to, and are all, I understand. There are now no interests to be provided for except those of the wife in the first place, and of the daughters in the second. The only interest that can be called an ulterior interest is the provision in the last clause of the settlement of the residue to the two last surviving daughters on the death of their father. But that still leaves the whole interest in this trust-estate in the hands of the daughters as a class. They are all parties to the case, and the whole parties interested are represented.

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In these circumstances I could have no difficulty in holding that the parties were entitled to enter into any such agreement as they chose for the purpose of facilitating the division of the trust-funds and the discharge of the trust. Were it not for the single clause above referred to declaring the trust to be alimentary, free from the *jus mariti* of husbands, and not assignable or alienable.

So far as the widow is concerned I do not think that there is any ground for giving weight to the considerations drawn from this clause. I doubt whether it was intended to apply to her. But whether it applies or was intended to apply to her, the provision of an annuity under the new trust-deed which is proposed to execute will afford the same protection.

With regard to the daughters' shares of the estate, there is more doubt whether to any, and, if so, to what effect, the provision I have referred to is effectual. It is unnecessary for us to decide this point. All that I shall say is that whatever effect could have been given to it under the settlement proposed to be given to the similar provision under the trust which it is proposed to execute. It is not the case of a person putting or endeavouring to put his means within the reach of his creditors, but of a mutual agreement between several parties for reciprocal considerations, to import into a trust created by themselves conditions which have been attached to beneficial provisions in their favour to the third party.

But I must in fairness say that I have very great doubt whether the trust either in the settlement or the new trust-deed, could be made effectual. The sums to which it is attempted to make it apply are not payments out of profits or interest, or by way of life annuity, or even annuity for a fixed number of years. They are truly and in substance payments out of capital. And I know of no case where bequests of capital have been effectually rendered alimentary by conditions, without the continuance of a trust to protect them. There is no machinery provided here to make the condition available so soon as the trust has, in accordance with the truster's directions, paid over the particular sums to the beneficiaries.

In these circumstances I think that we shall be doing justice to the parties if we sanction the transfer of this trust-estate from the testamentary trust to the trustees under the deed proposed to be executed. But it must be understood as a distinct condition that the new trust be created by the execution of the deed before we give our judgment.

LORD ORMDALE.—Keeping in view that all the parties interested in the succession concur in the proposed arrangement I should be inclined to say that they were entitled to get absolute possession of the estate were it not for the clause making their shares alimentary and excluding the *jus mariti* of the husbands of the female beneficiaries. This feature of the case cannot be ignored.

With regard to the new trust proposed to be executed in order to obviate the objection arising to the beneficiaries at once obtaining absolute possession of the estate, I fear it would not do so as the matter now stands. I rather think that the terms of the new agreement of trust will require to be altered in some respects, and in place of the estate being first made over absolutely to the beneficiaries, leaving it to them to make it over to the new trustees, it ought to be transferred at once by the Court to these new trustees. But were we to answer the question in the case in the affirmative as it now stands, there would, in the first place,

ing to oblige the parties to execute a new deed of trust such as they proposed, and if they did so after an interval, however short, during which they were vested absolutely in the trust-estate, they would be very much in the position of parties trying to lay aside and secure their means from the legal attachment of their creditors. But that could not be done. No such arrangement would be effectual against creditors. The parties must therefore, I think, arrange the matter as to have the estate transferred directly from the old to new trustees. If that be done, and the case and new trust-deed altered accordingly, I do not at present see that the object of the parties effected in any way should not be sanctioned by the Court.

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MR. GIFFORD.—This case is a very peculiar one, not only in its nature, but the way in which it is presented to us. The parties have submitted an agreed agreement by which they undertake to do certain things if they are allowed by our judgment to have the power. The difficulty in point of form amounts to this, that the parties here are really converting a special case into a question for authority. The substance of the case comes very nearly to this, that the trustees shall be empowered to enter into an agreement somewhat differing from the provisions of the trust-settlement, and enabling the new trustees to do what the original trustees had no power to do under the trust, but the doing of which is strongly expedient, or indeed necessary for the reasonable administration of the trust. If, however, this end can be attained through the submission of a special case, though it certainly is an unusual course, I do not see any serious objection; and if the special case be now remodelled by the substitution of the draft of the new trust-deed for the deed originally presented, and the corresponding alteration of the question submitted to us, I think we may answer that question in the affirmative.

Then, in a private trust, every possible beneficiary desires and consents to a particular course being adopted—all the beneficiaries being of full age and sui juris—and none of them being placed under any restraint or disability by the deed itself—then no one has any right or interest to object, and the Court will not interfere to prevent the sole and unlimited proprietors doing what they wish with their own.

Whereafter the parties adjusted a deed of direct conveyance by the same parties as trustees under the original trust-settlement to themselves as trustees under the proposed new deed of trust, embodying the agreed trust-purposes contained in the deed of agreement, and submitted the same to the Court, and at the same time altered the special case to the following effect—that the parties of the first part, being the whole beneficiaries interested, “have become desirous that the present trust should be wound up and a new trust constituted in terms of the said draft trust-settlement and conveyance, No. 8 of process. They have therefore requested the second parties to grant the said trust-disposition and conveyance in favour of the trustees therein named on receiving from the first parties a discharge of all claims on the trust-estate.”

They also substituted the following question for the question formerly submitted to the Court:—“Whether the parties of the second part, the trustees of the late Mr James Gray, are entitled now to execute and carry out the disposition and conveyance No. 8 of process, and whether, on so executing and carrying out the said disposition and conveyance, they will be sufficiently discharged of the trust?”

No. 65. After considering the new draft-deed and the amendments on special case—

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THE COURT pronounced this interlocutor:—"Find that the part of the second part, the trustees of the late James Gray, are entitled now to execute and carry out the disposition and conveyance No. 8 of process, and that on so executing and carrying out the said disposition and conveyance they will be sufficiently discharged of their trust: Allow the expenses of both parties to be paid out of the trust-funds, and remit," &c.

TODD, MURRAY, & JAMERON, W.S.—AULD & MACDONALD, W.S.—Agents.

No. 66.

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Scott, &c. v.
Scott's Executrix.

ALEXANDER GLOVER AND ANOTHER (James Scott senior's Trustees Pursuers and Real Raisers.—*R. V. Campbell.*

JAMES SCOTT junior, Defender and Claimant.—*Kinnear—Lorimer.*

JESSIE CAMERON AND CURATOR, Defenders and Claimants.—

Kinnear—Lorimer.

MARY MONTGOMERIE OR SCOTT (Robert Scott's Executrix), Claimant.—*M'Laren—Millie.*

PETER BEATTIE, Claimant.—*Burnet.*

Succession—Vesting—Trust—Discretion of Trustees.—A truster, whose death consisted entirely of heritage, burdened to a certain extent with debt, directed his trustees to pay an annuity to his widow, and in the event of his leaving the property clear of debt, to accumulate the surplus income for the widow's life, and until the period of division, but in the event of his leaving the property burdened with debt to accumulate the surplus income for the purpose of discharging such debt. He then directed his trustees in the event of the decease of his widow, "and so soon thereafter as the whole heritable debt affecting the property "shall be paid off and discharged," to sell and convert the estate into money, and divide it in equal shares among his five children, substituting the issue of children dying before the period of division for the parents, and with a survivorship clause referring to the same period. The trust also contained a clause providing that there should be no division during the widow's life, or until the whole heritable debt was extinguished, "with the exception of my said trustees selling my said heritable subjects, under the authority of the heritable debts affecting the same," after the death of his widow, "waiting to accumulate funds to extinguish the debt, "provided they shall find such a course expedient, and for the interest of my estate." There was also a general power of sale.

The truster died in 1854, and his widow in 1867. At the widow's death the property was still burdened with debt. Between 1867 and 1875 the trustees held the property and accumulated the revenue. On 28th April 1875 they had accumulated sufficient to extinguish the debt, the trustees resolved to sell the estate, and on 19th May 1875 they carried this resolution into effect. The truster's five children survived his widow, but four of them preferred the resolution of the trustees to sell the property.

Held that vesting took place at the date of the widow's death, the earliest period at which the trustees might, in the exercise of their discretionary powers, have fixed the period of division, and was not postponed till the exercise of these powers.

2D DIVISION.
Lord Young.
R.

THE question in this case arose on the construction of the trust-deed of the late James Scott senior, builder, Maryhill, who died in 1854.

The trust-estate consisted entirely of heritage situated in Glasgow, which, at the date of the truster's death, was burdened with a heritable debt of £350.

By the second purpose of the trust-deed Mr Scott provided an annuity of £30 to his widow.

The third and fourth purposes of the deed were as follows :—

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Thirdly, my said trustees and their foresaids, after payment of my
 ole debts, and all expenses incurred by them in the execution of this
 st, and after providing for the payment of the said yearly provision to
 said spouse, . . . shall collect the residue of my said estate, and in
 event of my having, prior to my decease, paid off and liquidated the
 itable debts presently affecting or which may affect my heritable sub-
 s, or any other heritable property I may yet acquire, they shall, in the
 nt of my said spouse being alive, invest the residue of my said means
 estate in good heritable or personal security, taking the rights and
 s in their names as trustees foresaid, and hold the same until the time
 a division of my estate is appointed to be made ; but in the event
 my dying before the heritable debts presently affecting my heritable
 jects, or any additional sums I may still borrow on the security of the
 e, or any other heritable property I may yet acquire, shall be fully
 d off and extinguished, then my said trustees and their foresaids are
 eby directed to collect the said residue and remainder of my means
 l estate, and lodge the same in some responsible banking company in
 ir names as trustees foresaid, until the funds so collected shall amount
 uch a sum or sums of money as may enable them from time to time
 liquidate and discharge such heritable debts, or whichever parts or
 fies thereof may be remaining over unpaid or unextinguished.

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 trix.

Fourthly, My said trustees and their foresaids, upon the decease of my
 spouse in the event of her surviving me, and so soon thereafter as
 whole heritable debts now affecting or which may yet affect the herit-
 subjects presently belonging to me, or which I may yet acquire, shall
 d off and discharged, in the event of the same not having been dis-
 d during my lifetime, are hereby directed to sell and convert my
 estate, heritable and moveable, real and personal, generally and
 lularly before described and conveyed, into money, and after paying
 roviding for all expenses, to divide the same into five parts or shares,
 ay over the said shares to the following parties, my children, namely,
 mes Scott junior, wright, Maryhill, one share ; Robert Scott, mason,
 hill, one share ; Catherine Scott or Haddow, widow of George Had-
 fiesher, Glasgow, one share ; Elizabeth Scott or Cameron, spouse of
 : Cameron, mason, and residing at Maryhill, one share ; and Janet
 , presently residing in family with me at Maryhill, one share ; and
 e event of any of my said children above mentioned deceasing be-
 after me, and before the division shall take place of my said means
 state, leaving lawful issue of their bodies respectively alive at that
 then the child or children of any such deceiver or deceasers shall
 e equally among them, if more than one, share and share alike, the
 or proportion that would have fallen to their parent if in life ; de-
 g that if any of my said children shall die before or after me, with-
 aving been married, or without leaving lawful issue alive at the time
 d division, the share or shares which would have belonged to such
 ser or deceasers shall fall and belong to the survivor or survivors of
 aid children before mentioned."

e settlement thereafter conferred the following discretionary power
 e trustees :—" But it is hereby expressly provided and declared that
 rt of the said residue of my means and estate shall be divided dur-
 he lifetime of my said spouse, nor until the whole heritable debts
 ing my heritable subjects and estate are paid off and extinguished ;
 ut prejudice to my said trustees selling my said heritable subjects,
 the burden of the heritable debts affecting the same, at any time
 the death of my said spouse, without waiting until they shall be in

No. 66. possession of funds from my said general estate to enable them to pay off said debts as aforesaid, provided they shall think such a course expedient and for the interest of my estate: And to enable my said trustees or their foresaids to carry the purposes of this settlement into execution I do hereby specially empower and authorise them and their foresaids to sell and dispose of my whole heritable and moveable property and for such price or prices as can be obtained therefor."

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The trustor was survived by his widow, who died in 1867.

The five children of the trustor mentioned in the fourth purpose of the settlement survived their mother, the trustor's widow; but four of them, Robert, Catherine, Elizabeth, and Janet, died before the year 1875, leaving issue, viz. James Cameron.

During the widow's life the income of the trust-estate was exhausted by payment of her annuity and other charges. From the widow's death in 1867 down to the year 1875 the trustees accumulated a sum of surplus income equal to about two-thirds of the heritable debt secured on the property.

Between 1867 and 1875 the trustees had on more than one occasion been under consideration the expediency of bringing the estate to sale, but the discretionary power conferred upon them, but determined to refrain from taking that step till the debt should be paid off out of accumulated income, thinking that they were thereby giving effect to what appeared to be the wish of the testator, and desiring to follow the directions of the settlement as closely as possible.

In 1875, however, influenced chiefly by the state of the market for heritable property in Glasgow, and thinking it expedient and for the interest of the estate, they altered their former resolution, and, on the 19th April 1875, resolved to expose the subjects for sale. They were accordingly sold on 19th May 1875.

The proceeds formed the fund *in medio* in the present multiplicity of claims which was thereafter raised by the trustees.

The claimants were—(1) James Scott junior, who claimed four-fifths of the fund (one-fifth as in his own right, and three-fifths as coming in right of his brother and two sisters, who died without issue before the division), on the footing that vesting was postponed by the terms of the trust-deed till the date of division, and that the date of division was the date at which the trustees took the resolution to sell the property and the proceeds; (2) Jessie Cameron, who claimed one-fifth as in right of her mother, on the same footing; (3) Mrs Mary Montgomerie, widow and executrix of Robert Scott; and (4) Peter Beattie, in right of poor of Barony Parish, Glasgow, a creditor of Robert Scott, who was a pauper lunatic.

Mrs Scott, as Robert Scott's executrix, and Peter Beattie, claimed for them one-fifth of the fund, on the footing that vesting took place at the death of the trustor's widow in 1867, when Robert Scott was still alive.

No claim was made to the shares of Catherine and Janet Scott by their representatives.

The Lord Ordinary, on 18th October 1876, found that vesting took place at the death of the widow, and appointed the fund to be distributed accordingly, the shares of Catherine and Janet Scott being in the meantime deposited in bank.

Against this interlocutor James Scott junior reclaimed, and argued that vesting depended on the date at which distribution became possible, that depended in this case on the discretion of the trustees. The trustees, in the exercise of that discretion, had resolved to sell, therefore there was no vesting. The mere delay in carrying out a direction of the testator

resolution of the trustees, might indeed have no effect on vesting. No. 66.
 If the trustees had resolved to sell, it might be admitted that the
 date of vesting was fixed, and could not be modified by delay in carry- Jan. 27, 1877.
 ing the resolution into effect. But so long as the trustees abstained from Scott, &c. v.
 exercise of their discretion, there could, under the terms of the deed, Scott's Execu-
 tric.

vesting.¹

argued for Peter Beattie and Mrs Scott;—The decisions referred to
 in application. They applied to cases of postponed payment, where
 postponement was for the benefit of some beneficiary. That element
 wanting here. The question was, did the right become pure on the
 death of the trustor's widow; or was there a remaining condition which
 postponed vesting? The postponement of payment till the subjects were
 cleared of debt, or till the trustees chose to sell, was a condition which did
 not postpone the vesting.²

nothing.—

JUDGE-CLERK.—The question in this case is, at what date did the in-
 heritable provisions vest? These provisions are the gift of residue to
 the children contained in the fourth purpose of the trust. It is con-
 sidered on the one hand, that vesting took place on the death of the testator's
 widow; on the other, that there was no vesting until the sale by the trustees
 of the testator's heritable property. The Lord Ordinary has decided in favour
 of the widow's death. I am of opinion that his Lordship's interlocu-
 tion is sound, and shall shortly explain my reasons.

The testator appears to have been in very great doubt as to what the value of
 his heritable property was. At the same time he was anxious above all things
 to provide for his widow. Accordingly he left his whole property to
 his trustees with instructions to pay her an annuity during all the days and years
 of her life, and not to dispose of the property until her death.

Provisions as to the widow's annuity are found in the second head of the
 will. In the third head the testator directs the trustees, in the event of his
 dying during his own life paid off all debts affecting his heritable estate, then,
 after paying his other debts, and providing for his widow's annuity, to accumu-
 late the residue "until the time when a division of my estate is appointed
 or determined," but in the event of his dying without having paid off the debts
 affecting his heritable estate, to use the residue so to be accumulated, in the first
 place for the heritable estate of debt.

In the fourth head the testator provides as follows—(reads fourth provision,
 p. 385). It is also added—"But it is hereby expressly provided
 that no part of the said residue of my means and estate shall be
 paid during the lifetime of my said spouse, nor until the whole heritable
 estate affecting my heritable subjects and estate are paid off and extinguished."
 If the deed stopped there, it would be difficult to hold that the date
 of vesting was any other than the date of division, that is, the date at which,
 the testator being dead and the estate cleared of debt, the trustees are directed

Stirling v. Thorburn (opinion of Lord Cockburn), Feb. 16, 1836, 14 S. 485,
 12 Jur. 239; *Wilkie v. Wilkie*, Jan. 27, 1837, 15 S. 430, 9 Scot. Jur. 236;
Stirling v. Leighton, March 8, 1867, 5 Macph. 561, 39 Scot. Jur. 283; *Paterson's*
Tr. v. Paterson, Jan. 29, 1870, 8 Macph. 449, 42 Scot. Jur. 198; *Howat's*
Tr. v. Howat, Dec. 17, 1869, 8 Macph. 337, 42 Scot. Jur. 116.
Stirling v. Ferriers, May 18, 1872, 10 Macph. 711, 44 Scot. Jur. 390; *Sloane*
Tr. v. Sloan, May 20, 1876, *ante*, vol. iii. 678.

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At the date of the deliverance of the Board of Education the school board the parish from which the *quoad sacra* parish was disjoined had not yet been constituted, and no opportunity was given for any party representing that parish being heard.

On a special case presented by the school boards of the *quoad sacra* parish and of the parish from which it had been disjoined, held (1) that the deliverance of the Board of Education was not final because it was issued without the parties interested; (2) that the Court could not pronounce on the merits of the question, the decision of it being exclusively committed to the Board of Education or the Sheriff by the 9th section of the Education Act.

1st DIVISION.

B.

ON 10th April 1873 the school board of the *quoad sacra* parish of Lochgilphead passed this minute:—"Mr M'Kichan laid before the board an extract decret of disjunction and erection of the parish of Lochgilphead, and submitted that there was doubt whether the farms of Daill and Craiglass, according to the terms of the decret, form part of the parish of Lochgilphead *quoad sacra*. The board having considered the matter resolved to ask the opinion of the Board of Education on the question provided for by clause 9* of the Education Act, and authorised the Chairman, *pro tempore*, to bring the matter under the notice of the Education Board."

The deliverance of the Education Board was as follows:—"At Edinburgh, the 18th day of April 1873.—Having considered the application made on behalf of the school board of the *quoad sacra* parish of Lochgilphead, and having examined and considered the decret of disjunction and erection of the districts attached to said parish with reference to the question submitted regarding the farms of Daill and Craiglass, the Board of Education for Scotland, by virtue and in exercise of the powers in them vested under the Education (Scotland) Act, 1872, have settled and determined and do hereby settle and determine that, for the purposes of the said Act, the farms of Daill and Craiglass above mentioned shall be included and comprehended within the area of the said *quoad sacra* parish of Lochgilphead."

The first election of the school board of South Knapdale, one of the parishes from which Lochgilphead was disjoined in 1846, took place on the 24th April following.

In June the Lochgilphead school board certified to the parochial board of South Knapdale the amount of the rate to be collected along with the assessment for the poor from those parts of Knapdale attached to Lochgilphead, including the farms of Daill and Craiglass. The parochial board replied that a demand for assessment from those farms had not been made upon them by the Knapdale school board, on the ground that the farms still formed part of the original parish, and that the parochial board would not acquiesce in the determination of the Board of Education and refused to levy the rate.

* Sec. 9.—"The area of a parish shall for the purposes of this Act be taken to be the area of any burgh or part of a burgh situated therein for which a school board is required to be elected, and the area of every such burgh shall for the purposes of this Act be taken to be the limits within which the municipal, or ward, or other local authorities are no municipal, then within which the police assessments thereof are levied, and any question or dispute regarding the area of any parish or burgh for the purposes of this Act shall be settled by the Board of Education, or by the Sheriff of the county in which the same or the greater part thereof is situated, on an application by the school board authorised by the Board of Education, or by the Sheriff, the determination of the Board of Education or of the Sheriff, as the case may be, shall be final."

the result is that, in my opinion, the Lord Ordinary's interlocutor reclaimed No. 66.
is ought to be adhered to.

Jan. 27, 1877.

AND GIFFORD.—I think that in this case, and upon a sound construction of the whole terms of the trust-deed and settlement, the true period of vesting was the death of the truster's widow. It is, of course, quite competent for a testator to suspend vesting till any time he pleases, whether fixed or contingent. But it does not come to the conclusion that the testator in this case intended to suspend vesting until his heritable property was relieved of debt by the slow process of paying off the debt from the accumulations of the rents, or until his trustee had actually sold and realised the heritable estate by selling and converting it into money. This might depend upon the state of the market and the disposition of the trustees, and might not be accomplished for an indefinite and an uncertain period. It is difficult to imagine any reason at all, certainly any good reason, for suspending vesting beyond the period of the widow's death. The clauses for realisation were provisions solely for the benefit of the residuary estate, and it would be to invert their purpose to make mere delay in realising a suspension of the vesting. I do not, therefore, think that it was the intention of the testator that no vested interest should be taken in these provisions by his children until the trustees had accumulated enough to pay off the debt which burdened the heritable estate. The express power to the trustees to discharge the burden of the heritable debt, is to me a conclusive indication against such a view.

Another test may be applied to the case. Suppose that the children, who were of age, and who were absolute and unfettered beneficiaries, had demanded conveyance under burden of the debts and without a sale, could the trustee have withheld it? I think clearly not. Or suppose the children had taken up the debts and discharged them, could they not then have insisted upon immediate division? In truth, the clauses directing the paying off of heritable debts were clauses of administration only. Although they might in certain cases postpone actual distribution they were not intended to postpone or defeat the actual rights and interests of the children.

THE COURT adhered.

BY & LYON, W.S.—DAVIDSON & SYME, W.S.—MACKENZIE, INNER, & LOGAN, W.S.—
J. & A. HASTIE, S.S.C.—Agents.

THE SCHOOL BOARD OF LOCHGILPHEAD, First Parties.—*Darling*. No. 67.
SCHOOL BOARD OF SOUTH KNAPDALE, Second Parties.—*Kinnear*.

Jan. 30, 1877.

—*Education Act, 1872, sec. 9.*—The 9th section of the Education Act 1872, which provides that "any question or dispute regarding the area of any parish or burgh for the purposes of this Act shall be settled by the Board of Education, or by the Sheriff of the county in which the same or the greater part thereof is situated, upon application by the school board authorised by the Board of Education, or by the determination of the Board of Education or of the Sheriff, as the case may be, shall be final."

The school board of a *quoad sacra* parish having doubt whether, under the provisions of the Act, in the event of the disjunction and erection of the parish included certain farms, referred the question to the Board of Education. The Board of Education issued a decision stating that they had examined the decree, and determining that for the purposes of the Act the farms "shall be included and comprehended" in the parish.

No. 67. right to decide the second or third questions at all, and my opinion is that the determination of these matters is committed to the Board of Education, and they are entitled to decide finally for the purposes of the Act in which the farms lie.

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No doubt section 9 commences by dealing with questions relating to parishes having burghs within them. But the words which we have now to consider are much too broad to be confined to such parishes.

There may be a little difficulty in following the policy of the statute in making this enactment, considering that the determination of such disputes involve questions of law. But it is not to be left out of view that there is an alternative. The Board of Education may authorise the school board to refer the matter to the Sheriff, and it rather appears that this course is the alternative provided by the statute for cases in which questions of law do arise.

Other clauses in the statute to which we have been referred go to support the construction which I have put on sec. 9, because they confer powers, though of a different kind, are very large, will involve civil rights, and oblige the inhabitants to or relieve them from assessments, and bring them for the purposes of the statute within one parish rather than another.

I therefore propose that we answer the first question in the negative, and decline to answer the others.

LORD DEAS.—It is plain on the face of the decree of disjunction and pronounced in 1846 that there is room for a question of construction whether or may not be aided by evidence whether or not the farms belonged to the *quoad sacra* parish.

I am of opinion, with your Lordship, that section 9 of the statute refers to that question of construction to the Board of Education, and that the effect of the section is not limited to questions between parishes on the one hand and burghs on the other.

The question was as to the area of the parish. It depended on the construction of the decree, and the only question the board were called on to determine was whether according to a sound construction of that decree the farms were or were not within the *quoad sacra* parish. The power of sending a case to the Sheriff is an element going to shew that the power of construing such a decree was intended to be conferred on the board. The Board of Education, however, neither heard parties as they should have done, nor sent the case to the Sheriff, but gave their answer as if they had an arbitrary power to include the farms in one parish or the other as they thought most expedient. Their determination would have been final if they had either applied their minds to and decided the real question themselves, or taken the still more appropriate course of referring it to the Sheriff. But it can have no finality as it stands.

LORD MURE.—I am quite satisfied with the way in which it is proposed to answer these questions.

I think the Board of Education had the exclusive power to decide the questions submitted to them for the purposes of this Act, and that their determination would have been final if the proceedings had been properly gone about. The matter was not properly gone about, inasmuch as all parties interested in the question were not called before the board at the time their determination was pronounced.

Accordingly the two school boards presented this special case, the No. 67.
 Lochgilphead board (first party) maintaining (1) that the determination
 of the Board of Education was final; and (2) that according to the true Jan. 30, 1877.
 construction of the decree of disjunction the *quoad sacra* parish did in-
 clude the farms. Lochgilphead
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The Knapdale board (second parties) maintained (1) that section 9 did
 not apply, being limited to the case of a parish containing a burgh or part
 of a burgh, or at all events to questions of mere boundaries between
 parishes; (2) that, in any case, the Board of Education had no power to
 decide on any such question on an *ex parte* application, and without
 giving other parties interested an opportunity of being heard; and (3)
 that the farms of Dail and Craiglass did not form part of the parish of
 Lochgilphead.

The questions were—" (1) Whether the determination of the Board of
 Education for Scotland is final and conclusive of the question whether,
 for the purposes of the Education (Scotland) Act, 1862, the farms of Dail
 and Craiglass form part of the parish of Lochgilphead, or of the parish
 of South Knapdale? (2) Whether the farms of Dail and Craiglass, for
 the purposes of the Act, form part of the parish of Lochgilphead? Or (3)
 whether the said farms, for the purposes of the said Act, form part of
 the parish of South Knapdale?"

Advancing,—

THE PRESIDENT.—The first question is whether the determination of the
 Board of Education is final and conclusive for the purposes of the Education
 Act, the question whether these farms belong to one parish or the other.

The school board of Lochgilphead, upon a consideration of the decree of dis-
 junction and erection, thought it a doubtful question whether the farms belonged
 to the *quoad sacra* parish or not, and they submitted the point to the Board of

Education, by their deliverance of 18th April 1873, "settle and
 determine that, for the purposes of the said Act, the farms of Dail and Craiglass
 are included and comprehended within the area of the said *quoad sacra*
 parish of Lochgilphead."

It may be doubted whether it does not appear on the face of this deliverance
 that the Board of Education failed to apply their minds to the true question
 before them, viz., whether, according to the just construction of the decree of
 disjunction and erection, the farms belonged to the one parish or the other, and
 whether they led to a decision on some view of expediency or *mero arbitrio*. But this
 is rather a narrow and critical view on which to hold that the deliverance
 is defective.

The objection that the board issued their deliverance *parte inaudita* is more
 frivolous. It is admitted that the application of the Lochgilphead board
 was *ex parte*, and that no one appeared or was called on to appear in the interest
 of the parish of South Knapdale. Now, whatever may be the construction of
 the section of the statute in other respects, I am of opinion that in a ques-
 tion of the kind now before us, in which two parishes have adverse interests,
 and the Board of Education are not within the powers conferred by this section if
 they determine the question without having both parishes represented, and
 without stating what is to be alleged by each. I therefore think the first query must
 be answered in the negative.

When we come to consider the second, which is on the merits of that
 dispute, we are met by the important preliminary plea that we have no

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right to decide the second or third questions at all, and my opinion is that determination of these matters is committed to the Board of Education, and they are entitled to decide finally for the purposes of the Act in which p the farms lie.

No doubt section 9 commences by dealing with questions relating to p having burghs within them. But the words which we have now to co are much too broad to be confined to such parishes.

There may be a little difficulty in following the policy of the state making this enactment, considering that the determination of such dispute involve questions of law. But it is not to be left out of view that there alternative. The Board of Education may authorise the school board to the Sheriff, and it rather appears that this course is the alternative p by the statute for cases in which questions of law do arise.

Other clauses in the statute to which we have been referred go to sup construction which I have put on sec. 9, because they confer powers though of a different kind, are very large, will involve civil rights, and the inhabitants to or relieve them from assessments, and bring them for the poses of the statute within one parish rather than another.

I therefore propose that we answer the first question in the negative decline to answer the others.

LORD DEAS.—It is plain on the face of the decree of disjunction and pronounced in 1846 that there is room for a question of construction whi or may not be aided by evidence whether or not the farms belonged *quoad sacra* parish.

I am of opinion, with your Lordship, that section 9 of the statute o that question of construction to the Board of Education, and that the of the section is not limited to questions between parishes on the o and burghs on the other.

The question was as to the area of the parish. It depended on the con of the decree, and the only question the board were called on to determ whether according to a sound construction of that decree the farms were not within the *quoad sacra* parish. The power of sending a case to the is an element going to shew that the power of construing such a de intended to be conferred on the board. The Board of Education, b neither heard parties as they should have done, nor sent the case to the but gave their answer as if they had an arbitrary power to include the one parish or the other as they thought most expedient. Their determ would have been final if they had either applied their minds to and the real question themselves, or taken the still more appropriate course ing it to the Sheriff. But it can have no finality as it stands.

LORD MURE.—I am quite satisfied with the way in which it is prop answer these questions.

I think the Board of Education had the exclusive power to decide t submitted to them for the purposes of this Act, and that their determ would have been final if the proceedings had been properly gone abou the matter was not properly gone about, inasmuch as all parties inter the question were not called before the board at the time their deliver pronounced.

Lord SHAND.—I am of the same opinion. I think this question fell properly before the cognisance of the Board of Education, and that whether they considered it themselves or sent it to the Sheriff the decision for the purposes of the Act would be final, provided the interests of the parties interested were duly represented.

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It would be a somewhat critical view to say that the board has not dealt with the question, though the proceedings are open to the observation that it has not well dealt with. I prefer to put my judgment on the ground that the board should have had some party before them who had an adverse interest. But the Knapdale board was not in existence. But the Board of Education might have had some party who represented the interest, or deferred the determination of the point; and at least, in the absence of any representation of the interest, I think the determination was not final to the effect of taking the board from again entertaining the question and hearing parties. And the Knapdale board has the opposing interest I concur in thinking must send the case back to the Board of Education in order that they may order the dispute between the two parties.

The interlocutor was pronounced:—"Find and declare that the question or dispute, whether, in terms of the decret of disjunction and erection, dated 9th December 1846, the farms of Dail and Craiglass form part of the parish of Lochgilphead, or of the parish of South Knapdale, is by section 9 of the Act 35 and 36 Vict. cap. 62, and for the purposes of that Act, competent only to the Board of Education, as therein provided; but find that the determination of the question by the Board of Education, by their minute of 13th April 1873, having been made and issued without hearing the party of the second part, or giving opportunity for any party representing the parish of South Knapdale being heard on the said question, is not final, and that the said question or dispute remains to be determined by the said Board of Education, or the Sheriff, in terms of section 9 of the said Act: Therefore the Court answer the first question in the negative, and for want of jurisdiction decline to answer the second and third questions."

D. MURRAY, & JAMIESON, W.S.—MACKENZIE & KERMAK, W.S.—Agents.

ROBERT FERGUSON, Pursuer and Appellant.—*McKechie*.
ALEXANDER THOMSON AND OTHERS (James Jack's Executors), AND
MARGARET JACK, Defenders and Respondents.—*Rankine*.

No. 68.

Jan. 30, 1877.
Ferguson v.
Jack's Execu-
tors.

Title to Sue—Husband and Wife—Divorce, effect of on Title to
Held that a husband, who had been divorced on account of his adultery, had title to sue for moveable estate which had vested in his wife prior to the decree of divorce, but had not been paid.

This action was raised in the Sheriff Court at Aberdeen by Robert Ferguson in November 1875 to recover from James Jack's executors the residue of James Jack's estate which, on his death in 1872, was undisposed of residue to his daughter, Margaret Jack, from whom the pursuer had been divorced in 1874 on the ground of his adultery. The action was defended by James Jack's executors, who stated the ordinary plea of no title to sue, in respect that the pursuer was not at the time of the action the husband of Margaret Jack, having been divorced from her on 19th December 1874.

2D DIVISION.
Sheriff of
Aberdeen-
shire.
I.

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tors.

Margaret Jack was also sisted as a defender, and, while adopting the plea of no title to sue, also pleaded "that, on the assumption that the pursuer has a title to sue, he is not entitled to claim the sum mentioned in any part of it, except on the condition of making therefrom a reasonable provision for her support and maintenance, under the provisions of the 16th section of the 'Conjugal Rights Amendment Act, 1861,' 24 and Victoria, chapter 86."

The Sheriff-substitute (Comrie Thomson) sustained the plea of no title to sue, and dismissed the action.*

The Sheriff (Guthrie Smith) adhered on appeal.†

The pursuer appealed to the Court of Session.

Argued for him;—The true import of the dicta of the institutional writers¹ on the subject of the effect of divorce on the matrimonial rights of parties is that upon divorce the marriage ceases to have any influence on these rights, and that provisions granted *intuitu matrimonii* must be restored to the innocent spouse. The divorce has, however, no effect on what accrues to the guilty husband *stante matrimonio* by his *jus maritus*. The case of Ritchie,² quoted by the Sheriff, was not truly an authority to the contrary. The 16th section of the Conjugal Rights Act, 1861, applies only to parties who were still spouses.

Argued for the defenders;—In the case of divorce for desertion the offending husband lost the tocher by the express words of the Act of 1571, 55, and this had been interpreted to include the conventional provisions of courtesy and *jus mariti*.³ There was no real distinction between this case and the case of divorce for adultery, for the decision in Justice v. Mackenzie.

* "NOTE.—The object of the present action is to enable the pursuer to get the sum sued for from the executors of the father of the woman who was his wife here, and to enable her to get the succession. I am of opinion that he is not entitled to get it. It is true that the sum sued for was vested in the wife prior to the dissolution of marriage, and that it might have been then claimed by the husband, as his marital rights were not excluded; but, in point of fact, he did not get possession of it, and I put my judgment on this broad ground, that having been divorced, and being the guilty party, he can take no benefit through the marriage or through the dissolution of the marriage.

"The words used by Stair seem to me to set forth the existing law of Scotland on the subject:—'When marriage is dissolved by divorce, the party injured loseth all benefit accruing through the marriage, but the party injured the same benefit as by the other's natural death.'

"I accordingly deal with the wife here as if she were a spouse surviving the death of her husband. The question of the rights of the husband's creditors is not raised."

† "NOTE.—The pursuer of this action, who was divorced from his wife in 19th December 1874, claims a sum of money to which she became entitled by her father's death on 16th July 1872. He maintains that the decree has retroactive effect, as it simply terminated his rights under the marriage.

"It, however, does more; it operated a complete forfeiture of them. The guilty spouse is thereby cut off from all right or privilege that he or she might have as a spouse.'—(Ritchie v. Ritchie's Trustees, 5th June 1874.) It is clear that, as regards this legacy, the wife herself is the only party now in the world entitled to uplift and discharge it, because, although it may have vested prior to the divorce, the husband never obtained possession of it, and the effect of the decree was to deprive him not only of the *status* of a husband, but of all the rights and privileges coming to him in that character."

¹ Stair, i., 4, 20; Ersk. i., 6, 46–8; Bell's Prin. 1622; Fraser, i., 686, *seq.*

² Ritchie v. Ritchie's Trustees, June 5, 1874, *ante*, vol. i. 987.

³ Fraser, i. 687, 1st ed.

⁴ 1761, M. 334.

been regarded as unsound,¹ and in noticing it Lord Chancellor Cairns² No. 68.
 set out the true test of what should or should not be given up to the
 present party, viz., whether it had or had not become mixed up with the
 of the offender's property. Here the husband never had possession Jan. 30, 1877.
 the fund, and required to sue for it now. *Ferguson v. Jack's Execu-*
tors.

Even if the defenders were wrong, the wife was entitled, either under
 Conjugal Rights Act or in equity, to a settlement.³ The divorce could
 put the guilty husband in a better position in this respect than if
 parties were still spouses.
 It advising,—

MR. ORMDALE.—The Sheriff-principal, as well as his Substitute, has held that
 the husband's divorce on the ground of adultery the pursuer forfeited all rights,
 and his *jus mariti* as now attempted to be put in operation by him, which
 accrued to him through his marriage with Margaret Jack, and consequently
 he has no title to sue the present action. The question for the Court is
 whether the Sheriff's judgment is well or ill founded.

It is disputable that the pursuer's marriage with Margaret Jack was equiva-
 lent to a legal assignation in his favour of all her moveable rights and estate,
 and required no intimation beyond that afforded by the marriage itself. If,
 therefore, no divorce had interposed, the pursuer's right and title to insist in the
 action would have been clear, for his wife's share of her father's move-
 able succession had indisputably vested in him on the father's death fully two
 years before the divorce, and payment of it might have been enforced by him,
 and might have been attached by his creditors.

Then, it is said that the divorce in 1874, before the present action was
 brought, destroys any title the pursuer might otherwise have had to sue for re-
 covery of the fund in question, in respect the same must be held to belong to
 Margaret Jack. I do not very well see how this can be, unless upon the
 ground that by the divorce her husband was divested of the right which he
 previously had, and that she thereby came to be vested in what she had not
 previously any right to. But can it be held that the divorce has had any such
 effect? It is true that a divorce operates as a dissolution of the marriage as
 fully as the death of either of the spouses; but a dissolution of the mar-
 riage by death, although it puts an end as at its date to the *jus mariti*, does not
retro so as to effect a restoration of previously vested interests. Ac-
 cordingly, as observed by Mr Erskine (i. 6, 13), "any moveable subject which
 the wife's death shall be discovered to have belonged to her falls to the
 surviving husband," or, it may be added, to his representatives in the event of
 death before the existence of the moveable subjects was discovered, as was
 in the case of *Egerton v. Forbes*, 27th November 1812, F.C.

The question, then, in the present case comes to be narrowed to this—Does
 dissolution of the pursuer's marriage, in consequence of his adultery, do
 more than what would have been effected by its dissolution through the death
 of either of the spouses? If the divorce had been for desertion its effects
 in some respects have been different from what they are when the divorce

¹ Fraser, i. 691, 1st ed.; Ivory's Note to Ersk., i. 6, 48.

² *Harvey v. Farquhar*, Feb. 22, 1872, 10 Macph., H.L. 26, 44 Scot. Jur.

³ *Re Kincaid's Trust*, 1 Drewry, 326.

No. 68. has proceeded for adultery, for by the Act 1573, cap. 55, it is declared that "the offending party shall lose the tocher and the *donationes propter nuptias*." But it has been decided in more than one case that such is not the effect of a divorce on the head of adultery—Anderson v. Welsh, 8th Feb. 1734, Mor. 1000, and Justice v. Murray, 13th Jan. 1761, Mor. 334. It is unnecessary, however, to go into that distinction, for here the dispute does not relate to the tocher or the *donationes propter nuptias*. The very circumstance, indeed, of its requiring a statutory enactment to effect a loss to the offending party of the tocher or the *donationes propter nuptias* goes far to shew that beyond these particular grounds of divorce on any ground, unless on the head of absolute nullity, implying that there never had been any valid marriage, can be held to operate *retro* in its effects.

Jan. 30, 1877.
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Jack's Executors.

I am therefore unable to satisfy myself, either on authority or principle, that the pursuer's vested right to the fund here in dispute has been cut down by a divorce. It might very well have been that he had not previously obtained actual payment of it in consequence of his having from indulgence to the debtor refrained from exacting payment; or it might have been owing to the inability of the debtor to make payment; or a variety of other accidental causes attributable to the pursuer, and which he could not help, may have prevented him obtaining actual possession; but I am unable to see how his right could be converted into no right by such accidental circumstances as those now suggested. I am equally unable to think that his right has been destroyed in the circumstances in which the present action has been brought. Nor am I impressed with the hardship that may be supposed to result from holding that a divorce does not destroy rights in a husband which had previously vested in him *mariti*, for it must be borne in mind that by his marriage a husband becomes liable for the debts and obligations of his wife, and after divorce, as before, is bound to bring up and maintain the children of the marriage.

As regards the plea stated for the wife on the Conjugal Rights Act, we decide that, as the record contains no averment whatever on the subject.

LORD GIFFORD.—I concur in the view which your Lordship has stated. I think that on marriage the wife's moveable estate vests *eo ipso* in the husband where there is no antenuptial contract. The mode in which the older law stated the effect of marriage was that it operated in favour of the husband by an intimated and completed assignation of the whole of the wife's moveable estate. The wife's claim here is moveable. It emerged during the subsistence of the marriage, though it was not reduced into possession. Now, I think that marriage was equivalent to an assignation intimated to the executors, and, if that effect was not cut down by divorce, for in that case I do not see why, if the amount had actually been in the husband's pocket and been recovered by him, it should not be repaid. No such effect has ever been given to divorce. The forfeiture which follows on divorce does not cut down an intimated assignation, though the subject is not reduced into possession. Neither does it cut down the husband's right to what has already vested *stante matrimonio*, if not recovered. I therefore concur in repelling the preliminary plea. All questions are necessarily reserved,—in particular, the questions under the Conjugal Rights Act.

LORD JUSTICE-CLERK.—Marriage operates as an assignation of all the

sonal estate, requiring no intimation. In this case, therefore, the wife's No. 68.
 interest in her father's succession vested in the husband by virtue of the marriage, and the divorce did not divest him. It is quite true, as Lord Stair has
 said, that in divorce the guilty spouse "loseth all benefit accruing through the marriage." But that does not cover past benefits. Unless divorce in such
 circumstances operated as a retrocession there is no foundation for the plea of
 title, and I know of no authority for holding that a divorce has this

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THIS interlocutor was pronounced :—" Having heard counsel on the
 appeal, sustain the same ; recall the judgments appealed from ;
 repel the first plea in law stated for the respondents in so far as
 the same is pleaded to bar the action ; . . . and remit the
 case to the Sheriff to proceed in the cause ; reserve all questions of
 expenses, with power to the Sheriff to dispose of the whole ex-
 penses, including those in this Court, at the end of the cause, and
 decern."

W. G. ROY, S.S.C.—AULD & MACDONALD, W.S.—Agents.

MRS P. LILLEY, Petitioner.—*Sol.-Gen. Macdonald—R. V. Campbell.*
 MR M. B. SALMOND or LILLEY, Respondent.—*Lord-Adv. Watson*
—Balfour—H. Johnston.

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 Lilley v.
 Lilley.

Wife of Child—Husband and Wife.—In a petition by a father for the
 custody of his child, which was eight months old, the mother answered that
 she had been obliged to leave her husband's house shortly before the birth of
 the child in consequence of unkind treatment, and that owing to the tender
 care the child it required its mother's care. The Court, without inquiry,
 ordered the child to be given up to the father, reserving to the mother right of
 visitation at any time she might desire, and appointing the child to be sent on
 to the mother on one day in each week.

There was a petition by the Rev. J. P. Lilley, minister of Free Knox's 1ST DIVISION.
 Church at Arbroath, for the custody of his child. The petition set forth
 that he was married to Margaret B. Salmond in July 1875. On 10th
 May 1876 he left Arbroath on business for a few days, and on his re-
 turn on the 13th he found that his wife had left his house that day.
 When she had lived in the house of her sisters at Arbroath. She
 gave birth to a daughter on 19th May, and she refused to return to his
 house to give up the child. The petitioner attributed her conduct to the
 influence of her brothers and sisters.

Lilley lodged answers, in which she stated that she was obliged to
 leave her husband owing to his cruelty and unkindness.

Lilley averred that it would be most detrimental to the child's
 health and comfort to remove it from her charge and place it in alien

possession. Moreover she had not done anything to forfeit the right of a
 mother to minister to the wants of her infant."

A correspondence was printed, beginning the day of the wife's desertion
 between the husband and his wife and her brothers. The petitioner
 failed ineffectually to induce his wife to return.

An inquiry was moved for or ordered.¹

No. 69. The opinion of the Court was delivered by

Jan. 31, 1877.
Lilley v.
Lilley.

LORD PRESIDENT.—The question is whether, in the circumstances of case, the father or the mother is entitled to the custody of their only child.

The child is now eight months old, and has been weaned. It was not in the father's house, the mother having left his house while in an advanced stage of pregnancy, and gone to live with her sisters, where she still resides. The case would not be substantially different if the child had been born in the father's house, and the mother had recently left the house, taking the child with her. Neither the father nor the mother is personally disqualified to the custody of the child. There are no considerations of a special nature affecting the question.

In these circumstances, the Court are of opinion that, in accordance with previous cases, the right of the father must prevail. We shall therefore make an order substantially in terms of the prayer of the petition. But before the order is signed some arrangement must be made to secure that the mother shall have proper and reasonable access to the child.

THIS interlocutor was pronounced:—"Having heard counsel for the petitioner and answers, find that the petitioner is entitled to the custody of the child of the marriage between him and the respondent: Therefore decern and ordain the respondent forthwith to deliver up the said child to the petitioner, or any one having authority to receive delivery, but reserving to the respondent the right of access to the said child as follows, viz., the petitioner shall send the child to the respondent's residence in Arbroath only once a-week, on any day she may select, to remain with the respondent from 11 A.M. to 6 P.M., the respondent to be entitled, but without any attendant, to visit the said child at the petitioner's house without the petitioner being present, at any time she may desire: *Quoad ultra* continue the cause that the parties may hereafter move the Court in the event of any change of circumstances: Find the petitioner liable to the respondent's expenses hitherto incurred," &c.

MAITLAND & LYON, W.S.—LEBURN & HENDERSON, S.S.C.—Agents.

No. 70.

WILLIAM HAY'S TRUSTEES, Petitioners and Respondents.—*Kearney*
GEORGE YOUNG, Respondent and Appellant.—*Mackintosh*—*James*

Jan. 31, 1877.
Hay's Trustees v. Young.

Interdict—Trespass—Bona fides.—A person in good faith entered upon the land of the proprietor without permission from the proprietor, and dug holes to trace an old mine for the purpose of obtaining evidence for a jury trial then proceeding. The proprietor, a month after, presented a petition for interdict. Held that there was no ground for the application, and petition dismissed with expenses.

2D DIVISION.
Sheriff of
Berwickshire.
R.

THE trustees of Mr Hay of Dunse Castle, on 1st February 1877, presented a petition in the Sheriff Court to have George Young, p. 397, Dunse, interdicted from trespassing on the lands and estate of Dunse Castle. A record was made up, from which it appeared that on 24th December

June 3, 1870, 8 Macph. 821; Ketchen v. Ketchen, July 2, 1870, 8 Macph. 821; Symington v. Symington; March 20, 1874, ante, vol. i. 871, March 18, 1875, vol. ii. (H. of L.) 41.

Accordingly the two school boards presented this special case, the No. 67.
 the Lochgilphead board (first party) maintaining (1) that the determination Jan. 30, 1877.
 the Board of Education was final; and (2) that according to the true Lochgilphead
 construction of the decree of disjunction the *quoad sacra* parish did in- School Board
 de the farms. v. South

The Knapdale board (second parties) maintained (1) that section 9 did Knapdale
 apply, being limited to the case of a parish containing a burgh or part School Board
 a burgh, or at all events to questions of mere boundaries between
 ishes; (2) that, in any case, the Board of Education had no power to
 pose of any such question on an *ex parte* application, and without
 ng other parties interested an opportunity of being heard; and (3)
 the farms of Dail and Craiglass did not form part of the parish of
 Lochgilphead.

The questions were—" (1) Whether the determination of the Board of
 Education for Scotland is final and conclusive of the question whether,
 the purposes of the Education (Scotland) Act, 1862, the farms of Dail
 Craiglass form part of the parish of Lochgilphead, or of the parish
 South Knapdale? (2) Whether the farms of Dail and Craiglass, for
 purposes of the Act, form part of the parish of Lochgilphead? Or (3)
 whether the said farms, for the purposes of the said Act, form part of
 parish of South Knapdale?"

It advising.—

THE PRESIDENT.—The first question is whether the determination of the
 Board of Education is final and conclusive for the purposes of the Education
 Act, the question whether these farms belong to one parish or the other.

The school board of Lochgilphead, upon a consideration of the decree of dis-
 junction and erection, thought it a doubtful question whether the farms belonged
 to the *quoad sacra* parish or not, and they submitted the point to the Board of
 Education.

The Board of Education, by their deliverance of 18th April 1873, "settle and
 determine that, for the purposes of the said Act, the farms of Dail and Craiglass
 shall be included and comprehended within the area of the said *quoad sacra*
 parish of Lochgilphead."

It may be doubted whether it does not appear on the face of this deliverance
 that the Board of Education failed to apply their minds to the true question
 before them, viz., whether, according to the just construction of the decree of
 disjunction and erection, the farms belonged to the one parish or the other, and
 whether they should be included in the parish of Lochgilphead or not. But this
 is rather a narrow and critical view on which to hold that the deliverance
 is invalid.

The objection that the board issued their deliverance *parte inaudita* is more
 substantial. It is admitted that the application of the Lochgilphead board
 was *ex parte*, and that no one appeared or was called on to appear in the interest
 of the parish of South Knapdale. Now, whatever may be the construction of
 this section of the statute in other respects, I am of opinion that in a ques-
 tion of the kind now before us, in which two parishes have adverse interests,
 the Board of Education are not within the powers conferred by this section if
 they determine the question without having both parishes represented, and
 without stating what is to be alleged by each. I therefore think the first query must
 be answered in the negative.

When we come to consider the second, which is on the merits of that
 dispute, we are met by the important preliminary plea that we have no

No. 70. supplied with water by a pipe passing through Peelrig he had gone to inspect the state of that pipe, that he had found the pipe to the extent of 90 feet already laid open, and had made the necessary investigations. No objection had been taken to that action of his at the time, or till it was made in the present petition. He further averred that on neither of the occasions complained of had any harm been done either to the petitioners or their tenants.

Jan. 31, 1877.
Hay's Trustees v. Young.

The Sheriff-substitute (Dickson) on 31st March 1876 refused the prayer of the petition, with expenses.

The petitioners appealed to the Sheriff (Pattison), who recalled the Sheriff-substitute's interlocutor, and granted the prayer of the petition.

Young appealed to the Second Division of the Court of Session.

LORD JUSTICE-CLERK.—I regret very much that this case should ever come before us. I am, however, quite unable to concur in the view taken by the Sheriff.

I see no difficulty in accounting for the steps which were taken by Mr Young. He certainly had no intention of trespassing, nor did it occur to him that the respondents would object to his operations. Mr Hannan, the factor for the trustees, and Mr Young, had been employed by the police commissionaires Dunse to make investigations of this nature with a view to being prepared to give evidence on their behalf in the pending action against them, and they appear to have worked together for this purpose. Hannan and Young were both to have been in Edinburgh at the trial, and Young, who was returning from Dunse while the case was still going on, wishing to support the facts to which Hannan was prepared to speak, if called upon, resolved to make fresh statements with a view to strengthening those already made by Hannan. It is not, it is true, entitled to assume, but he did assume, that whatever he could do to support Hannan's evidence would be allowed both by Hannan, and the trustees, whose factor he was. Accordingly, he wrote to the local overseer for assistance and telegraphed to Hannan that he was about to take fresh gaugings. Having done this he proceeds to go upon the property of the trustees, and with the assistance of their overseer and workmen takes gaugings, and also finds out what repairs are going on and the ground broken up he gets holes dug to the extent of this old drain. All this he says he did to support Hannan's evidence, and he never thought that any one would object. It is possible that if he had thought more deliberately he would have applied for leave to do what he was doing, but he was thinking of nothing but the trial and the importance of the evidence. He afterwards, it appears, waited upon Hannan to put him in possession of the additional information which he had acquired, but failed to do so. All this was imprudent and thoughtless, but it was certainly done in good faith.

The next thing that occurred was the receipt by him of Hannan's letter of the 30th December 1875 complaining of what he had done as a trespass. He answered most candidly that he employed the overseer and workmen, and that he had no intention or idea that what he did would give offence, and he also offered to pay the expense incurred in the operations.

In such circumstances, the proper course for Mr Hannan to have taken would have been to have said, "You have given offence to my employers, and you must give me an assurance that you will not do so again." But nothing of that sort is done. No notice of that letter is taken at all until a month

LORD SHAND.—I am of the same opinion. I think this question fell properly No. 67.
 to the cognisance of the Board of Education, and that whether they con- Jan. 30, 1877.
 sidered it themselves or sent it to the Sheriff the decision for the purposes of Lochgilphead
 the Act would be final, provided the interests of the parties interested were duly School Board
 represented. v. South
 Knapdale
 School Board.

It would be a somewhat critical view to say that the board has not dealt with
 the question, though the proceedings are open to the observation that it has not
 well dealt with. I prefer to put my judgment on the ground that the
 board should have had some party before them who had an adverse interest.
 I doubt the Knapdale board was not in existence. But the Board of Edu-
 cation ought to have had some party who represented the interest, or deferred
 consideration of the point; and at least, in the absence of any representation of
 opposing interest, I think the determination was not final to the effect of
 excluding the board from again entertaining the question and hearing parties.
 As that the Knapdale board has the opposing interest I concur in thinking
 that we must send the case back to the Board of Education in order that they
 may consider the dispute between the two parties.

THE interlocutor was pronounced:—"Find and declare that the
 question or dispute, whether, in terms of the decret of disjunction
 and erection, dated 9th December 1846, the farms of Dail and
 Craiglass form part of the parish of Lochgilphead, or of the parish
 of South Knapdale, is by section 9 of the Act 35 and 36 Vict. cap.
 62, and for the purposes of that Act, competent only to the Board
 of Education, as therein provided; but find that the determina-
 tion of the question by the Board of Education, by their minute of
 13th April 1873, having been made and issued without hearing the
 party of the second part, or giving opportunity for any party repre-
 senting the parish of South Knapdale being heard on the said
 question, is not final, and that the said question or dispute remains
 to be determined by the said Board of Education, or the Sheriff, in
 terms of section 9 of the said Act: Therefore the Court answer the
 first question in the negative, and for want of jurisdiction decline
 to answer the second and third questions."

TODD, MURRAY, & JAMIESON, W.S.—MACKENZIE & KERMAK, W.S.—Agents.

ROBERT FERGUSON, Pursuer and Appellant.—*McKechnie*.
 ALEXANDER THOMSON AND OTHERS (James Jack's Executors), AND
 MARGARET JACK, Defenders and Respondents.—*Rankine*.

No. 68.

Jan. 30, 1877.
 Ferguson v.
 Jack's Execu-
 tors.

Verdict—Title to Sue—Husband and Wife—Divorce, effect of on Title to
 —Held that a husband, who had been divorced on account of his adultery,
 has title to sue for moveable estate which had vested in his wife prior to the
 decree of divorce, but had not been paid.

HIS action was raised in the Sheriff Court at Aberdeen by Robert 2D DIVISION.
 Ferguson in November 1875 to recover from James Jack's executors the Sheriff of
 residue of James Jack's estate which, on his death in 1872, Aberdeen-
 shire.
 as undisposed of residue to his daughter, Margaret Jack, from whom I.
 pursuer had been divorced in 1874 on the ground of his adultery.
 The action was defended by James Jack's executors, who stated the
 liminary plea of no title to sue, in respect that the pursuer was not at
 date of the action the husband of Margaret Jack, having been divorced
 from her on 19th December 1874.

No 70. Young did not intend to commit a trespass or to give offence to any party. Nothing could better shew this than the telegram which he sent to the respondents' general factor, and the communications he had with their local owners. All he did appears to me to have been done by him *in optima fide*. And, whenever he was complained of he wrote the letter quoted in the record by the respondents' factor—a letter which, in its terms, does him, I think, great credit and ought to have been held as perfectly satisfactory. But the respondents, although they remained quiescent for more than a month after that letter was written, proceeded, without any previous intimation to Mr Young of their intention, to present their petition for interdict against him. I cannot think that, under the circumstances, they were warranted in doing so.

Jan. 31, 1877.
Hay's Trustees v. Young.

I agree, therefore, with your Lordship that the petition for interdict was founded, and ought never to have been presented. And I may add that I consider the reference to the so-called former trespass does anything but improve the position of the petitioners.

LORD GIFFORD.—I am of the same opinion, and I entirely concur in the observations of your Lordship in the chair.

The remedy of judicial interdict is a most important one, for it proceeds on the principle that prevention is better than cure, and that in many cases it is more expedient to prevent a wrong from being done than merely to attempt to give subsequent redress. But interdict is never granted as a matter of course, and ought not to be applied for or granted without strong, or, at least, reasonable grounds.

The petitioners do not say in this petition for interdict that they apprehend and fear that the respondent will offend again, or that they have any reason to think or to suppose that he has any intention of interfering with their land or estate. Now, this is not a mere matter of form and a thing to be implicitly taken for granted. If it were I should not at all found on it. It is a matter of substance. The essence of a case for interdict is that either there is a wrong being actually committed, or that a wrong is apprehended. There must be reasonable grounds for fearing that the respondent in a petition such as this will do the act which he is to be interdicted from doing. The Court is not asked without any cause shewn to interdict and prohibit all the world from doing anything contrary to law. It will presume that the law will be obeyed unless it is shewn that an infraction is seriously threatened, or on good grounds apprehended. Now, when I come to the facts of this case I find no ground for any such apprehension. Without going into details, I have no doubt that the respondent thought that what he was doing was what no one would object to. He employed the petitioners' overseer and labourers with him, and what was done was done by their hands, and this very clearly indicates that he must have known that he was doing nothing wrong. When written to by the petitioners' agent he made what seems to me to be a full apology, and that letter, fairly read, implies a promise, or at least a disclaimer of any intention of ever again making such investigations on the petitioners' property without permission. I am of opinion that this is not a case for interdict, and that this petition should never have been presented. The reference to the old examination service water-pipe does not aid the petitioners' case. It is not disputed that there was a right or permission to take water by means of that pipe the

owners' land. I think such right or permission implies a right to inspect No. 70.
 pipe when necessary to repair it or ascertain its efficiency.

Jan. 31, 1877.
 Hay's Trustees v. Young.

THE COURT pronounced this interlocutor:—"Recall the judgment complained of; dismiss the petition: Find the petitioners liable in expenses in both Courts; and remit both these accounts to the Auditor of this Court," &c.

BENTON & GRAY, S.S.C.—DUNDAS & WILSON, C.S.—Agents.

MARY DOW AND OTHERS, First Parties.—*Moncreiff*.
 KILGOUR'S TRUSTEES, Second Parties.—*McLaren*.

No. 71.

Jan. 31, 1877.

Executor—Trust—Defeasible Directions.—When a testator has made a particular investment for behoof of a beneficiary who would have control over the investment if it were made the Court will not enforce the direction.

Dow v.
 Kilgour's
 Trustees.

THOMAS, merchant, Dundee, died on 15th July 1875, leaving a 2^D DIVISION.
 will in which he directed his trustees, after payment of debts R.
 legacies, to realise the residue of his estate and divide it into
 parts or shares. One of these shares he directed to be invested
 in annuities of equal amount—one a Government annuity, another
 in the Scottish Widows' Fund, and the third of the Scottish Provi-
 dent Institution, each of these annuities to be made payable to his
 Mary Ann and Ellen Dow, residing in Oporto, "jointly, and the
 survivors of them." Another share was appointed to be similarly invested
 in three like annuities in favour of Mary Dick and Marjory Forbes Dick,
 wives of his, jointly, and to the survivor. The third share was to
 be invested in three like annuities in favour of his housekeeper,
 Mrs. Mitchell. It was provided that, in the event of any of the sets
 of beneficiaries predeceasing the purchase of the annuities, the funds
 should be similarly invested in favour of the surviving bene-

factor contained this direction—"And I direct my said trustees, in
 paying the foresaid annuities, to provide as far as possible that the
 annuities shall be payable to the said annuitants exclusive of the *jus mariti*
 of administration and all other rights and interests which the
 any of them may have married or may marry might have by the
 law of any other country, so that the same may be payable to
 them on their own simple receipt without the consent of their said

trustees were also directed to deliver to the respective annuitants
 the sum of annuity on obtaining a full discharge of their intromissions

After the testator's death the trustees, as directed, proceeded to realise
 the residue and to invest it in annuities in favour of the beneficiaries, all of
 whom survived. They purchased the annuities from the insurance com-
 pany when they came to inquire as to procuring Government
 annuities. They found that they could not get annuities for the Misses
 who resided abroad, and certain special requirements were made
 for the Misses Dick, with which it was inconvenient for them to comply.
 In the circumstances all the annuitants requested the trustees, instead
 of purchasing the Government annuities, to pay over to them the re-
 sidual shares of residue directed to be so invested.

A case setting forth the above facts was presented to the Court

No. 71. —the annuitants being the first parties thereto, and the trustees second parties.

Jan. 31, 1877.
Dow v.
Kilgour's
Trustees.

The question was as follows:—"Are the first parties entitled to demand payment of the respective portions of the said remaining third of said residue which were directed to be invested in the purchase of Government annuities for their behoof irrespective of the possibility of obtaining such annuities?"

Argued for the annuitants;—It was a recognised rule in the law of England that the law will not compel that to be done which can be done immediately afterwards.¹ This rule had been adopted in the law of Scotland, and there were numerous decisions giving effect to it.² In the view, as it was impossible to purchase the Government annuities for Misses Dow, owing to their residing abroad, they were entitled to the payment of their shares in money.

Argued for the trustees;—The rule of law in England was not different, but no Scotch case had ever gone the full length of it. The case for the annuitants had all proceeded upon specialties. It was clear that if the annuities had been declared alimentary the annuitants could have defeated the trustor's directions.³

LORD GIFFORD.—In this case the whole beneficiaries for whose behoof the residue of the estate is directed to be invested are before us. They are all of full age and *sui juris*, and none of them is placed under any restraint or disability by the terms of the testator's deed, excepting, if this be really a condition, that the *jus mariti* of the husbands of females is excluded. The intention in the deed is that the money should be invested in annuities in favour of residuary legatees. The money was to be sunk in Government annuities, and annuities to be purchased from two insurance companies named in the deed. The annuities were to be taken to each set of annuitants, the whole to be taken to the survivor of each set, with the exception of the last annuity provided which was to one person alone. It was also provided that they were to be so far as possible exclusive of the *jus mariti* of any husbands the beneficiaries might subsequently marry.

I suppose that this last condition could only be carried out by the trustees taking the annuities with a clause inserted in the bonds of annuity bearing that the annuity should be payable to the annuitant alone, exclusive of the husband of her present or future husband.

The question is, are the trustees entitled or bound to invest the trust money in these annuities in spite of the wish of the beneficiaries, who prefer to have the money paid direct to themselves, and some difficulties having arisen in the purchase of annuities in the exact terms of the trust-deed? Now, I take it, on the authority of the cases of Tod, Kippen, and Gordon, and of other cases both here and in England, that wherever a beneficiary totally unfettered by the trust

¹ Jarman on Wills, i., 367; White and Tudor's Leading Cases (4th ed. v. M'Guire), ii., 288; Power v. Hayne, May 28, 1869, L. R. 8 Eq. 201; Weston v. Walker, Aug. 15, 1831, 2 Rus. & Mylne, 197; Ford v. B. 8, 1853, 17 Beav. 303; Stokes v. Cheek, July 2, 1860, 28 Beav. 62.

² Tod v. Tod's Trustees, March 18, 1871, 9 Macph. 728, 43 Scot. Jur. 134; Kippen v. Kippen's Trustees, Nov. 24, 1871, 10 Macph. 134, 44 Scot. Jur. 134; Gordon v. Gordon, March 2, 1866, 4 Macph. 501, 38 Scot. Jur. 231; v. Scott's Trustees, July 18, 1872, 10 Macph. 982, 44 Scot. Jur. 556; Gray's Trustees, Jan. 1877, *ante*, p. 378.

³ Menzies v. Murray, March 5, 1875, *ante*, vol. ii. 507.

and what the trustees have done, or what the trustees are directed to do, No. 71.
 wherever there is no limitation of the beneficiary's right, and no restraint
 upon the beneficiary, but only a direction to trustees, the Court will Jan. 31, 1877.
 insist upon the trustees carrying out the direction, for the only result of Dow v.
 would be to put the beneficiary to the expense, trouble, and inconvenience Kilgour's
 of going in a circuitous way, and entirely at his own pleasure, what the Trustees.
 trustees had fruitlessly done.

Of course there are cases where the bequest may have been made alimentary,
 restricted for the sole and continuous aliment of the legatee, or the annuity
 is declared to be not assignable by the beneficiary, and not capable or
 to be alienated by him, and such cases are to be distinguished from a case
 this. Where a beneficiary is placed under fetters, either for his own benefit
 that of his wife or children, or of third parties or substitutes, such restric-
 tions would have to be inserted in the bonds, and the legatee would be not an
 absolute but only a limited fiar. Here there is no such provision, and the
 legatee has no power in any way to tie up or fetter the annuitants in their
 disposal or otherwise. It was practically admitted at the bar that if
 annuities were once bought from Government or from the insurance offices
 terms of the deed any set of the beneficiaries could sell or assign them to
 their own pleasure.

Inclusion of the *jus mariti* of the husbands of the annuitants is not really
 a restraint on the annuitants; it is the very reverse, it is a restraint only on the
 husband and makes the annuitant's right larger and more absolute than it
 otherwise have been. I think, then, that we should in this case affirm
 the principle, the broad and general principle, which has been already recognised
 in England, and which is the law of England, and answer the question in the
 affirmative.

MR. CROMBIE.—I am of the same opinion. If the fund or estate in dispute
 had been declared to be strictly alimentary, or if there had been an express
 declaration of the right of the annuitants to assign, the question we have to
 decide would have been materially different from what it is, because, on either
 assumptions the beneficiaries might not have been in a position to realise
 their annuities after they had been constituted in their favour. In this case,
 as it stands, the annuities, for anything I see, might, after being con-
 stituted, be sold, and the proceeds disposed of as the annuitants might think
 proper. But it is an established principle that what can be instantly undone
 can be done at all.

JUSTICE-CLERK.—I entirely concur, and have nothing to add except this,
 that it will be clearly understood that we have decided this case on the
 principle, and on no specialty. The ground on which we proceed is that
 as in England as well as here, that an act which, if done, can be at once
 done by the person having interest, will not be directed by the Court to be done.

THE COURT pronounced this interlocutor:—"Find that the first
 parties are entitled to demand payment of the respective portions
 of the remaining third part of the residue which was directed to
 be invested in the purchase of Government annuities for their be-
 nefit, irrespective of the possibility of obtaining such annuities."

MR. DICKSON, & SHAW, W.S.—FYFE, MILLER, FYFE, & IRELAND, S.S.C.—Agents.

No. 72.

JOHN HOLMAN AND OTHERS (Owners of the Steamship "Gertrude," Pursuers.—*Guthrie Smith—Keir.*Feb. 1, 1877.
Holman, &c.
v. Irvine Har-
bour Trustees.THE IRVINE HARBOUR TRUSTEES, Defenders.—*Trayner—Mackintosh.**Harbour—Obligations of Harbour Trustees—Pilot—Master and S.*

When harbour trustees, who are appointed "a pilotage authority" within the meaning of the Merchant Shipping Act, 1854, do not license pilots under powers conferred on them by Part V. of that Act, but employ unlicensed pilots at stated wages to pilot vessels into their harbour, and themselves receive pilotage dues, and apply them to harbour purposes, they are liable for the loss of the pilots so employed by them.

Reparation—Negligence—Ship—Harbour Trustees—Pilot—Merchant Shipping Act, 1854, Part V., Pilotage Regulation.—The I. harbour trustees, by their statute of incorporation (36 and 37 Vict. c. cxxiv.), vested with the management of I. and its whole works and pertinents, and entrusted with its management for the benefit of the public. By sec. 32 of this Act they were authorised to levy certain rates, and, *inter alia*, "rates for pilotage." These "rates for pilotage" were leviable on all vessels entering and leaving the harbour, whether pilot was employed or not, and were applied under sec. 42, along with the rates levied, as a general fund for harbour purposes. By sec. 47 the trustees were appointed "a pilotage authority" within the meaning of the Merchant Shipping Act, 1854. The trustees, however, did not, under Part V. of that Act (secs. 330-388), license any pilots to act within the limits of their jurisdiction, but instead they employed certain men termed "hobblers" at weekly wages, whose duty it was to act under their harbour-master in berthing and moving ships about the harbour, and in other harbour work, and to pilot ships out of the harbour when required. By "Mariners' Notice as to I. Harbour" the trustees advertised that "pilots are in attendance at tide-time night and day."

The s.s. "Gertrude," while entering the harbour, was injured through the negligence of J. M., one of the "hobblers" in the trustees' employment, under a charge as pilot she was at the time.

Held that the trustees were liable for the damage, in respect that J. M. was not acting as a licensed or authorised pilot in the sense of the Merchant Shipping Act, 1854, but merely as the servant of the trustees, paid by the trustees, acting within the limits of their harbour, in discharging a duty which the trustees undertaken to perform.

2D DIVISION.
Lord Shand.
R.

THIS was an action raised by John Holman and others, pursuers, against the Irvine Harbour Trustees, defenders, to recover damages for injury to the s.s. "Gertrude," of which the pursuers were owners, while in the harbour of Irvine on 10th September 1875, through the negligence of Jeremiah M'Gill, the pilot sent out by the defenders to bring the vessel into the harbour.

It was admitted that the vessel, in being brought into the harbour, was struck against the base of the perch which marked the entrance to the harbour, and received the injury complained of, through the negligence of M'Gill.

M'Gill was not a licensed or qualified pilot in the sense of the Merchant Shipping Act, 1854. He was what is known as a "hobbler" employed by the defenders at weekly wages. He was under the direction of the defenders' harbour-master, and his duties were principally connected with the berthing of ships and the moving them about within the harbour. The defenders had not licensed any pilots to act at the entrance of Irvine, and M'Gill and other "hobblers" were employed in bringing ships into the harbour when required.

It was not compulsory upon ships entering the harbour of Irvine to accept the services of a pilot; but the defenders were entitled to

charge, pilotage dues on all ships entering the harbour, whether required a pilot or not. These dues were paid directly to the de-
 and formed part of their general funds, out of which they paid
 cesses of the "hobblers" employed by them, and kept up the neces-
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Defenders stated in their "Mariners' Notice as to Irvine Harbour,"
 June 1875 (a copy of which the master of the "Gertrude" had ob-
 before sailing for the port),—"A powerful paddle tug and pilots are
 at hand at tide time, night and day, and every facility is given for
 loading and discharging of cargoes."

Master of the "Gertrude," being a stranger to the harbour, waited
 till a pilot-boat came off to him, and, on M'Gill coming on board,
 the vessel under his charge.

Defenders were appointed under the Irvine Harbour Act, 1873 (36
 Vict. c. cxxiv.) Under that Act (sec. 47) they were constituted
 pilotage authority and local authority within the meaning of the
 Merchant Shipping Act, 1854, and the Acts amending the same, with
 powers conferred by those Acts on pilotage authorities and on
 authorities.* And they were entitled (sec. 32) to "demand and

Merchant Shipping Act, 1854 (17 and 18 Vict. c. 104), provided:—

"Pilotage authority" shall include all bodies and per-
 sonalities to appoint or license pilots, or to fix or alter rates of pilotage, or
 exercise any jurisdiction in respect of pilotage.

"Conduct" shall mean any person not belonging to a ship who has the conduct

"Licensed pilot" shall mean any person duly licensed by any pilotage autho-
 rity to conduct ships to which he does not belong."

"Subject to the provisions contained in the fifth part of this Act,
 it shall be lawful for every pilotage authority, by bye-law made with the con-
 sent of His Majesty in Council, from time to time to do all or any of the follow-
 ing things within its districts; (that is to say)

To determine the qualification to be required from persons applying to
 be licensed as pilots, whether in respect of their age, skill, term of service, cha-
 racter, or otherwise.

To make regulations for the government of the pilots licensed by them,
 and to ensure their good conduct, and their constant attendance to and effec-
 tive performance of their duty, either at sea or on shore.

To fix the terms and conditions of granting licenses to pilots,

To make regulations for punishing any breach of such regulations as afore-
 said by such pilots by the withdrawal or suspension of

licenses or by the infliction of penalties to be recoverable
 by before two Justices," &c.

To fix the rates and prices or other remuneration to be demanded and
 paid for the time being by pilots licensed by such authority, or to alter the
 mode of remunerating such pilots, in such manner as such authority may, with
 consent as aforesaid, think fit," &c.

To repeal or alter any bye-law made in exercise of the above powers,
 and to make a new bye-law or bye-laws in lieu thereof.

Every bye-law duly made by any pilotage authority in exercise of the
 powers hereby given to it shall be valid and effectual, notwithstanding any Act
 in that behalf made, or any rule, law, or custom to the contrary."

"Every pilotage authority shall deliver periodically to the Board
 of Trade in such form and at such times as such board requires, returns of the
 following particulars with regard to pilotage within the port or district under
 the jurisdiction of such authority; (that is to say)

All bye-laws, regulations, orders, or ordinances relating to pilots or
 pilotage for the time being in force.

The names and ages of all pilots or apprentices licensed or authorised to

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receive for and in respect of vessels entering within or leaving the lin of the harbour, or using the works in or connected with the harbour any of them, any sum not exceeding the several rates specified in schedule (A) to this Act annexed."

Schedule (A) contained, *inter alia*,—"Rates for pilotage. For vessels entering or leaving the harbour, per registered ton, twopence."

By section 42 the trustees were empowered to apply the rates la generally in the maintenance, repair, management, and improvement the harbour.

Although they had not licensed any pilots in the sense of the Merc Shipping Act, 1854, the defenders, in their annual returns for 1875, suant to the 18th section of the Pilotage Act, 1853 (16 and 17 Vi 129), entered M'Gill and the other "hobblers" in their employas "pilots," "licensed or authorised" by them.

The pursuers pleaded ;—(1) The pursuers having sustained los damage through the fault of the defenders and their servant, in ca the vessel to come into collision with rocks or stones on entering the bour, are entitled to decree for the sums specified in the said accou concluded for.

The defenders pleaded ;—(2) The said Jeremiah M'Gill being a qualified pilot, the defenders are not liable. (3) The services of the Jeremiah M'Gill having been accepted by the pursuers at their own and without any responsibility on the part of the defenders, the de are not liable.

The Lord Ordinary, on 15th November 1876, pronounced this locutor :—"Finds that the pursuers have failed to prove facts and d stances inferring liability against the defenders for the sum sued any part thereof : Assoillizes the defenders from the conclusions c action, and decerns : Finds the defenders entitled to expenses," &c.

act by such authority, and of all pilots or apprentices acting either medi immediately under such authority, whether so licensed or authorised or n

"(3) The service for which such pilot or apprentice is licensed.

"(4) The rates of pilotage for the time being in force, &c.

"(5) The total amount received for pilotage, &c.

"(6) The receipt and expenditure of all moneys received by or on b such authority in respect of pilots or pilotage."

Sec. 349. "Every qualified pilot, on his appointment, shall receive a containing his name and usual place of abode, together with a descriptive person, and a specification of the limits within which he is qualified to ac

Sec. 351. "Every qualified pilot, while acting in that capacity, shall vided with his license, and produce the same to every person by whom employed, or to whom he tenders his services as pilot ; and if he refus so at the request of such person, he shall incur for each offence," &c.

* "NOTE.— It is not alleged on record that M'Gill, the who was sent by the harbour-master to bring the vessel in, was unfit f duty ; and in the absence of such an averment it would be an injustice defenders to take such a fact as proved. The evidence, however, on the is sufficient to shew that M'Gill possessed the requisite knowledge and rience to fit him for the duty. The piloting of vessels over the bar t places in the harbour is not attended with any difficulty to one acquainte the harbour and the rules of seamanship. M'Gill, who was born in Irvi sailed out of that port for a number of years. At a later time of his life acted as a pilot for seven years at the port of Ardrossan, and he had b gaged piloting vessels out and into the harbour of Irvine, with full tunities of seeing its condition and peculiarities at all times of the tide fo two months before the accident in question took place.

"The result is that the injury to the vessel was caused by the fault of and that the defenders, the harbour trustees, were not in fault. But the

the pursuers reclaimed, and argued;—The defenders were liable for the t of M'Gill, their servant. There was no compulsory pilotage at the

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tion which remains is, whether the defenders, the harbour trustees, are onable for the fault of M'Gill the pilot? That question seems to depend his other question, whether, when the captain accepted the services of ill, who was sent out by the harbour-master, as representing the defenders, ring the vessel in, the defenders undertook and contracted to bring the d in safely, or only undertook to give the services of one whom they be- d to be duly qualified for the duty. I am of opinion that the defenders ot undertake responsibility for any fault which M'Gill, whom they believed a duly qualified pilot, might commit.

In support of the view of the defenders' liability, on which the action is del, the pursuers rely on the fact that the defenders are proprietors of the sur. M'Gill was their servant, paid by weekly wages, and dismissible at ure, and engaged, not only to perform the duty of piloting vessels from the of the river in the bay of Irvine into the harbour, but of moving vessels a place to place in the harbour, taking soundings in the river, and perform- much other duties in relation to the navigation as the harbour-master might ure. It is proved that the relation of master and servant existed between ill and the defenders, and the pursuers maintain that the defenders under- the safe pilotage of the vessel, performing the duty by their servant, and they are, therefore, responsible for his fault.

are, however, of opinion that, notwithstanding the relation which subsisted on M'Gill and the defenders, the latter are not responsible for his fault, not in providing pilotage for vessels resorting to the harbour, the defenders undertake more than that due and reasonable care shall be taken in the ment of the persons who shall perform the duty of pilots. The defenders and at the proof the local Act, 7 Geo. IV. c. 107 (1826), and two provi- l orders, dated in 1867 and 1870, and it appears that under the first of orders the defenders became 'a pilotage authority' for the harbour under Merchant Shipping Act of 1854. It is unnecessary to consider the effect documents, for by the Irvine Harbour Act, 1873, section 7, the local ad the orders of 1867 and 1870 were repealed in so far as related to the ur of Irvine, and a new series of statutory provisions was then enacted. in Act of 1873 the provost, magistrates, and town-council of the burgh of y the convener of trades, and a certain number of owners of vessels be- g to the harbour, and of traders at the harbour, were incorporated as the Harbour Trustees. By section 17 the limits of the harbour were defined the beds or channels of the rivers Irvine and Garnock, in and through our, and from the harbour to the bay of Irvine' and the foreshore on the harbour and works are situated. The statute authorises a variety of to be executed by way of improving the harbour, and section 42 provides e trustees shall apply the money received from the rates levied under the ally in the maintenance, repair, management, and improvement of the : The 32d section of the statute gives the trustees right to the rates l in the schedule annexed to the Act on all vessels 'entering within or the limits of the harbour,' and amongst the rates specified in the e is the following:—'Rates for pilotage: For all vessels entering or leav- harbour, per registered ton, 2d.' Section 47 is in the following terms:— trustees shall be a pilotage authority within the meaning of "The Mer- shipping Act, 1854," and the Acts amending the same, and shall have all ens conferred by those Acts on pilotage authorities and on local authorities.' on these provisions it appears that the defenders are entitled to charge els entering or leaving the harbour a rate 'for pilotage,' and this of itself, least taken in connection with the clause providing that the defenders e a pilotage authority, it may be assumed imposes on them the obligation ing some provision for the pilotage of vessels entering and leaving the r. Such a duty and obligation seems to be a necessary consequence of istence of a harbour to which access is obtained by a navigable river

No. 72. harbour of Irvine, but the defenders, by their notice to mariners, invite the public to rely upon the pilots supplied by them. As a pilot

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channel, and certainly of the existence of a bar harbour in which the band liable to shift with the effect of altering the channel more or less from time to time. Harbour trustees have generally the duty of making provision for pilotage, and are usually authorised to levy rates in return for the pilotage. The owners of vessels, on the other hand, have the important advantage of local knowledge of the peculiarities of the harbour, possessed by persons employed in the peculiar service of pilots at that place. In the present case Captain Hall has stated that he would not have himself ventured to take the vessel into port, particularly as he knew Irvine was a bar harbour, and probably if he had taken this duty upon himself his employers would have forfeited any claim to indemnity under any insurance effected on their behalf. See authorities cited by Mr Kay in his work on Shipmasters and Seamen, vol. 2, p. 756.

"In the port of Irvine there is no compulsory pilotage. In practice vessels frequently enter and leave the port without taking the services of a pilot, and vessels which hail from the port, or frequently resort to it, and the captains of which are familiarly acquainted with the harbour, are probably better served by the hands of their own commanders than in those of the pilots appointed by the harbour trustees. Vessels are liable to pilotage dues, and pay such dues accordingly, whether they take the services of a pilot or not; but any vessel desiring such services is entitled to have them.

"The provisions of the Merchant Shipping Act of 1854 recognise the existence of two classes of pilots,—'Pilot' meaning 'any person not belonging to the port who has the conduct thereof,' and 'qualified pilot,' 'any person duly licensed by any pilotage authority to conduct ships to which he does not belong.' Section 333 contains provisions giving full power to pilotage authorities to determine the qualifications of pilots, and grant them licenses, to make regulations for the conduct of pilots, and for ensuring their attendance and the performance of duty either at sea or on shore, to fix the remuneration to be received by pilots, to arrange the limits of their districts, to make regulations for the approval and licensing of pilot-boats, and ships, and otherwise to regulate the pilotage authority (section 337) also provides that every pilotage authority shall periodically to the Board of Trade, to be laid before both Houses of Parliament, returns embracing a number of particulars shewing the regulations relating to pilots, or pilotage in force in each district; 'the names and ages of all the pilots or apprentices licensed or authorised to act by such authority, and of all other persons or apprentices acting either mediately or immediately under such authority, whether so licensed or authorised or not, the rates of pilotage for the district in force, with the total amount received for pilotage, and receipt and expenditure of all monies received by or on behalf of such authority in respect of pilotage.' This section of the statute obviously contemplates the case, which is probably not an uncommon one, at least in the coast harbours of Scotland, of pilots acting under the pilotage authority although not holding a formal license. The clauses of the statute (365-6-7) relating to the offences of pilots and the penalties to which they are to be subject under the statute also recognise the existence of licensed pilots as distinguished from pilots acting without a license.

"From the provisions of the statute of 1854 thus noticed, in connection with the enactment contained in the Irvine Harbour Act of 1873, it appears that the defenders were entitled to license pilots, who should be subject to such regulations as they might think fit, and whose remuneration they were to fix. If the defenders, in the performance of their duties under the Act, had adopted this system, and become practically a licensing board only, like the Trinity House of Leith, or the Elder Brethren in England, it is maintained that they would have been liable for the fault of the pilot or pilots, at least it is not maintained there would have been no liability if the defenders had not gained benefit by the pilotage dues. In the case of a licensing authority, which is substantially a licensing board only, it seems clear

authority they might have licensed pilots, who would then have been No. 72.
 lic officers, for whose acts the defenders would not have been liable.

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responsibility for the fault of the pilot would attach to the board. In this case the defenders did not license the pilots at the port so as to make them 'qualified' pilots under the statute, but merely appointed them to the duty. It appears to me to be a reasonable extension of the general principle to the present case, in these circumstances, that there is no such responsibility on the defenders which the pursuers seek to enforce.

Under the statute, the defenders being bound to provide pilotage for those who desire it, may either license persons or simply appoint them to do the duty. If the defenders found it necessary, in order to provide competent pilots for the service they might no doubt pay away all the pilotage dues directly, or, it may be, give the pilots right to receive the dues directly; but they do not find it necessary to expend the whole pilotage dues on that account, then their statute provides that the dues received shall be applied for general harbour purposes. The form of the appointment of pilots, or the mode of their remuneration, does not appear to me to affect the legal responsibility of the board for the pilots' acts; nor do I think the circumstance that the remuneration is given by the board out of the pilotage dues, in periodical instalments, instead of being in the form of direct payments from the shipowner, makes any difference. In all of these cases alike it appears to me that the legal obligation which lies upon the body of trustees, acting as a pilotage board, towards the owners and traders resorting to the port, is to take reasonable care to provide men whom they believe to be fitted for the duty of the office. There is certainly no express contract to do anything more, and I do not think that the relation between the parties creates a legal power with higher obligations. It is true that in one sense pilots, employed as those in Irvine, are servants of the trustees, under their orders, and liable to be dismissed by them. But these pilots are there truly in the performance of the public service, in the same way as duly licensed pilots are, and in each case in which they act for the time the servants of the owner or trader of the vessel under charge. The service cannot, I think, be regarded as one which the trustees themselves perform by their servant or deputy. It would be a very serious responsibility that harbour trustees, by the appointment of pilots for the public service, should be held absolutely to undertake the safe pilotage of vessels within their district, becoming responsible for the faults of the pilots appointed, and no example of such responsibility can be cited by the pursuers. In the present case, no doubt, the defenders might have formally issued orders to the three pilots who are required for the work of the harbour, and their responsibility is, that if they did so, men of better capacity for the office, and probably with somewhat better remuneration, would be selected, to the benefit of the public. It is difficult, however, to see how the defenders, in practice, have adopted any other system of remuneration. It would probably yield but small returns to give them the dues, or a large portion of the dues due for each vessel which they brought in or took out of the harbour, for the vessels prefer to dispense with the pilot altogether. The only practical mode of payment appears to be that adopted by the defenders, and which would most probably act upon whether they licensed pilots or not, viz., to pay them so much a-week or month for their services. If the defenders paid the whole pilotage dues in this way it would be extremely difficult for the pursuers to maintain the argument that the defenders incurred liability for the faults of the pilots. In that case, though no doubt to some effect the legal relation of master and servant would subsist, yet in substance the pilots would, I think, be truly the servants of the public, and the defenders merely intervene to form for the benefit of the public resorting to the harbour the duties of licensing the pilots, and regulating their conduct and remuneration. It does not, in my opinion, make a difference in this case, that the pilots do not receive the whole pilotage dues. It may fairly be assumed that under the general head of pilotage the ship is paying for something more than mere pilotage, including

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But instead of licensing pilots they chose to employ their own servants to discharge the duty of pilotage, which they held themselves out as prepared to perform. They were in no different position from any statutory body of trustees performing a work imposed upon or assigned by them by the hands of their servant, and accordingly the ordinary liability for their servant's act attached to them.¹

maintenance of pilot boats; as, for example, such items as are mentioned in return, No. 81 of process, of lights, and expenses in sounding the channel bell like. In that view, the proper charge for the services of the pilot was paid by the owner or trader to the port, but, for the sake of convenience, by the hands of the trustees. In any view, however, I think the owner or trader, getting the benefit of a pilot's service, is for the time his employer, and not the employer of the trustees; that the pilot, and not the trustees, undertake the duty of bringing in the vessel to the harbour; that the trustees are the persons by means of whom the remuneration is given by the owner or trader to the pilot, the balance of the pilotage dues being, as authorised by Parliament, applied to harbour purposes. If this be the substance of the arrangement between the trustees and those who resort to the harbour, or the nature of the obligation which the law imposes on the harbour trustees, there is obviously no responsibility on the part of the trustees for the pilot's acts.

"The case of *Ogilvie v. The Magistrates of Edinburgh*, 22d May 1821, 24, was mentioned in the course of the discussion. The report does not contain the opinions of the Judges, but the case appears, when fully examined, to be direct authority in support of the judgment I have pronounced. The papers were not referred to by the defenders, but an examination of them after this opinion was written has satisfied me that the judgment of the Court proceeded generally on the grounds to which I have given effect. The case appears to have been very elaborately argued in written papers, and must have been subject of anxious consideration by the Court, who obtained reports from various harbour authorities in the kingdom as to the practice in regard to pilotage. These reports are printed in the appendix to the pleadings. They did not to any extent turn on any fault on the part of the magistrates as trustees in not removing the sand-bank referred to in the report, but was based on the footing of the accident having occurred through the fault of the pilot. The only difference between that case and the present appears to be that the magistrates regularly licensed the pilots who were employed at the port. The pilots received two-thirds of the dues from the magistrates, the remaining third having been paid to the shore-master. He was referred to by the trustees as pilot-master, but it appears to be clear from the papers that it was in that limited capacity that he received a third of the dues. The case in the present instance appears to me to be scarcely distinguishable from the present, and the argument which received effect is very much based on the grounds on which the present judgment rests.

"It was pleaded on the part of the pursuers that the three persons in the position which M'Gill occupied were not to be regarded as pilots at all, but what is called 'hobblers,' whose proper duty was working in or about the harbour only. There is, I think, no room for this view on the evidence sufficient to observe that the persons referred to performed the duties of pilots between points specified in the statute as the limits of the harbour for pilotage dues were paid.

"In conclusion, I may say that if I had taken a different view of the degree of liability, and had held them responsible for the fault of M'Gill, I should have found the pursuers entitled to £240 in name of damages."

¹ *Mersey Dock Trustees v. Gibbs*, 1866, L. R., 1 E. and L. App. 93, 11 Q. B. 110; *H. of L. Rep.* 686; *Virtue v. Police Commissioners of Alloa*, Dec. 12, 1861, ante, vol. i. 285; *Thomson and Others v. North Eastern Railway Co.*, Feb. 1, 1862, 31 L. J. Q. B. 194; *Ogilvie v. Magistrates of Edinburgh*, 22, 1821, 1 S. 24; *Indermaur v. Dames*, Feb. 6, 1867, L. R., 3 C. P. 311; *Ruthers v. Sydebotham*, 4 M. and S. 77; *Att.-Gen. v. Case*, 3 Price, 362; *Sons on Shipping*, vol. ii. p. 116, note.

Armed for the defenders ;—The real question was, not whether M'Gill was a licensed pilot, but whether he was fit for the duty imposed on him. His fitness was not denied. What a license did was to give a pilot the status of an independent contractor. For him the pilotage authority was in no way responsible. But if the defenders' acting, not as pilotage body, but simply as harbour trustees, chose to employ their own servants for pilotage purposes all that they were responsible for was that they should be fit persons to act as pilots, and this they might be quite well though unlicensed as if licensed. There was no absolute warranty by the defenders that vessels would be brought safely into their harbour. Negligence on the part of the defenders must be proved to infer liability.

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MR. JUDICIAL—This is a case of importance and interest, and has evidently attracted the Lord Ordinary.

The ground upon which the defenders' liability is maintained is that the pursuers' steamship, the "Gertrude," was caused through the fault of their servant Jeremiah M'Gill, who acted as pilot on the occasion in allowing her to strike against some stones or other obstructions on the harbour. The defenders deny their liability, on the ground that they are in law responsible for the fault of M'Gill. It is not, however, disputed either that loss and damage to the amount claimed, have been caused by the pursuers, or that they were caused by the fault of M'Gill. The defenders' liability disputed on the ground that they are a corporation and that their corporate funds and estate cannot be applied to the compensation of the pursuers for the injury of which they complain. It is clear, that no such plea could now be maintained, having regard to the judgment of the House of Lords in the *Mersey Dock Trustees v. Gibbs*, L. R., 11 App. p. 93 ; and that of *Virtue v. The Commissioners of Police of London*, p. 285, in this Court ; as well as subsequent cases.

The pursuers, however, maintain that the defenders are liable to them, irrespective of the fault of M'Gill, in respect that contrary to their duty they allowed obstructions by which the ship was injured to exist in the harbour ; and have not been able to satisfy myself that the Lord Ordinary is wrong on this ground of liability not established I shall proceed at once to the more important ground of liability, and that which was chiefly relied on by the pursuers, viz., the liability of the defenders for the fault of their servant.

In reference to this part of the case it has to be observed that Captain James, the master of the pursuers' ship, says he saw at Glenarm, in Ireland, started from that place on the voyage to Irvine, the "Mariners' Notice of the Harbour," No. 62 of process, which, among other things, contains

Greenock v. Greenock Harbour Trustees, Dec. 10, 1875, *ante*, vol. iii. 1194 ; *St. Andrew and Others*, 1875, L. R. 10 Q. B. 125 ; *General Steam Navigation Company v. British Colonial Steam Navigation Company*, 1869, L. R. 4 ; *Shearman and Redfield on Negligence* (2d ed.), sec. 81, a ; *Story on Negligence* (1851), sec. 456, a ; *Maclachlan on Shipping* (2d ed.), p. 267 ; *Smith and St Catharines Dock Company*, 1868, L. R. 3 C. P. 326 ; *Stephen v. Police Commissioners*, March 3, 1876, *ante*, vol. iii. 535 ; *Hammond v. The Trustees of the Glasgow Harbour*, 1830, 10 Barn. and Cress. 424.

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the following announcement—"A powerful paddle-tug and pilots are in attendance at tide-time, night and day, and every facility is given for the loading and discharging of cargoes." The shipmaster was therefore entitled to rely on the tug and pilots, when he approached Irvine, a pilot sufficiently qualified to take the vessel safely into that harbour, and this, in his case, was indispensable, as he says he was himself unacquainted with the harbour, never having been there before. He accordingly waited in the offing for a pilot; and he then states that "A pilot-boat came out from the harbour with three men in it, one of whom was Jeremiah M'Gill, came on board the 'Gertrude.' I asked him if he was a pilot of the river Irvine. He said he was, and demanded the helm. This was my first voyage to Irvine, and I would not have attempted to enter the harbour without a pilot. I allowed him to take the helm. He took full command of the vessel. I stood by the telegraph to the engine and obeyed his orders. 'Gertrude' answered her helm very well."

But who was M'Gill, and who sent him out from Irvine to take command of the pursuers' ship? In regard to these questions there can be no doubt, from the record the pursuers say that M'Gill, "acting under the instructions of the employment of the defenders," came on board and took the command of the ship for the purpose of taking her into the harbour of Irvine; and the defenders explain in answer to that statement, that "the three men, including said Jeremiah M'Gill, were duly qualified pilots, and that they were allowed to act as pilots by them," and went out and boarded the "Gertrude." If M'Gill was a duly "qualified pilot," as thus stated by the defenders, it may be that they have plausible, if not sufficient, ground for maintaining that they are responsible for him; but if, on the contrary, it should appear that M'Gill was not a duly qualified or licensed pilot at all, but merely a servant of the defenders, working about the harbour, the question of their responsibility, as I apprehend, presents itself in a very different light. In regard, then, to this important matter, Alexander Muir, the defenders' engineer, says—"I knew M'Gill who was the pilot in charge of the 'Gertrude' at the time of the accident. I do not know what was his character or experience as a pilot." But William Wilson, the defenders' harbour-master, by whom M'Gill was engaged, furnishes more particular information regarding him. He says—after explaining that he had engaged him only shortly before the accident—"I did not make any examination of him. I gave him no special instructions except as to how to get in vessels safely. I did not give him any particular instructions as to how he was to do so." And he further explains that M'Gill and the other two who were sent out to the "Gertrude" on the occasion in question were paid a weekly wage of 21s. each out of the harbour trust funds. They were engaged in transporting vessels from one part of the harbour to another, in placing vessels, and in piloting vessels in and out. In the book of directions they are called pilots, but 'hobblers' is the proper name for them, as they do not generally go outside the bar. A 'hobbler' is a man who moors vessels and does not work in the open sea. These men are subject to my orders. They do no other general work for the harbour trust, except, perhaps, sounding the bell at the bar, and so on. (Q.) They make themselves generally useful subject to my orders? (A.) Yes. I engage and dismiss them and have the entire control over them." And in answer to the Lord Ordinary this witness concludes his evidence by saying—"The harbour trustees do not issue any license to them, they just employ them as their servants at weekly wages." And M'Gill

he "never held a license as pilot. When I went to Irvine I received no instructions from any one as to the navigation of the river. The only instruction I received were, that I was to obey the harbour-master in everything he said or done. Nothing was told me as to the line of safety between the porches and the channel. I saw no chart of the river." And he afterwards says he and his two comrades were called "hobblers," and that he was not aware of the stones or other obstructions in the harbour against which the "trade" struck.

The true character and position of M'Gill thus appear very clearly. That he was not a licensed pilot is indisputable. But to be a "duly qualified pilot," as represented by the defenders in the record, he required to be licensed; for a "duly qualified pilot" and a "licensed pilot" I hold to be the same thing. This is made sufficiently plain by the Merchant Shipping Act, 17 and 36 Vict. c. 104, under and in reference to which there is evidence that the defenders professed to regulate themselves in regard to the pilotage of Irvine, in connection with their own Harbour Act of 1873, the 36 and 37 Vict. c.

By section 32 of the latter Act the defenders are authorised to demand for the pilotage dues there referred to, consisting, amongst others, of a certain registered ton "for all vessels entering or leaving the harbour;" and section 47 it is enacted that the defenders "shall be a pilotage authority within the meaning of the Merchant Shipping Act, 1854." And that Part V. of the Merchant Shipping Act, besides conferring powers on pilotage authorities, contains a code of directions for the regulation and licensing of pilots. It is certainly not made clear that the defenders as a pilotage authority were bound, although they had the power, to license pilots; nor do I think that this is of much moment in relation to the question of the defenders' liability in the present case. Clear it is, however, that no examination of M'Gill by the defenders or any one else was made, or any license ever granted to him. How, then, could the defenders come upon them to say in the record that M'Gill was a "duly qualified"

In the debate sub-division 2 of section 337 of the Shipping Act was introduced as justifying this. By that section it is enacted that every pilotage authority shall make certain returns relating to the port or district within its jurisdiction, and amongst others the particulars specified in sub-division 2, viz., the names and ages of all pilots or apprentices licensed or authorised by such authority, and all pilots or apprentices acting either mediately or immediately under such authority, whether so licensed or authorised or not. The defenders, founding on the expression "licensed or authorised," said that they were entitled under the Act to "authorise" pilots, and that that was a different thing from licensing them. I cannot think so. It appears to me that to "license" and to "authorise" pilots mean the same and not different things. And, accordingly, the defenders could not point out in the record the provision whatever for authorising pilots separately and independently of licensing them. Nor could they say, and certainly the proof does not disprove, if any, authority or appointment, as pilots, M'Gill and his two

obtained from the defenders; all they could say was, what their master stated when examined as a witness, that M'Gill was engaged, on any inquiry or examination as to his qualifications or experience, as a pilot, to do all work about the harbour, that his proper character was that of hobbler

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rather than pilot, and that the defenders just employed him and his two com-
"as their servants at weekly wages."

But if such is the true position of M'Gill—if the relation between him
the defenders is that of master and servant—I must own my inability to un-
stand how the usual consequences and responsibilities resulting from that
tion should not in the present instance be held to follow. Not only was
the defenders' servant, but he was acting and paid by them as such on the
sion and at the time when, by his fault, the pursuers' ship was injured.
maxim qui facit per alium facit per se clearly therefore applies, and the
M'Gill, the defenders' servant, must be held to be the defenders' own.

Nor do I think it can avail the defenders anything to say that they
exact any pilotage or other dues from the pursuers for the services of
for it is in evidence they were prepared to do so, and only abstained in
quence of M'Gill's services being the reverse of beneficial. The de-
harbour-master, Wilson, says that he instructed the clerk to delete the
pilotage from the account which had been made out against the
"because the pursuers' vessel got damages by being brought in by the

But the defenders argued that there was no compulsory pilotage in con-
with their harbour, and that the pilotage dues are payable whether the
of a pilot are taken or not. This may be so, but of what avail it can
defenders in the present case I fail to see. The pursuers desired
pilot; the defenders sent out, not a licensed or duly qualified pilot,
the pursuers were entitled to expect and were ready to pay for, but one
own servants or hobblers working about the harbour on a wage of 21s.
and that man, acting under the defenders' authority and instructions,
command of the pursuers' ship, and by his faulty guidance of her
loss and damages now sued for.

It is in these circumstances, that, in my opinion, the defenders' lia-
been made out. The defenders undertook to bring the pursuers' ship
into the harbour of Irvine, but in place of doing so she was serious-
through the fault of their servant acting under their instructions.
Ordinary has come to the conclusion that no liability has been estab-
the assumption that the defenders are in an equally favourable posi-
M'Gill had been a duly qualified or licensed pilot. It is here I feel
much deference, obliged to differ from the Lord Ordinary. A duly
licensed pilot is a public officer who obtains his certificate only after
examination of his qualifications by parties competent to judge of
being licensed he occupies an independent position, very much as
public or messenger-at-arms does. The public constitute his master,
the servant of the public, like these and other public functionaries
usual consequences and responsibilities arising from the ordinary
master and servant do not arise. It was for this reason—a reason
no application to the circumstances of the present case—that the
pilotage authorities were assoilzied from liability in the case of
Others v. The Magistrates of Edinburgh relied on so much by the
nary. The action in that case appears to have been laid upon the
that the pilot whose fault was there in question was appointed by the
the Magistrates of Edinburgh, and it was not said that there was
clarity or illegality in the appointment. But in sending M'Gill in
case to take command of the pursuers' ship the defenders sent a man

been licensed as a pilot at all, and who occupied merely the position of No. 72.
 of their servants working about the harbour; and in so sending that man
 defenders contravened their own bye-laws, and especially the first of that Feb. 1, 1877.
 of them titled "Regulations for pilots at the Harbour of Irvine," which Holman, &c.
 in these terms—"That no person shall act as a pilot for or on board of any v. Irvine Har-
 trading to or from the harbour of Irvine without being first duly licensed bour Trustees.
 by the harbour trustees, and that under a penalty not exceeding £5 sterling
 such offence besides all damages and expenses that may be incurred, and
 a pilot shall upon his appointment find caution for his good behaviour
 faithful discharge of his duties." But M'Gill had no license, and he never
 caution for his good behaviour and the faithful discharge of his duties.

MR GIFFORD.—This is a very important case, and attended with considerable difficulty. It involves in some of its aspects principles of wide application; it has an important bearing on the general responsibility of harbour trustees not only of the harbour of Irvine, but also of other harbours similarly situated.

After full and careful consideration I have come to the conclusion that the Lord Ordinary's judgment cannot be sustained, but that the defenders, the Irvine Harbour Trustees, are liable in damages to the pursuers for the loss and expenses which the pursuers sustained through the fault or negligence of Jeremiah M'Gill, who piloted the pursuers' vessel into Irvine harbour on 10th September 1876. I think that the pursuers are entitled to recover damages for these expenses against the Irvine Harbour Trustees *qua* trustees, and against the public funds under their control. As to the amount of the damages, I am in agreement with the assessment and suggestion which the Lord Ordinary makes, and I would propose that the pursuers should obtain decree for

that ground upon which I rest my opinion may be stated almost in a few words. I think, upon the evidence, and looking to the whole circumstances of the case, including the terms of the various statutes under which the trustees acted, that Jeremiah M'Gill, on the occasion in question, was not an independent pilot employed by the shipmaster or captain of the vessel, but was acting merely licensed or authorised by the defenders, but was acting simply as the servant of the defenders, employed by them alone, and acting within the limits of the defenders' harbour in performing a duty which the defenders themselves had undertaken to perform. If this be so, I can see no reason for departing from the general rule which holds the master who undertakes any piece of work liable for the fault or negligence of any servant or workman whom he directs to carry out the operations which the master has undertaken. In short, a person who undertakes to do a piece of work by means of a subordinate employed by him is liable for the negligence of the subordinate just as if he had been acting himself. It is doubt true that the Irvine Harbour Trustees are a public statutory corporation created and constituted by Act of Parliament, vested with the harbour of Irvine and its whole works and pertinents, and entrusted with its management for the benefit of the public. But it is now quite fixed that such a position does not exempt the statutory trustees from liability for damages occasioned by the negligence of the trustees' workmen, or of those whom they must employ in the management of the undertaking. The case is not

No. 72. different from what it would have been had the harbour belonged to a private individual, and been managed for his own private emolument, whether with or without statutory powers. It may be that in the case of public trustees the liability (where they do not bind themselves personally) will be limited to the funds under their control; but no question of this kind arises in the present case in which the defenders are only concluded against as trustees and not personally or individually.

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The first material point to notice is the position of the defenders as harbour trustees under their statute of incorporation (36 and 37 Vict. cap. cxxiv.). Under this statute the defenders are vested with the harbour of Irvine, and the wharves, works, and property connected therewith, and the limits of the harbour are by sec. 17 defined to include the bed or channel of the river Irvine in and about the harbour and from the harbour to the bay of Irvine and the sea. The harbour of Irvine is in fact just a part of the river Irvine, and it is not material to notice that the accident which occurred did not occur in the river but in the open sea but in the river and within the limits which the statute defines as "the limits of the harbour."

Next, the defenders, the harbour trustees, are empowered by sec. 39 to demand and levy "for and in respect of vessels entering within or leaving the limits of the harbour," the various rates and duties not exceeding the rates specified in schedule A, and among these duties we find the entry,—"Pilotage.—For all vessels entering or leaving the harbour, per registered tonnage, two pence." Then, by sec. 42, it is enacted that "the trustees shall apply the money received by them from the rates authorised to be levied by them . . . for the following purposes," and then the statute proceeds to enumerate the general harbour expenses which all harbour trustees must necessarily incur, and, in particular, the "expense of the maintenance, repair, and improvement of the harbour and works connected therewith."

On these clauses I have to remark that it is only *qua* harbour trustees that the defenders are entitled to levy dues at all, and that no distinction is made either in the Act or in the schedule annexed thereto between the dues for "pilotage" and the dues leviable in respect of any other service or contribution, nor is any distinction made as to the application of such dues; the dues, including dues for pilotage, are to form one undivided fund, and are indiscriminately applied for general harbour expenses. This seems to be the plain provision of the statute, and it would require something very precise in the general or in the special Acts to place the different kinds of dues in different categories to constitute them separate and independent funds applicable respectively and exclusively to different purposes. In particular, there is no provision constituting the pilotage dues into a special fund applicable only to the payment of pilots or to strict pilotage purposes. It might have made a material difference in the case if the statute had provided or enacted that the pilotage dues should form a separate trust-fund applicable or held applicable to a special trust for the pilots alone who might be licensed for the harbour, and that this fund should not be applied to any other purpose. I can find no such provision, and I think that any attempt to do this, even if this had been done, if it was not, would have been unwarranted by the provisions of the statute.

As I read the Act, therefore, the harbour trustees themselves must provide pilotage within the limits of the harbour, that is, practically within the river for about a mile, just as they undertake to provide wharfage, &c.

and the other accommodation required by vessels discharging or taking in; and the dues, whether leviable on vessels or goods or for pilotage, form common and undivided fund, and are made indiscriminately applicable to general harbour purposes.

It, then, it is said the Irvine Harbour Trustees are specially appointed by 17 "a pilotage authority and local authority within the meaning of 'The Merchant Shipping Act, 1854,' and the Acts amending the same, and it is said that they shall have all the powers conferred by those Acts on pilotage authorities and on local authorities," and the defenders maintain that it is solely pilotage authority and not as harbour trustees that they authorised Jeremiah M'Gill to act as pilot, that they paid him his wages out of the pilotage dues, and that they are no way responsible either for his skill or for his actings.

It is quite true that the defenders are by their Act appointed to be a pilotage authority and a local authority, although what is exactly meant by local authority has not been explained, unless it means that they shall be a local authority under the Merchant Shipping Act. The defenders, however, are not a pilotage authority under that Act. On turning to the duties of pilotage authorities I find that they discharge *quasi* judicial duties regarding the licensing and in reference to the employment of pilots. Section 331 of the Act gives the pilotage authority power to fix the qualifications of pilots, to make regulations as to licensing pilot-boats and pilots and apprentices, and to fix the prices or remuneration to be demanded by licensed pilots, and to make a variety of other regulations relating to pilotage, but all regulations and bye-laws must be submitted to the Board of Trade, and laid before Parliament.

In the present case it does not appear that the defenders *qua* pilotage authority have exercised any one of the statutory powers conferred upon them that is, as a pilotage authority. They have not made any regulations as to the qualifications of licensed pilots, either as to skill, age, or otherwise, nor have they instituted any examination of pilots whatever. They have not issued a single license or a single written authority to a single licensed or unlicensed pilot; in particular, Jeremiah M'Gill held no license, no written authority, and underwent no trial or examination of any kind as to his qualifications. The defenders *qua* pilotage authority have issued no bye-laws or regulations of any kind, and have not fixed in any way the rates of remuneration. By the words of the statute, licensed pilots are to be entitled to demand the rates of remuneration produced appear to have been enacted under the provisions of the general harbour Acts, and it has not been shewn that they were enacted by minute or otherwise, as bye-laws of the pilotage authority, and never been confirmed as such. But even if these bye-laws were to be confirmed as such, enacted by the pilotage authority and duly approved, the first law enacted would be that no person shall act as pilot without being first duly licensed and having taken due caution, and the general statute provides, sec. 349, "that every person who shall act as pilot, shall receive a license containing a variety of particulars, which license must be duly registered, and which license must be produced to every person to whom he tenders his services. Of course the license required by the statute must be in writing. In no way can it fulfil the statutory requisite. Mere verbal authority as equivalent to a license is out of the question. The defenders, supposing them to be pilotage authorities, never granted a license at all of any kind, and,

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No. 72. on their own shewing, every time they employed M'Gill or any of their hobblers they contravened their own bye-laws.

Feb. 1, 1877. The truth is, that, although appointed a pilotage authority, the defendants have never really acted as such, except, apparently, in making certain returns which were called for by the Board of Trade. Whether these returns were properly made or could have been demanded by law, or how far they were accurate, we are not called on to determine. Plainly they are inaccurate in that respect, viz, in so far as they describe M'Gill and the other hobblers as licensed or authorised under the pilotage authority, when they held no such licence or authority. I may say also that if the pilotage dues are to be held as levied by the pilotage authority for behoof of the pilots I see no warrant for charging them any part of the general expenses of the harbour, such as quays, repairs, &c. The utmost that the pilots could be charged with would be the expense of pilot-boats and piloting apparatus. The rest of the pilotage dues would belong to the pilots themselves, and would in the words of the statute be demandable by them, subject to superannuation or widow's fund, if such a fund were established, and to the expense of management, but on this matter we are not called on to decide. In reference to the expression in the statute "licensed pilot," the distinction may perhaps refer to apprentices, apprentices mentioned as well as pilots in the same clause; but the broad distinction is established between "qualified pilot," which means a person duly licensed by any pilotage authority, and unqualified pilot, or pilot, which means a person licensed and not belonging to a ship, but who has the conduct thereof. I see no warrant in the statute for holding that the pilotage authority could grant two kinds of licenses, the one a license with the statutory requirements, the other a mere authority, the meaning and effect of which is nowhere defined. The words seem generally to be used as synonymous or explanatory of each other.

The defenders, as the pilotage authority of Irvine, never having licensed pilots, and never having granted any written licenses of any kind, the only remains to inquire, what was the position held and occupied by M'Gill and the other hobblers, as they are called, who were engaged in service with Irvine harbour.

Now, I have no difficulty in answering this question upon the evidence. It is proved that they were simply the servants of the harbour trustees, and that the harbour trustees at weekly wages of £1 each per week, for which wages they gave their whole time to the service of the harbour, under the direction of the trustees and their harbour-master. In particular, I think it is proved that Jeremiah M'Gill, in conducting the "Gertrude" into the harbour, was employed solely as the servant of the defenders, and that he must be held as such in the question between the pursuers and defenders. There was no contract between the pursuers and M'Gill as an independent pilot. M'Gill had no contract with the pursuers for pilotage fee or remuneration of any kind. The ship was taken into the harbour authorities alone, to whom they paid or incurred the pilotage dues in return for which the harbour trustees undertook to supply the pilot. If a licensed pilot might have offered his services, but within the limits of the defenders' harbour, in territory where the defenders alone were supreme, and which they might exclude all excepting their own servants and those of the ships they had received into their harbour. M'Gill and

boats were sent to the pursuers' ship by the defenders or their harbour- No. 72.
 men, under whose entire and sole control the whole hobblerers were.

Difficult questions might arise if M'Gill, in the course of piloting the de- Feb. 1, 1877.
 fenders' ship, had by his fault or negligence occasioned injury to third parties, Holman, &c.
 for example, to other ships in the harbour, or to members of the public, and it is v. Irvine Har-
 probable that in a question with such third parties he might have been held bour Trustees.
 servant of the "Gertrude" or of her owners. No such question arises
 and it is enough for the decision of the present case that as in a question
 between the pursuers and defenders M'Gill was acting solely as the servant of
 harbour trustees.

In illustration of my ground of judgment, suppose that the "Gertrude,"
 instead of being piloted into the harbour by M'Gill, had been towed into the
 harbour by the defenders' tug-steamer, and that the accident had occurred solely
 from the fault of the tug or of those in charge of her: In such a case I think
 the tug-steamer would be liable. The tug-steamer was the defenders' exclusive
 property, furnished and equipped by them, and under the control and charge
 of the servants of the harbour trustees. By the published table of dues
 the tug-steamer exacts so much for towage, and they apparently make this charge
 of vessels of the "Gertrude's" size whether the tug-steamer is required or
 not. I should entertain no doubt that the defenders are liable for the negli-
 gence of their tug-master whom they employ, and of whose skill and
 actions they alone are cognisant. On precisely the same grounds I think
 the defenders liable for the fault or blunder of Jeremiah M'Gill.

At the moment the conclusion is reached that Jeremiah M'Gill on the
 day in question was acting, not as an independent pilot selected and em-
 ployed by the captain of the "Gertrude," but simply and solely as the servant
 of the harbour trustees, this is enough for the decision of the case, and upon
 this ground I think the defenders are liable for the proved damages.

JUSTICE-CLERK.—I concur in the general views which your Lordships
 have expressed, and therefore shall not enter at any length into the question.
 There can be no doubt that the case is one having a very wide and important
 bearing, and all the more so if it is true, as we were told, that the practice of
 the Harbour Trustees is a common practice in the harbours round our
 coast. The moral which I should draw from this fact is, that while the pilotage
 authorities are conformed to, and the duties laid on pilotage authorities are performed
 they are not so in spirit. And if the result of our judgment should be
 to increase vigilance among pilotage authorities, and increased atten-
 tion to their statutory duties, it will not be unproductive.

As regards the case itself, my observations will be confined to two points.
 I am of opinion that the Irvine Harbour Trustees undertook the duty of
 receiving this vessel into the harbour of Irvine, in consideration of certain pay-
 ment to be made by the vessel using the harbour, which are directed by their
 statute to be applied for harbour purposes,—that is to say, the relation
 between this vessel the "Gertrude" and the harbour commissioners was
 a contract, under which the vessel was bound to pay pilotage dues, and the
 trustees in return undertook the safe pilotage of the vessel. Now, when
 the vessel enters into an onerous contract, whereby one agrees to pay and the
 other to perform, it is the duty of the latter to perform that for which the pay-
 ment is made with care and skill, and if the duty be negligently performed by

No. 72. the party contracting or those employed by him, liability will attach to for the consequences.
 Feb. 1, 1877. Second, the harbour commissioners here did not perform their duty under
 Holman, &c. pilotage Acts in sending out a man to pilot the "Gertrude" who was a licensed
 v. Irvine Har- pilot. They sent only one of their own servants, who held no license, and
 bour Trustees. his fault they must be liable. No doubt, if the harbour commissioners had
 out a licensed pilot they would have done all that could have been required
 them, for it is certain that a pilotage authority, having duly licensed a pilot,
 not responsible for any fault he may commit. The licensing of a pilot is
 appointment of a public officer, and the supplying of a licensed pilot to a
 vessel is the due performance of the obligation under which the harbour
 commissioners lie.

It is not a sufficient performance of that obligation, first to neglect the
 of licensing pilots, and then to send out a man who, however qualified to
 be, is not in the position of a public officer.

As to the duty incumbent on the commissioners under the statute re
 pilotage regulations, and as to whether those made by the defenders are
 framed, I give no opinion. All I shall say on this point is that if the de
 have made regulations they have made no attempt whatever to act up to

Had they complied with their own regulations they would have duly
 pilots, and delegated the duty to no other; and so would have escaped
 present liability. I do not mean to say that if in case of emergency
 no licensed pilot to be had, and the defenders were to send out the best
 their disposal, that they might not be held to have done their best to
 immediate necessity. There is no such case here. They have failed in
 duty to license pilots, and having sent out one of their own servants,
 not the public character of pilot stamped on him by a statutory license
 defenders must be liable for their servant.

THIS interlocutor was pronounced:—"The Lords, having
 counsel on the reclaiming note for John Holman and
 against Lord Shand's interlocutor of 15th November 1876
 the said interlocutor: Find the pursuers entitled to damages
 libelled, and assess the same at £240, with interest thereon
 the date of citation, and decern against the defenders for
 of the same, with expenses, and remit," &c.

T. & W. A. M'LAREN, W.S.—MORTON, NEILSON, & SMART, W.S.—Agents.

No. 73. LADY RAMSAY GIBSON MAITLAND, First Party.—*M' Laren*
 Feb. 1, 1877. *R. V. Campbell.*
 Maitland v. SIR JAMES RAMSAY GIBSON MAITLAND, Second Party.—*King*
 Maitland. *J. C. Lorimer.*

Heir and Executor—Public Burdens.—The heir in possession of
 estates, the rents of which were postponed, died one day after the test
 Sunday. In a question between his executrix and the succeeding heir
 held that the executrix was not liable for burdens effecting to the
 after Whitsunday.

Heir and Executor—Drainage Money.—In a question between the
 executor of the proprietor of an entailed estate, held that money borrowed
 Acts of Parliament to be expended in drainage, and to be repaid
 ments, including both capital and interest, fell to be paid by the heir
 sion at the date when each instalment fell due.

Heir and Executor.—*Held* that an assessment imposed by consent of heritors 30th June, partly to meet debts incurred prior to Whitsunday, and partly to provide for the expenditure of the year following, could not be charged against the executor of a heritor who had died at Whitsunday.

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Maitland v.
Maitland.2d DIVISION.
I.

ALEXANDER RAMSAY GIBSON MAITLAND of Cliftonhall and Barnton born 16th May 1876, survived by his widow, Lady Ramsay Gibson Maitland, and his son, Sir James Ramsay Gibson Maitland. The estates burdened with an annuity under the Aberdeen Act to Mrs Ramsay, the widow of a previous heir of entail, payable at Whitsunday and Martinmas. In addition, Sir Alexander burdened the two estates under the Aberdeen Act with annuities in favour of his widow, payable half-yearly at Martinmas and Whitsunday in advance.

The entailed estates were farther burdened with debt for drainage and improvements under statutes 12 and 13 Vict. cap. 100, and 27 and 28 Vict. cap. 114. Part of the principal and the interest so expended were paid by half-yearly instalments at various dates throughout the year, the first year's payment in each case commencing six months after the date of execution to the satisfaction of the commissioners under the Act.

Lady Maitland, as executrix of Sir Alexander, confirmed to the rents of the first half of crop 1876, some of which were payable under the Act at Martinmas 1876 and others at Candlemas 1877.

Parts of certain grass parks on the entailed estates, let in February 1876 at Martinmas 1876, were admitted to be divisible equally between the executrix and the heir, on the authority of the case of Swinton dec. June 20, 1809, F. C.

Lady Maitland made no claim for any apportionment of rents in respect of Sir Alexander surviving the term of Whitsunday by one day.

A question having arisen as to the liability of the executrix for certain public burdens and other payments a special case was presented to the Lord Ordinary Maitland being the first party and Sir James Ramsay Gibson Maitland the heir of entail, the second party thereto.

The executrix did not dispute her liability for public burdens effeiring the estates prior to Whitsunday 1876.

She maintained (art. 10) for her, that the liability of the executrix for annual or other burdens on the lands ceased as at Whitsunday 1876 and was limited to the burdens effeiring to the possession prior to that date—that on this view the executrix was not liable for any part of the interest on entail and improvement debt, heritable bonds, &c. for the year to Martinmas 1876, payable at that term;

annuities, half year's payments payable at Martinmas 1876;

rent-duty, half year to Martinmas 1876;

poor and school rates for the year from Whitsunday 1876 to Whitsunday 1877;

poor rates for same period; and (8) Cramond heritors' assessment amount £37, imposed by consent of the heritors 30th June, paid 30th June 1876. This assessment was imposed partly to meet debts incurred prior to Whitsunday 1876, and partly to provide for the expenditure of the year following 30th June 1876, in equal proportions.

She was liable only for such parts of

rents, crop 1876, payable in March 1877;

drainage rent charges before mentioned for previous half years respectively at sundry dates between June and Martinmas 1876, and for previous half years ending respectively at sundry dates between Martinmas 1876 and June 1877;

poor labour conversion money for year 1876;

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(10) Land-tax for year from 25th March 1876 to 25th March 1877 payable 1st January 1877;

(11) Property tax, year from 5th April 1876 to 5th April 1877 payable 1st January 1877;

as effeired to the possession prior to Whitsunday 1876.

On the other hand (art. 11), it was maintained by the heir that the burdens in question were proper deductions from the rents falling to the executrix, and conventionally payable after the death of Sir Alexander Maitland, and that the executrix could only draw these rents on condition of discharging the burdens therefrom.¹

The following questions were submitted:—“(1) Is the liability of the first party, as executrix foresaid, limited to the burdens effeiring to the possession down to Whitsunday 1876? Or (2) Does the liability of the first party, as executrix foresaid, extend to all or to what part of the rents payable at or prior to the terms at which the rents falling to the executrix are conventionally payable? (3) How is each of the several classes of burdens herein above specified to be charged and apportioned as between the first and second parties hereto?”

On 23d January 1877 the following opinions were delivered on the question as to the annuities to Mrs Ramsay and Lady Maitland:—

LORD JUSTICE-CLERK.—I do not think there can be much doubt upon the first point, as to whether the rents are to be charged with these annuities. Lady Maitland is entitled to an annuity of £3000 out of the entailed estate, by virtue of a provision in terms of the Aberdeen Act. The heir in possession, as the rents are postponed, and as Lady Maitland is entitled to them as executrix, she should pay her annuity out of them.

It seems to me that the effect of this contention would be merely to postpone the heir of a half year's annuity, and to make it fall upon Lady Maitland, who has a right to the rents on a different title altogether.

I am of opinion that the heir must pay this annuity. That is my impression upon the first point raised, but I should like to hear more upon the other points.

LORD ORMDALE concurred.

LORD GIFFORD.—I think that it is an equitable principle that where the rents are postponed by mere conventional provisions in a lease, so that delay of payment is given to the tenant, who is allowed time for payment beyond the terms of Whitsunday and Martinmas at which the rents would otherwise be due,—this is a mere matter of convenient arrangement between the landlord who gives the credit and his tenants who receive the prolonged credit. In a case of intestate succession, which is the simplest case to take, the death of the testator cannot affect in the slightest any questions between heir and executor. In the case of Sir Alexander Gibson Maitland's interest in the lands ceased as at Whitsunday 1876, or say—for there is no question as to the one day—at Whitsunday 1876, and the interest of his heir-at-law then began.

The legal terms are the true terms of payment, and the terms at which the right to the rents legally vests, and the conventional postponement of

¹ The heir relied on the following cases—*Hard v. Anstruther*, Nov. 1863, 1 Macph. 14, 35 Scot. Jur. 19, reported in the House of Lords under the name of *Paul v. Anstruther*, Feb. 15, 1864, 2 Macph. H. L. 1, 36 Scot. Jur. 323.

payment of the rents has nothing to do with the question. Such conven- No. 73.
 postponement will not diminish the rights of the executrix and will not ^{Feb. 1, 1877.}
 the rights of the heir. The executrix takes, in the present case, the first Maitland v.
 year's rents for crop and year 1876, and the heir takes those for the second Maitland.
 year, that is, those which, apart from conventional postponement, would fall
 at Martinmas 1876. If there be burdens payable out of the first half year's
 the executrix must pay them, and the heir, who takes the second half
 rents must pay the burdens effeiring to them. The postponement of the
 of payment of the rents does not in any degree affect the division of the
 and cannot in any way affect the incidence of the burdens.

were further heard upon the other points on 24th January.

THE JUSTICE-CLERK.—There are three classes of burdens, payment of which
 due since the death of Sir Alexander Maitland, the liability for which,
 the succeeding heir of entail and the executrix of the last heir, is the
 in this special case. These payments are substantially (1) those
 at the terms of Whitsunday and Martinmas; (2) those payable for
 and (3) payments falling due at irregular periods. The first class is
 important.

In this case I have been unable to find any point of difficulty. The question
 whether or not these burdens, all of which fell due after the death of the last
 possessor, should be paid out of the funds of the executrix. On the
 other side made in the case I can see no ground on which this can be maintained.
 The interest falling due on the heritable bonds at Martinmas 1876 for
 the year from Whitsunday 1876: It is stated in the case (1) that these are
 charged under the Montgomery Act for entailed improvements, and by
 bonds and dispositions in security for money borrowed. As to these,
 the possessor for the time being bound to keep down the accruing
 interest as the primary debtor in the interest falling due for the period of his
 possession. (2) It is stated that the last heir in possession kept down all the
 accruing during the period of his own possession, whence it follows that
 the succeeding is the proper debtor in the interest which fell due thereafter.
 That the rents in question were debts due by the tenants to the last
 possessor, and now belong to his executrix. It follows from all this
 that there can be no pretence for taking payment of a debt, due by the heir in
 possession, out of the funds of one who is not the debtor, and who has no
 connection with the debt; and on this simple ground I am of opinion that the
 executrix is not bound to bear the burden of this sum. The only ground on
 the opposite contention has been maintained is, that those rents, which
 were stated to belong to the executrix as in right of Sir Alexander Gibson
 and are payable at the same terms as the interests in question. No doubt
 that, as these were postponed rents, that is to say, the debtor of the de-
 betor in possession had by the terms of his lease so much credit before he
 was to pay his debt. I cannot see what interest the succeeding heir of
 entail has in that matter. He is not the creditor of the tenant for this amount,
 and cannot affect him at what period his predecessor chose to exact his debt.
 He may have discharged the debt altogether, or assigned it during his life, or
 postponed the payment to any period he pleased. Having discharged during
 his life all the obligations incumbent on him in respect of this interest in the

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estate and its fruits, his rights in these rents vested in himself, and transferred to his executrix, free of any claim at the instance of the next heir of entail. The question whatever arises as regards the right to these rents, in consequence of their being payable at postponed terms, for the right of the executrix is not disputed, nor could it be, for the law on this head is clearly settled. The statements in the case are conclusive of the rights of heir and executrix in this respect.

The case of *Paul v. Anstruther* has no application to the point now in dispute. It related to a claim by an assignee of a prior heir of entail for repayment of two sums which he contended were proper debts of the succeeding heir. The House of Lords held that as regarded the first of these sums the cedent was the proper debtor in the debt so paid, because it came payable during his lifetime, which he clearly was. The claim as to the second was in regard to a proportion of a term's annuity corresponding to the proportion of rent which the assignee drew under the Apportionment Act, an entirely different question. Alexander Maitland had lived till August 1876, and the executrix had drawn under the Apportionment Act a quarter's rent—postponed or not postponed. She must have borne a corresponding proportion of the current burden of the estate, as the heir in possession was bound to keep down the interest for the period during which he or his representatives drew the rents, so, for the fractional part of the year, which, by the Apportionment Act, the representative was made entitled to draw the rents, the liability for the proportional amount of the burdens necessarily followed. This view solves the questions here put as to termly payments.

As to the stipend, the executrix drew one-half of the rents for crop 1876, and must pay half the stipend.

The instalments of the drainage money stand in a different position. They are not due at fixed periods, but become payable at certain intervals provided by the statute. I am of opinion that these, being payments for permanent improvements, are burdens on the heir in possession at the time when the instalments fall due. There is no question raised as to the instalment falling due in September, which Lady Maitland undertakes to pay. The subsequent instalments are burdens on the heir in possession.

The inconsiderable sum assessed for by the heritors after the death of Alexander must, I think, be borne by the heir in possession, seeing that he was himself a party to the laying on of the assessment. This only became due by the heir in possession when the assessment was imposed, and the payments, even although executed previously, were for the benefit of the property.

The other payments seem to divide equally between heir and executrix.

LORD ORMIDALE.—I think it unnecessary to go back upon what was said a few days ago, and I concur with your Lordship in your remarks on the points which have now to be disposed of, merely remarking that I place more weight upon the terms of the 66th section of the Drainage Act of 1864, which lays the burden expressly upon the heir of meeting the rent upon their becoming "payable during the continuance of his interest." I cannot, I think, be disputed that the interest of the heir here had ceased and was continuing at the dates when those rent charges in question were due and became payable.

LORD GIFFORD.—I concur entirely in your Lordships' opinions. I

opinion which I expressed at the former hearing of this case. It seems to me that the case for the heir proceeds upon the fallacy that the conventional postponement of the rents can have any effect either upon the right to the rents themselves or upon the incidence of the burdens. As the postponement of the rents does not enlarge the right of the subsequent heir, as it has no effect upon rents themselves, so it can have no effect upon the burdens. The burdens just as if the rents had been payable at the legal terms. With regard to the several small items, I think we should find that they fall to be divided in the manner contended for by the first party in article 10 of the deed. Some admissions have been made by the executrix conceding perhaps that the heir somewhat more than she was bound to do. But this is matter of dispute with which the Court will not interfere. We do not decide anywhere where the party herself concedes the point.

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The following interlocutor was pronounced:—"The Lords are of opinion, and find (1) That the liability of the first party as executrix is limited to the burdens effecting to the possession down to Whitsunday 1876. (2) That the liability of the first party as executrix did not extend to all or to any part of the burdens payable at or prior to the terms at which the rents falling to the executry are conventionally payable. (3) That each of the eleven classes of burdens specified in the case fall to be charged and apportioned as between the first and second parties thereto in the mode stated in article 10 of the special case, and decern."

CAMPBELL & SMITH, S.S.C.—MAITLAND & LYON, W.S.—Agents.

ELIZABETH STEWART, Pursuer.—*Fraser—Strachan.*
GEORGE BURNS, Defender.—*R. V. Campbell.*

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Rei interventus—Locus poenitentiae.—Two persons having agreed for the purchase respectively of a licensed public-house belonging to one of them, a bargain was written out in duplicate by a third party, and the two were signed by the purchaser and seller, each of whom retained one. The seller afterwards gave the tenant of the house notice to quit, and the purchaser let it to a tenant of his own selection. The purchaser's tenant having in getting the license transferred to him, the purchaser repudiated the bargain before the term of entry. Held, in an action for implement at the instance of the seller, that sufficient *rei interventus* had followed to render the bargain binding, and that there was no *locus poenitentiae* for the purchaser.

Testing-clause—Subscription of Witnesses ex intervallo.—Duplicate copies of sale of heritable property were written out by a third party, and subscribed by the seller and purchaser in presence of other persons not specially called as witnesses.

The purchaser, four months afterwards, repudiated the bargain, and the seller then caused the persons who had been present to subscribe the missive of possession as instrumentary witnesses, and had a testing-clause added. Held, that the subscription of the witnesses and the testing-clause had been complied with, and that the missive was a probative writ.

ELIZABETH STEWART, owner of certain house property in Grassmarket, Edinburgh, brought an action against George Burns, horse-dealer, for implement of an alleged contract of sale entered into by him with her on 13th January 1876, by missives of sale executed by them, by which she averred he had offered, and she had accepted, the sum of £1000 for her house property. The subjects had been advertised in the "Edinburgh" newspaper of 13th January as follows:—"Grassmarket—House, &c. To be sold, by public roup, within Dowell's Rooms,

2d Division.
Ed. Craighill.
I.

No. 74. 18 George Street, at two o'clock afternoon, the licensed shop No. 1 G
 Feb. 1, 1877. market, as presently occupied by Mr Spence, with flat above," &c.
 Stewart v. The pursuer averred that Burns, at a meeting in the public-house
 Burns. her son, John Stewart, at No. 70 Canongate, had offered her £140 for

the above subjects, and that she had accepted the offer, and then a
 missive in the following terms was written out by a man named Brechin
 in duplicate, and signed by them:—"Edinburgh, 13th January 1877.
 I, George Burns, hereby offer Mrs Elizabeth Stewart fourteen hundred
 pounds sterling for properties consisting of licensed shop No. 1 G
 market, Edinburgh, and the whole of the first floor above the same en-
 tered by No. 3 Grassmarket and also entering by the Vennel, all as pre-
 sently owned by her, which offer is hereby accepted by the said Mrs Elizabeth
 Stewart. ELIZABETH STEWART. GEORGE BURNS." The pursuer
 produced her copy of this missive (No. 9 of process) with a testing-
 clause filled up as follows:—"In witness whereof these presents, written
 by George Brechin, painter, Lothian Street, Edinburgh, are subscribed
 said Mrs Elizabeth Stewart, Canongate, Edinburgh, and George
 Stewart, horse-dealer, Edinburgh, at Edinburgh, thirteenth January eight-
 hundred and seventy-six, before these witnesses, the said George Burns
 and John Bowles, farmer, Drumgaveline, County Down, Ireland,
 William Stewart, spirit-merchant, Belfast, declaring that the entry in the
 said George Burns shall be at Whitsunday next." Then followed the
 signatures of the witnesses. This testing-clause was crowded into the
 partly above and partly below the signatures of Mrs Stewart and

The pursuer further averred that the defender, after the date of the
 alleged purchase, proceeded to exercise rights as proprietor, and re-
 fused to warn Spence, the then tenant of the public-house, out of the
 premises, and himself let the whole subjects to a man Storrie, to be used
 by him as a public-house, and concurred in Storrie's application for
 transfer of the license for the premises, in which application Storrie
 was unsuccessful.

The defence stated for Burns was that he had purchased a
 house, and that when the transfer of the license was refused he was
 no longer bound to implement the bargain, it having been a condition of
 the bargain that the premises were to be licensed. There were also
 averments to the effect that the loss of the license was owing to the
 pursuer; and that the missive founded on had been improperly
 supplied with a testing-clause, the parties having had no intention that
 the testing-clause should be added, and the subscribing witnesses had
 not been called on or required to act as instrumentary witnesses.

A proof was allowed to both parties, from which the following
 appeared:—At the meeting in John Stewart's shop, 70 Canongate,
 13th January, there were present the pursuer, John Bowles (her
 son), John Stewart and William Stewart (the pursuer's sons), and
 after some bargaining it was arranged that Burns should give £140
 for the subjects. At this time George Brechin came in, and was re-
 quired to put the bargain in writing, and accordingly wrote out two
 missives, Nos. 9 and 16 of process, which were signed by Mrs Stewart and
 Burns, and one was taken by each. Both of these missives were sub-
 stantially stamped at the instance of the parties. A few days after this
 Burns went to Spence, the tenant of the public-house, 1 Grassmarket, and
 asked him to make an offer for a lease of the property. This he did
 and on 26th January Burns let the whole premises to Storrie at
 rent of £40. Thereafter, at the request of Burns, Spence and his
 tenant were given notice by Mrs Stewart's agent to leave the premises
 at Whitsunday. On 20th March Storrie applied for a renewal of the

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he premises, and on 11th April, at the Licensing Court, this application was refused. An appeal was taken to the Quarter Sessions, and that was dismissed on 11th May. Immediately after the license was refused Burns' agent intimated to Mrs Stewart's agent verbally that Burns declined to go on with the purchase, and on 23d May Burns' agent wrote Mrs Stewart's agent repudiating the transaction on Burns' behalf. After notice of Burns' repudiation of the bargain Mrs Stewart, her husband, William Stewart, and Brechin, to sign her missive, No. 9 of process, as instrumentary witnesses, and the testing-clause was thereafter signed by Brechin.

At the Licensing Court, in April, Spence, the former tenant of this house, who had taken new premises opposite, applied for the renewal of his license to these new premises, and in support of his application produced an unsigned lease in his favour of his former house by Mrs Burns for six years, and a correspondence with reference thereto. Burns deposed that the magistrates granted Spence's application in preference to Storrie's on the ground that Spence had been ill-treated by Burns in not getting his lease of his old shop. Burns deposed that he was in entire ignorance that there had been any transaction between Mrs Stewart and Spence as to a lease until after the meeting on 13th January 1876 when he called upon Spence, who then said something about a lease. The pursuer pleaded;—(1) A valid and effectual contract of sale of the premises having been entered into between the pursuer and the defender by the foresaid minute or missive of sale executed by them the pursuer is bound to implement and fulfil his part thereof (2) *Separate* The contract of sale libelled having been followed by *rei interventus* the same was thereby rendered effectual and binding on the defender (3) The said subjects having been sold unconditionally, and with any warranty, express or implied, with reference to the license, the defender is not entitled to refuse to implement the contract on the ground of withdrawal of the said license.

The defender pleaded;—(1) The missives between the parties being in the defender's possession the defender is entitled to absolvitor. (2) The missives having been put out in duplicate, and delivered as completed documents in the possession of the defender's duplicate, the pursuer's subsequent additions to the duplicate, without the defender's knowledge or consent, are of no effect. (3) The proposed purchase being conditional, and the pursuer unable to transfer the premises as licensed premises, the defender is entitled to absolvitor. (4) The license having been lost by special process for which the pursuer is responsible the defender is entitled to absolvitor. (5) The missives, in any event, implied warrandice that the pursuer knew of nothing, and had done nothing, likely to prevent a lease being obtained by the defender, or any tenant from him; and the warrandice not having been made good the defender is entitled to absolvitor. (6) The defender having been induced to enter into the said contract (first) by essential error caused by the pursuer, and (second) by the pursuer's fraudulent concealment of material circumstances, he is entitled to absolvitor.

On 11th November 1876 the Lord Ordinary pronounced this interdict:—“In the first place, and with reference to the first plea in law of the pursuer, and the relative counter pleas for the defender, finds as a matter of fact (1) that at a meeting between the pursuer and the defender on 13th January 1876 the defender agreed to purchase from the pursuer the premises which the pursuer agreed to sell to the defender, the premises in the market of Edinburgh which are described in the summons, and on the writing, No. 9 of process, as it was before the signatures of

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witnesses were adhibited and a testing-clause was introduced, and writing, No. 16 of process, were subscribed by the pursuer and the defender; (2) that immediately after subscription the said writing, No. 9, was when signed by the parties, was delivered to and carried away by the pursuer, and the said writing, No. 16 of process, was delivered to and carried away by the defender, and both the pursuer and the defender understood and believed that by the signature and the delivery of the writings a contract for the sale and purchase of the said premises had been effectually concluded; (3) that as delivered and carried away neither the writing, No. 9 of process, nor the writing, No. 16 of process, was signed by witnesses or contained a testing-clause, and it was neither intended that either of these writings should be subscribed by witnesses, or that a testing-clause should be added, the signature of witnesses, as well as a testing-clause, being at the time considered by the pursuer and the defender to be unnecessary; (4) that George Brechin, John Bowles, and William Stewart, the three persons whose names appear on the said writing, No. 9 of process, as instrumentary witnesses, were present when the said agreement between the pursuer and the defender was concluded, and saw the said writings subscribed by the pursuer and by the defender, but none of them were specially called upon or required at the time when the said writings were signed by the parties to be a witness to their subscriptions; and (5) that the defender has subsequently repudiated the bargain, the said George Brechin, John Bowles, and William Stewart thereafter, that is to say, sometime in 1876, on the application of the pursuer, and without communication with the defender, signed as witnesses the said writing, No. 9 of process, which was the pursuer's duplicate, and the said George Brechin, by the body of the said writings had been written, wrote above the signatures of the pursuer and the defender the testing-clause which appears in that document: Finds as matters of law that the facts being as above set forth, there is nothing in the circumstances of the case which the validity of the said writing, No. 9 of process, produced and founded on by the pursuer as a probative writ, can be successfully impugned: In the second place, and *separatim*, with reference to the second plea in law for the pursuer, finds as matters of fact (1) that the said contract had been concluded as aforesaid the pursuer, at the request of the defender, warned the tenant of the shop No. 1 Grassmarket, which is the more valuable part of the premises in question, to remove therefrom at the then ensuing term of Whitsunday 1876; (2) that the defender granted a lease of the said shop to a new tenant for a period of years from said term, but this lease, with the consent of the pursuer, was renounced before said term of entry, in consequence of a refusal of transfer of the license for the shop having been refused by the Lord Ordinary; Court; and (3) that the said shop is now, and since Whitsunday 1876, has been, without a tenant or occupant: Finds as matter of law that the facts being as above set forth, *locus penitentiae* is excluded, even on the supposition that the said writing founded on by the pursuer is not entitled to be received in faith as a probative writ: In the third place, and with reference to the other pleas of parties, except the fifth plea, which, not being insisted on, has been already repelled, and the seventh, consideration of which has meantime delayed, finds as matters of fact (1) that the said contract was not entered into by the defender under essential error; (2) that the said shop, No. 1 Grassmarket, was a licensed shop at the date of the said contract; (3) that it was not a condition of said contract that the said shop then held by the tenant of said shop should be transferred to or retained by the defender, in favour of the defender, or the tenant of the defender; and (4)

did nothing to prevent, and at the time of the sale knew of nothing event, the transfer or renewal of said license : Finds as matter of fact, the facts being as above set forth, the grounds on which the said contract is impeached by the defender cannot be maintained : Therefore the defences, and finds, declares, and decerns in terms of the first intimation of the summons, reserving meantime judgment upon the subject of conclusion, in which decree for damages is sought in the event of the defender's failure to implement the said contract which has now become obligatory : Finds the pursuer entitled to expenses of process and incurred," &c.

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The defender reclaimed, and argued ;—(1) The pursuer had no right to produce the improbativ document with a testing-clause, nor was she entitled to get the persons who were accidentally present at the signing of the missive to adhibit their signatures after an interval of four months.¹ (2) No mandate to get the missive completed,² especially when it was one of duplicate documents.³ (2) No *rei interventus* had passed in the bargain. Anything that had been done had been merely in preparation for the execution of the contract. Burns never could have been in possession of the subjects, as the term had not arrived by the expiration of the bargain.⁴ To found a plea of *rei interventus* it was essential that there should have been part implement of the contract. Burns was entitled to break off the contract any day before the expiration of course to a claim for any damage caused.⁵ (3) Under the settlement and the missives the bargain was one for the purchase of a "leased house," and when the license was lost, owing to the fault of the pursuer, the bargain fell to the ground.⁷ The pursuer was bound to tell Burns how she stood with her tenant Spence, and to have cleared her quarrel with him, which was an essential fact in the case.⁸ (4) The plea for the pursuer ;—(1) Burns by signing the missive in the presence of witnesses put himself in such a position that the other party was bound to produce a probative document at any time, and he was not entitled to deny her having done so. It was quite competent to fill up the clause of a writ any time before the writ was produced in judgment.⁹ Even if the missive were not held to be probative, sufficient evidence had followed on the bargain to make it binding. The production of a ticket had been held to validate an improbativ conclusion, and here much more had followed. (3) The house was a licensed

¹ See 2, 27 ; Duff's Feudal Conveyancing, pp. 15-6 ; Hamilton's Creditors, June 19, 1713, M. 16,734 ; Home v. Dickson, June 1730, 18.

² Strathmore v. Paul, July 30, 1840, 1 Rob. App. 189, Lord Brougham, Scot. Jur. 411 ; McNeillie v. Cowie, July 8, 1858, 20 D. 1229, 30 Scot.

³ 2, 20.

⁴ The London and England Insurance Company v. Wink, July 17, 1857, 19 D. Scot. Jur. 486.

⁵ See v. Steuart, June 25, 1844, 6 D. 1201, 16 Scot. Jur. 521.

⁶ See v. Baikie, Jan. 14, 1846, 8 D. 376, 18 Scot. Jur. 170 ; Bell v. Bell, 1841, 3 D. 1201, 13 Scot. Jur. 628 ; Sinclair v. Weddell, June 13, Scot. Law Rep. 600.

⁷ See v. Gale, Nov. 13, 1871, L. R. 7 Chancery, 12.

⁸ See on Contracts, 490.

⁹ See v. Arthur, Dec. 6, 1870, 9 Macph. 223, 43 Scot. Jur. 171 ; Veasey's v. Malcolm, June 2, 1875, ante, vol. ii. 748 ; Frank v. Frank, March 16, 1824, H. L. June 10, 1809, 5 Pat. App. 278 ; Bell on Deeds, 270. See also v. Hay, Dec. 12, 1845, 8 D. 283, 18 Scot. Jur. 133 ; Dickson v. Hay, vol. i. book 3, sec. 839.

No. 74. house at the time it was sold, and the pursuer could not be expected to guarantee that the license would be renewed.
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LORD JUSTICE-CLERK.—In this case some points of considerable practical importance are raised. The facts are simple enough. Mrs Stewart and Burns, on 13th January 1876, in a shop in the Canongate, and in the presence of several persons, made a bargain about the sale and purchase of a shop in Grassmarket, the property of Mrs Stewart, and this agreement was embodied in a missive containing offer and acceptance. This missive was written out in duplicate, signed by Mrs Stewart and Burns at the same time and place. This missive is now brought at the instance of the seller to compel Burns to fulfil the bargain and pay the price. He answers that there never was a concluded agreement. That is met by the production of Mrs Stewart's copy of the missive of offer and acceptance, with the signature of witnesses added and a testing-clause filling up making it *ex facie* a probative writ. It is objected to this document by Burns that the signatures of the witnesses were appended *ex intervallo*, and that he had repudiated the bargain, and that there had been *locus pœnitentiæ* at all events until the missive was filled up, and that he had taken advantage of his power to repudiate. To this it is answered, on the other side, that there is no rule of law to prevent witnesses' subscriptions being added at any time, and that there was no intention of taking undue advantage of Burns in filling up the missive up. There is also a separate ground of action, that at all events *interventus* followed on the concluded agreement.

I am inclined to agree with the Lord Ordinary on both grounds of action. We are entitled to look at the missive, because it appears to be a probative document. No doubt at one time there was some discussion as to the proper time at which witnesses should subscribe, but it has now been settled that there is no circumstance to suggest an improper motive for the delay in obtaining the subsequent subscription of the witnesses, they may subscribe at any time. The object of the subscription of witnesses is merely to make it clear that what the deed bears to have been done was really done. There is no pretence here that the missive was not signed by Stewart and Burns, but it was so signed, and in the presence of these witnesses. If the witnesses were mere casual spectators of the act it would be a different case, but Mrs Stewart was present to advise and assist his mother, and Brechin, another witness, was the writer of the missive. It cannot, I think, be said that the witnesses were not intended to be witnesses. I do not dispute that there is some question as to whether the missive could be properly filled up after Burns had repudiated the bargain. If there was *locus pœnitentiæ* I do not think it could be filled up. There was a concluded agreement, and the missive itself is proof that there was. Then it was quite competent to fill the missive up, because so doing could not possibly affect the concluded agreement; it could only affect the proof of the agreement. It is not, however, necessary to put our judgment on the question whether Burns acted on the bargain in a most important manner. There was a bargain in the shop of the name of Spence in the occupation of it at that time, Burns was not going to remain as tenant, and was warned out by Mrs Stewart on the day of the bargain, and Mrs Stewart did not look out for another tenant for the same reason. But Burns, as purchaser of the subjects, proceeds to give possession of them to a man called Storrie, and on the strength of this an application

e for a license for the shop. The license is, however, refused, because No. 74.
 ee, who had taken another house close by, succeeded in impressing the
 strates with the idea that he had been badly treated by Mrs Stewart with Feb. 1, 1877.
 d to his former house, and got his license transferred to his new house, Stewart v.
 Burns' tenant's license was refused.

nothing was said in argument about Burns having bought a "licensed"
 e, but I think that phraseology was only descriptive. It was also said that
 Stewart had deceived Burns in not disclosing the nature of the dealings
 Spence. I cannot attach weight to this either, as Burns knew that Spence
 had to get a new lease, and he had the means of ascertaining the details of
 negotiation if he had thought it necessary to inquire.

On the term came, Mrs Stewart, on the faith of the bargain, is able to hand
 the subjects, but Burns, who had acted for some time as proprietor of the
 e, repudiates his bargain.

With that it was too late for Burns to throw up his bargain.

On the whole matter, I am inclined to find for the pursuer.

MR JAMDALE.—I am of the same opinion.

It is not to be supposed that the Court will in this, or in any case, depart
 from the safeguards which it is necessary to observe in connection with
 the writs. And I do not think we shall do so by sustaining as a probative
 document on which the pursuer, Mrs Stewart, founds in the present
 The defender's objections to the writ may be noticed in their order.

It is argued, first, that the witnesses had not been specially called and
 told to be witnesses of Mrs Stewart's and Mr Burns' signatures. That may
 be in a certain sense; they may not have been specially called and told,
 and witness the execution of this deed." That, however, is not always
 It is enough, and is usually in practice held to be enough, that the wit-
 nesses should be present and see the deed signed, or afterwards hear the parties
 make their signatures.

The objection taken by the defender raises the question whether the
 witnesses were entitled to adhibit their signatures *ex intervallo*, that is, after the
 lapse of about four months from the date when they had seen the principal
 subscribe the writ. It is settled law that the testing-clause of a deed
 may lawfully be filled up at any time before the deed is produced in judg-
 ment, and even after the death of the principal party or parties. I doubt,
 however, whether it was correct to say, as the defender's counsel did at the
 bar, that that was permissible on the principle of mandate or implied man-
 date on the death of the mandant the mandate would certainly fall,
 as I have already said, a testing-clause may be filled up at any time,
 even after the death of the principal party, providing there are sufficient
 witnesses for doing so. I rather think, therefore, that, independently of the
 principle of mandate, any party having a legitimate interest to do so may fill up
 the testing-clause of a writ whenever he pleases, providing he does so fairly and
 lawfully and for no improper purpose. In like manner I am disposed to think
 that *ex intervallo*, get the witnesses to adhibit their signatures. The
 question of time at which this may be done will depend upon circumstances.
 In the present case there is nothing, I think, to make the lapse of time which
 has been objected to objectionable.

The defender raised, as a farther objection to the writ in question, that

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Burns.

the witnesses adhibited the signatures to it on the call of the pursuer, after the defender, had intimated his resolution not to be bound. I confess that objection, which I rather think is well founded so far as the fact is concerned, impressed me a good deal at first, but, on consideration, I am now satisfied it is not maintainable in law. In getting the witnesses to adhibit their signatures when they did so, the pursuer neither did, nor desired, to alter any of the facts which had occurred; she only got the witnesses to testify to the truth of what had actually taken place, and she did not thereby affect the nature or substance of the transaction itself. I think, therefore, that if it were necessary for the Court to give judgment to hold that the pursuer was entitled to get the witnesses to adhibit their signatures at the time she did we could do so.

It is not, however, necessary for us so to determine, because there is evidence of *rei interventus* amply sufficient to validate and support the writ in question and render it effectual for the purposes of the pursuer, even if the witnesses' signatures and the testing-clause were to be altogether disregarded.

LORD GIFFORD concurred.

THE COURT adhered.

ALEX. GORDON, S.S.C.—HUGH MARTIN, S.S.C.—Agents.

No. 75.

Feb. 1, 1877.
Nicolson v.
Munro.

2D DIVISION.
Sheriff of
Banff, Elgin,
and Nairn.
I.

MARY ANN NICOLSON, Pursuer and Appellant.—*A. J. Young*.
DONALD MUNRO, Defender and Respondent.—*Thorburn*.

Process—Appeal—No appearance for the Respondent.—This was an appeal by the pursuer in an action of affiliation in the Sheriff Court of Elgin, and Nairn, in which both the Sheriff and the Sheriff-substitute assoltized the defender.

When the case was called in its order in the Short Roll of the Division counsel and agent for the appellant attended, but there was no appearance by either counsel or agent for the respondent.

The interlocutor-sheet bore a certificate by the Sheriff-clerk of the county to the effect that the appeal had been intimated to the respondent.

The Court heard the counsel for the appellant upon the evidence against the judgments of the Sheriff and Sheriff-substitute. At the conclusion of his argument, there being still no appearance by either counsel or agent for the respondent, the Court continued the cause and intimated to the agent for the appellant to communicate with the respondent's agent in the country.

When the cause was called next day appearance was made for the respondent, and the following explanation of the previous non-appearance was given. The Edinburgh agents for the respondent had intimated to the original agents for the appellant that they were instructed to serve the respondent. The appellant's agency was, however, afterwards referred to her present agent, who did not know who were the respondent's agents, and did not send them copies of the prints. The case had accordingly been overlooked when it appeared in the roll. The Court accepted the explanation, and the appeal was subsequently dismissed on its merits.

THOMAS LAWSON, S.S.C.—BOYD, MACDONALD, & LOWSON, W.S.—Agents.

¹ Chisholm v. Marshall, Jan. 17, 1874, *ante*, vol. i., 388.

THOMAS BOYNE PEGLER, Pursuer.—*Rutherford.*

No. 76.

NORTHERN AGRICULTURAL IMPLEMENT AND FOUNDRY COMPANY (LIMITED),
Defenders.—*Asher—Mackintosh.*

Feb. 2, 1877.

Pegler v.
Northern
Agricultural
Implement Co.

Master and Servant—Contract—Liquid and Illiquid—Compensation.—The pursuer, a foundry company employed under a written contract an engineer, general manager of their business, with “the full control and direction” of subject always to such general and special instructions and directions in relation to his duties of manager” as the company might see fit to give through the board of directors.

An action brought by the manager two months after he had left the pursuer's employment for the balance of his salary, the company did not dispute their liability, but stated that it was the pursuer's duty to keep regular books, that a system of books had been arranged and prescribed to him, that he refused to keep the books on that system but had not done so, and that the pursuer had money in his hands belonging to the company to the extent of £200, the having failed to account for money received, men's time, and materials, at least that amount,” and pleaded that the action could not be maintained as the pursuer had accounted.

The defenders did not deny that the pursuer had at their special request remained in their service two months after the date when he had voluntarily terminated the contract, and that at that date no complaint had been brought against him.

The Lord Shand) that the pursuer's claim for salary under the written contract for his services as manager had become liquid without objection on the part of the defenders, and that the defenders' claim against the pursuer as a defaulter and intruder was an illiquid counter claim which could not be admitted as a defence to the action.

A written agreement was entered into between the Northern Agricultural Implement and Foundry Company (Limited), Inverness, of the first Division, and Thomas Boyne Pegler, engineer, Leeds, of the second Division, dated 22d June 1874, in the following terms:—“First, the said company of the second part shall serve the parties of the first part as manager of their business, and shall have the full control and direction of said business, subject always to such general and special instructions and directions in regard to his duties of manager as the said company of the first part may see fit to give through their board of directors or any committee of said board.” By the second article Mr Pegler's remuneration for his services as manager was fixed at £200 per annum. By the third article the company bound themselves to allot to Mr Pegler fifty shares of the company at the price of £500, which he bound himself to accept and to pay the £500. By the fourth article the company bound themselves to repurchase from Mr Pegler one-half of these shares at the same rate of price, in the event of his ceasing to be in their employment. Fifth, “The said party of the second part shall be bound to devote his whole time and attention to the duties of the manager for the parties of the first part; and shall not, by himself or others, either directly or indirectly, engage in any other business or any other office whatsoever.” The sixth article stipulated that the company might terminate the engagement by giving three months' notice in writing.

Mr Pegler entered upon his duties on 8th June 1874. He paid £500 to the company, and fifty shares were allotted to him.

On 6th August 1875 Mr Pegler wrote a letter to the directors of the company giving notice of his intention to leave their employment on 16th September, in terms of article sixth of the agreement, and requiring them to pay up twenty-five shares in the said company at the same date, according to article four in said agreement.” Mr Pegler remained in the employment till 20th January 1876.

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On 16th March 1876 he raised this action concluding for declaration that the company was bound to take over twenty-five shares and to pay him £250, or otherwise for payment of £250 as the price of the shares and further, for payment of £72, 4s. 6d. in name of salary.

The pursuer stated;—(Cond. 6) "Following up the intimation contained in the letter of 16th August the pursuer intended to leave the employment of the defenders on the 16th of November 1875; but at special request of the defenders, as they, as was represented to him, did not then succeed in getting another manager, he continued in their employment till 20th January 1876. During the currency of his employment the defenders made no complaint to the pursuer of any failure of duty or breach of agreement on his part."

The defenders' answer to this statement was—"Admitted that in January 1876 the pursuer left Inverness. The defenders' statement is referred to *Quoad ultra* not admitted."

The defenders stated in their statement of facts, which was lodged 26th April;—(Stat. 1) "The pursuer was engaged as general manager of the defenders' company, and had the sole control of their business property from 8th June 1874 till he left Inverness in January 1876. It was the pursuer's duty, *inter alia*, to keep regular books recording the work done and the cost of the articles produced at the company's works, and "the whole transactions of the company's business. A system of book-keeping fitted to secure these objects was arranged and put into his hands, and he professed to keep the company's books on said system. It was also the pursuer's duty to keep himself informed as to the progress of the company's business, and to inform the directors if the business was proving unsuccessful. The statements in the answer are denied."

In his answer the pursuer, *inter alia*, "explained and averred that the pursuer, who is an engineer and practical mechanist, never undertook to keep the defenders' books, and it was no part of his duty to do so. The books were kept by another person employed for that purpose. The defenders were fully informed as to the state of the company's business."

The defenders further stated;—(Stat. 2) "The pursuer, in breach of his duty to the defenders, failed to keep or cause to be kept regular books, either on the prescribed system or any system. He also failed to keep the directors informed as to the state of the business. He repeatedly assured them that the business was prosperous and was being conducted at a profit, when the fact was, as he knew, or might have ascertained, that it was being conducted at a very heavy loss." (Stat. 3) "At the end of the year 1875 stock was taken by the pursuer, and a balance-sheet of the affairs of the company was made up under his directions. This balance-sheet shewed an apparent loss of the company's business during the year 1875 of £1971, 15s. 1d., a sum very little short of the whole wages and salaries paid by the company during the year."* In Stat. 4 the defenders stated that they were ready to pay the salary claimed and take over the shares on the condition of implementing his part of the agreement by rendering a proper account of his intrusions and management. The pursuer, however, failed to do so, the defenders are not aware to what extent the said deficiency of £1971, 15s. 1d. is one for which the pursuer is responsible, and they decline to settle with the pursuer till the account is cleared up." The defenders stated that an accountant employed

* This balance-sheet shewed the affairs of the company as at 31st December 1875, and was docketed by the auditor of the company on 10th February 1876, as having been examined with the books and vouchers and found correct.

reported that owing to the manner in which the books had been kept it was impossible to trace the deficiency. "The defenders believe and trust that on a just accounting it will be found that nothing is due by the pursuer." No. 76.
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The pursuer pleaded, *inter alia*;—(3) No relevant defence having been shown by the defenders' pleas should be repelled, and decree pronounced in favour of the conclusions of the libel. Pegler v. Northern Agricultural Implement Co.

The defenders pleaded;—(1) The pursuer having failed to perform his duty under the said agreement, and, in particular, having failed to keep proper books, or to supply proper information to the directors, and to render a proper account of his intrusions and management, the action should be maintained. (2) The defenders, not being due any sum to the pursuer, are entitled to absolvitor.

On 14th June 1876 the Lord Ordinary decreed against the defenders on the basis of the alternative conclusions of the summons."

The defenders reclaimed, and argued;—The contract was mutual, and the pursuer was entitled to set off their claims under it against the claims of the pursuer. These claims were reciprocal and contemporaneous. A man who was entrusted with funds by his master could not retain them and claim his salary. If the pursuer had kept the company's books in a proper manner the claims of the company against him would have been disclosed in the books, and the pursuer could not have disputed them. He ought not to profit by his fault in neglecting to keep the books.¹

The pursuer argued;—The defenders' remedy was an action of count and reckoning. They could not plead their illiquid claims in compensation of the pursuer's claims, which they admitted to be due.²

In the discussion the defenders were allowed to amend their statement of facts, and on 16th January 1877 their amended statement was allowed to be added to the record on condition of payment of expenses on closing of the record.

The defenders then stated—(as an addition to Stat. 1)—That it was the duty of the pursuer to keep books recording, *inter alia*, "the men's time and labour, and the material used in each job, the various articles manufactured by the company's works and the cost of said articles." (In addition to Stat. 2)—"There is accordingly nothing in the books to shew how the pursuer has supplied to him on the company's account was disposed of, or the men's time charged for was employed." (In addition to Stat. 4) There are, however, various sums appearing to have been received by the pursuer which are not accounted for. There are also various discrepancies in the amounts taken credit for as paid for wages and as above-mentioned. There is no account of the disposal of the material or of the cost of men's time. . . . On the contrary, they aver that the pursuer has money belonging to them in his hands to the extent of more than £1200, he having failed to account for money received, and men's time, to at least that amount. The defenders have brought an action of count and reckoning concluding against the pursuer in the sum of £1200." The pursuer replied, "The pursuer is not liable for the sum of £1200."

The pursuer is not liable for the sum of £1200."

JUDGES.—It is quite clear in this case what were the terms upon

¹ *Macmillan v. Robertson*, March 1, 1861, 23 D. 646, 33 Scot. Jur. 335; *Macmillan v. Robertson*, June 11, 1875, *ante*, vol. ii. p. 775.

² *Personal and Domestic Relations* (1st ed.) p. 429; *Tait v. Mackintosh*, 1841, F. C., 13 Scot. Jur. 280; *Fraser v. Lang*, Feb. 10, 1831, 9 S. 441; *North-Eastern Railway Co. v. Napier*, March 10, 1859, 21 D. 700, 21 Scot. Jur. 350; *Taylor v. Forbes*, Dec. 2, 1830, 9 S. 113, 3 Scot. Jur. 67.

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which the pursuer entered upon his employment, what was the rate of remuneration, and what the period of service. He was to be entitled to put an end to the contract on giving three months' notice. This he did on 16th August 1875 when he addressed to the defenders a letter in which he gave notice of his intention to leave their service on 16th November. He adds—"I shall request you to take up twenty-five shares in the said company on the said date, according to article 4 in the said agreement." Now, had this notice been accepted and acted on there could have been little doubt that as at 16th November 1875 the claim made by the pursuer for the value of the shares in this action would have been a perfectly liquid claim—that is to say, that the pursuer's right to the value of the shares was liquidated by the notice, and the amount is not doubtful. The pursuer's wages were also liquidated by the notice, because the salary was fixed and not disputed. But the defenders were not willing to let him go on 16th November. He was entitled to do so, but by arrangement he remained. He afterwards avers "that at the special request of the defenders as they, as was represented to him, had not then succeeded in getting another manager, he continued in their employment till 20th January 1876. During the currency of his employment the defenders made no complaint to the pursuer of any failure in duty or breach of agreement on his part." Now, this is a precise averment on the part of the pursuer, and it is not met in such a way by the defenders that they are entitled to say that they do not admit it. The averment that the pursuer accepted their special request in their employment is a fact within the defenders' knowledge, and they were bound either to admit or deny it; and their failure in doing so must be taken as a confession of fact that it was at their request he continued in their employment. The claims of the pursuer thus became due on the 16th of November, and the defenders were then bound to pay. The reason why they did not pay was that the pursuer was requested by the defenders to remain. The money has not been paid, and on 16th March 1875 the pursuer brought the present action.

Now, the first defence stated (for it is not disputed that the sum of money due under the contract) is that the pursuer undertook to do something for the defenders which he has failed to do, and that he is therefore not entitled to recover his claims under the contract. The awkwardness of their defence in this sight is, that it stands on the bare averment of the defenders. If it were averred that there was a distinct agreement, even a verbal agreement, in addition to the written contract, there might have been a difficulty in disputing it. But I do not so read the averment. The averment is that the pursuer undertook something not in the written contract, viz., that he undertook and agreed to keep the company's books. He was not bound to do so under the written contract, and it is not relevant to say that he undertook to do something which was outside that contract. But being under no obligation to keep books nevertheless he did so, say the defenders, and having failed in it he is not entitled to recover his claims under the contract.

I think this contention of the defenders is bad. If there had been an averment that the pursuer had failed to do something which he was bound to do under the contract that might have brought the case under the rule in the recent cases of Johnston v. Robertson, and Macbride v. Hamilton. But there is no such averment. In Johnston v. Robertson there was a distinct averment of a breach of one of the articles of the written contract. In Macbride v. Robertson although no precise clause in the written contract could be founded

ce, and no allegations of a breach of such a clause could effectually be made, No. 76.
there was a distinct allegation of breach of contract, in so far as it was alleged
t the clause of the contract specifying the time when it was to be executed had Feb. 2, 1877.
n departed from, and that another period had been substituted by a subsequent Pegler v.
bal agreement. But in the present case there is no allegation of a subsequent Northern
ement, and therefore, in my opinion, the amendment which has been made Agricultural
; not come up to an averment of breach of contract entitling the defenders Implement Co.
efuse to pay the pursuer's claims.

ut there is another allegation, to the effect that the pursuer in the course of
employment had sums of money in his hands belonging to the defenders,
that he has failed to account for these. Even after the amendment has
a made the averment is not specific. Without the amendment there was no
ment of a claim against the pursuer at all, and as it now stands, in the absence
my averment that the pursuer was bound by the contract to account for his
omissions and failed to do so, there is no breach of the contract averred. In
nt of fact and law this amounts to nothing more than a plea of compensation,
uring under the disadvantage that it was plainly an afterthought. When
record was closed there was no such allegation. There is nothing in the
the contract on the matter of accounting. Of course when a man intromits
funds belonging to another there is an obligation at common law to account.
failure to account, when pleaded in defence, is nothing more than a plea of
ensation. It is quite settled that it is only against an illiquid claim, that a
of compensation founded on an illiquid counter claim may be set up.
am of opinion that both these defences fall to be repelled, and that the pur-
lentitled to decree in terms of the conclusions of the summons.

MR DEAS.—I entirely concur with your Lordship. The two sums con-
d for by the pursuer are (1st), £250, being the price of twenty-five shares
e capital of the company at £10 per share; and (2d), £72, 4s. 6d. of salary
to the pursuer as the company's manager from 8th September 1875 to 20th
ary 1876. Both of these are liquid claims upon the face of the contract libelled
The stipulation that when the connection between the pursuer and the defen-
should cease the defenders should take over from him the twenty-five shares
e above price, came into operation, beyond all question, when he left the
ders' service in January 1876. He had given the stipulated three months'
e of his intention to leave as on 16th November 1875, and, as your Lord-
has explained, it was at the special request of the defenders that he remained
uary 1876. It is not disputed that he was entitled to leave the service
e time he did, and it cannot be doubted that he was then entitled to the
ated price of £10 for each of the twenty-five shares, and that the salary
ed then became payable. The events which liquidated each of those claims
recurred.

e rule which prevents illiquid claims being set off against liquid claims is
led in justice. It is intended to prevent parties from being kept out of
money by claims which may turn out to be altogether groundless, and
h may be put forward for the mere purpose of delay. The wages or salary
ervant is a strong instance of the reasonableness of this rule, for otherwise
ervant might be indefinitely kept out of what is intended for his means of
hood. As your Lordship has observed, no counter claim arises, on the face
is contract, so as to be pleadable on that ground against the pursuer's claims.

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I do not say that there may not be exceptional cases, but no exception can be listened to where the conduct of the party contending for it has indicated a want of confidence in his counter claim and *prima facie* there is nothing in its favor. The course of procedure seems to me to shew that that has been the case here. The summons was signeted on 16th March 1876, the record was closed on 9th June, and after parties had been heard decree was given against the defenders on 14th June. The case was argued on a reclaiming note to this Lord on 11th January of this year, and it then clearly appeared that the defender had stated no relevant defence on the record. They were consequently allowed to lodge an amendment, which was added to the record, and then, for the first time, they introduced the only averments on which their defence is now founded. Their own counter action was not served till about three weeks ago. No man is not to be kept out of his money by a defence got up *ex post facto*, which raises the strongest presumption that it is not well founded. That is not a matter of pleading but of substance.

LORD MURE.—I have come to the same conclusion, for I agree that, on the face of the averments, there is no allegation of any breach of the express terms of this contract. The case might have been different if the allegation had been that the pursuer had failed to do something which he was expressly taken bound by that contract to do.

There is, moreover, a great deal, I think, in what has been said by Lord Mure as to the injustice, at this stage of the litigation, and in the admitted facts of the case, in allowing the defenders to go into an accounting as a defence to the pursuer's claims. As stated in the sixth article of the condescendence, the pursuer remained in their employment, at their request, for two months longer than he had intended to do, and it is averred that during all that time they made no complaint of any failure or breach of agreement on his part. Now, these were facts within the defender's knowledge, and they were bound, according to the ordinary rules of pleading, either to have admitted or denied them. But they do not deny them, and we must, I think, deal with the case on the footing that the pursuer was bound at the defenders' request, and that no complaint was made. So standing the facts, the pursuer left the defenders' service in January 1876, and it is averred from the docquet attached to the balance-sheet, founded on by the defender, that on the 10th of February the balance-sheet was examined by the pursuer, compared with the books and vouchers, and found to be correct. The pursuer's action was raised on 16th of March, and defences lodged on the 26th of March, but neither in these, nor in the revised defences, is there, in my opinion, any such defence stated as is relevant to be sent to proof as against the pursuer's claim. The fact that this now unusual course was taken of allowing the pursuer to revise their pleadings is, in the view I take of the case, much against the defenders. For they had thus full opportunity of stating under that revision what they have now added to the record. They, however, did not do this, but the record being closed in the shape in which the Lord Ordinary closed it.

Taking the case, therefore, as stated in the original record, I do not think the Lord Ordinary could have come to any other conclusion than he did. There was nothing more upon the record than a vague statement of the pursuer's failure to keep books and to account for the funds. That judgment was

and on 14th June, and it was not until the case appeared in the roll for No. 76. in January that there was any proposal to amend, and now, having Feb. 2, 1877. an amendment, they propose to go into an accounting. In these circumstances, and apart altogether from the question of relevancy, on which I concur, Pegler v. Northern Agricultural Implement Co. it would be a great injustice to the pursuer to refuse to allow him to claim his wages, and the sums due on the shares, until this accounting is done, and I agree with your Lordships that the defences to this action should be allowed.

SHAND.—I differ in opinion from your Lordships. I think the defences want as an answer to the pursuer's claim, and that the defenders should produce a proof in support of their averments.

In question, it appears to me, is one of pleading, and of pleading only. There can be no doubt that the defenders in an action at their own instance maintain the claim which they here state in defence. But as matter of fact they say they are entitled to have their claims entertained and decided in this action as an answer to the pursuer's demands.

The case is founded on an agreement between the pursuer and defenders, contained in the 2d and 4th articles of that agreement. The 2d article deals with the rate of remuneration which the company were to give. The 4th article states that the defenders shall in the pursuer's option take back from him shares in the company at a certain value in the event of his ceasing to be employed. Founding upon that agreement, the pursuer asks a balance of his wages, and that the company shall take over the shares and pay for them. The defenders, founding also on the agreement, say that the pursuer is not entitled to these payments, because he has failed to perform his duty; and they say that he has £1200 of their funds in his hands of monies intrusted to him in the performance of his duties under the agreement. I think it is wrong proceeding to compel the defenders to pay the pursuer's salary for the shares when they have stated in defence that the pursuer has not put them in his hands, arising out of intrustments under the same contract, to the extent exceeding his claims. The defence is based upon the same document which is the foundation of the action.

The case, as originally presented, was no doubt loose and vague. But it is averred that it was only precision of averment that was wanting. The defence maintained is not new. It was stated before the amendment was made, and it is now averred with greater precision and accuracy. Taking the case as presented to the Lord Ordinary, I am not prepared to say that I differed from his Lordship in the conclusion to which he came. But if I agreed with him, it would have been entirely on the ground that the averments of the defenders were not precise or specific enough. The averments seem to me to put the matter in a different position.

I think this is a proper case of liquid and illiquid claims, nor a case of application of the ordinary rules of pleading as to compensation. The Lord Ordinary does not propose to mix up claims which are unconnected with each other, but to seek, as I think legitimately, to have the claims of both parties arising out of the same contract, and not those of one party only, made the subject of one decree. The statute 1592, cap. 141, properly comes into operation where a claim is made to plead compensation on a debt arising out of a different contract, as I stated in the case of *Macbride v. Hamilton*, that "the

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sound general rule, which may be the subject of exceptions arising from circumstances, or the special terms of a particular contract, is, that in a mutual contract a party in defence is entitled to plead and maintain a reduction or extinction of a sum due under his obligation, where such arise from the failure of the pursuer to fulfil his part of the contract; I may add that any other rule is, in my opinion, likely to lead to injustice done, and to two litigations where one would frequently be sufficient.

An opinion has been indicated in the case of *Macbride v. Hamilton*, and by some of your Lordships in the present case, that such counter claim defences should only be held relevant as are founded upon some express promise in the contract. I doubt whether this suggestion affords either a satisfactory or a reasonable ground of distinction. Indeed, I think the ground of distinction is not sound. There are many obligations which are not to be found stated in a contract, but which are implied just as plainly as if they were expressed. I venture to think the sound principle is rather this, that the defence be founded on an obligation fairly arising out of the contract, the performance of which is reciprocal to and contemporaneous (*viz.* capable of being prestatable at the same time) with the obligation which is the foundation of the action, then the defence is good. I do not think the question is one of liquid and illiquid claims. The case of *Macbride v. Hamilton* is an authority to the contrary. There the articles the price of which was sued for had been manufactured and delivered, and there was no dispute as to the amount of the claim. The claim in defence was one of damages of uncertain amount, and disputed, and a proof was allowed in order that the counter claim might be established. I agree with what your Lordship in the chair said in the case of *Scottish North-Eastern Railway Coy. v. Napier*—"The case of *Tait v. Napier* suggests that a counter claim which may be resolved into a claim of damages may be sustained by way of compensation. If a servant brings a claim for wages, the answer to that claim is an allegation of the servant's misconduct during the period of the service for which the wages were claimed, that would be an answer in law to the demand *in toto*." In the case put, where the claim is for liquid and the damages illiquid, the counter claim is accepted as a defence properly so where it arises upon the same contract.

So much for the general rule of law, and I now apply it as so stated to the particular case. One specialty to which reference has been made is that the pursuer remained in the defenders' service for two months longer than he was bound. That does not appear to me to make any difference. I regard the arrangement here as in no way different from what frequently happens in the case of leases and contracts of service. These are prolonged on the footing that the agreement which has been in subsistence is to continue in all its stipulations to regulate the relations of parties. It is said that as at the 16th November the pursuer's claims were liquid, and that the fact of his remaining for two months longer in the employment is the only reason why his claims were not liquid. But I do not think the case can be taken on the footing that if the pursuer had left the defenders' service at the date for which he gave notice this defence would not have been stated. It is only reasonable to suppose the defenders would have made the investigations which disclosed the ground of defence as soon or later, when the pursuer left their employment.

A second specialty has been referred to—I do not know how far it applies into the opinions which your Lordships have expressed—I mean

ch took place before the amendment was made. The amendment was made by way of introducing a new defence but in terms of the Act of Parliament, which provides that all such amendments as may be necessary "for the purpose of determining in the existing action or proceeding the real question in controversy between the parties" shall be made, and the defenders were subjected to the penalty in payment of expenses. The case is just one of the class to which this beneficial provision of the statute was intended to meet. The Court hereby enabled to determine the question in dispute between the parties without being obliged to turn one of them out of Court, leaving him the right of a second action.

What are the claims and counter claims? The pursuer asks his wages, and what was paid by the defenders for the shares he took under the original agreement. The defenders say, "You misconducted yourself when in our employment, and when you left you did so with a considerable sum of money belonging to us in your hands." It is said that the first of these defences does not arise under any stipulation of the contract. I do not think it necessary that it should. If it be necessary, I am of opinion that it does. The pursuer undertook to be the "general manager" of the business of the company, and by the agreement the full control and direction of said business was committed to him. I consider that under this agreement it was quite as much the function of the pursuer as general manager to attend to the mercantile department as to the technical part of the business. He was bound to keep the books—I do not think in his own hands—but with the assistance which he was entitled to derive from his employers. The defenders say that he undertook to keep the books on a proper system, but failed to do so, and left them in complete confusion. That is a relevant averment, although there is perhaps this point against it that the defenders did not apparently find fault with him on this subject before he was leaving their employment. The only doubt I have about the relevance of this averment is that, seeing the pursuer was so long in the defenders' employment, they ought at an earlier date to have enforced their directions about the books.

When I come to the other averment of the defenders I see no reason to doubt its relevancy. They state now in the amended record that there are sums unaccounted for, and that the pursuer has a sum of not less than £1200 in his hands belonging to them in respect of his intromissions as manager under the agreement. Suppose that the defenders, instead of saying that there was due them a sum of £1200, had produced a state shewing the various sums due by him, I cannot suppose that this judgment goes so far as to decide that in such a case the pursuer would have a right to decree in the face of such evidence. It seems to me to make the case worse and not better for the pursuer that he left the books in such an incomplete and confused condition that a clear and detailed statement cannot be given.

Far from thinking that it would be an injustice to the pursuer to refuse to grant him an instant decree, I regard it as a case of injustice to the defenders that, although they alleged that the pursuer has £1200 of their money in his hands, they are nevertheless now compelled to pay the sums of smaller amount claimed for as salary and as the price of the shares, and should be obliged thereby to bring another action; and I think there is no rule of law or of pleading which requires that this injustice should be done. I am of opinion that the whole case should be sent to proof.

No. 76.

Feb. 2, 1877.

Pegler v.

Northern
Agricultural
Implement Co.

No. 76.

Feb. 2, 1877.

Pegler v.

Northern

Agricultural
Implement Co.

THE COURT pronounced this interlocutor :—" Recall the interdict to repel the defences, and decern against the defenders for payment to the pursuer of £250 and £72, 4s. 6d., with interest from date of citation," &c.

GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—MORTON, NEILSON, & SMART, W.S.—

No. 77.

Feb. 2, 1877.

Wyper v.

Carr and Co.

P. and R. WYPER, Pursuers.—*Guthrie Smith.*HARRISON CARR AND COMPANY, Defenders.—*Lord-Adv. Watson—M'Laren.*

Arrestment ad fundandam jurisdictionem.—Arrestments *ad fund.* *jur.* used by a pursuer in the hands of the trustee on the bankrupt estate of a party against whom the defenders had a contingent claim. Plea of no jurisdiction sustained, in respect that it was proved that there were no assets in the hands of the trustee.

1ST DIVISION.

Lord Shand.

B.

THIS was an action by P. and R. Wyper, coalmasters, Motherwell, against Harrison Carr and Company, coalmasters, Newcastle, for payment of £149, the price of a cargo of coals sold and delivered by the pursuers to the defenders on the order of their accredited agent Mr. Lindsay. The defence on the merits was that the defenders had purchased the coals, not from the pursuers, but from Lindsay, who was their agent, and that he having become bankrupt, and absconded, they were bound to account to the trustee on his estate for the price.

The pursuers used arrestments *ad fundandam* in the hands of the trustee on Lindsay's estate, and averred (Cond. 5) that they had funds belonging to or claimed by the defenders sufficient to subject the estate to the jurisdiction of the Court. This was denied by the defenders, who stated (1) a plea of no jurisdiction.

A proof with regard to the question of arrestment was led, and the following points were established—(1) That if the defenders were not debtors to Lindsay for the price of the coals they had a claim against him, but that if they had bought the coals from him as a principal and were indebted to him for the price the balance was the other way. (2) That there were no assets of Lindsay's estate.

The Lord Ordinary pronounced this interlocutor :—" Finds that the arrestments used by the pursuers the defenders have become liable to the jurisdiction of the Court in the present action : Repels the defenders' plea in law," &c. *

* "NOTE.—The evidence appears to me to shew that the defenders had a contingent claim against the bankrupt estate of Mr Lindsay, merchant and owner in Leith, which would entitle them to have dividends laid aside under the Bankrupt Statute in any division of the estate, and which they were entitled to have made the subject of a valuation under the 53d section of the statute.

"The bankrupt, in January of this year, sent to the defenders two cargoes of coals, one by the 'Ariel,' of the value of £228, and another by the 'Dwight,' of the value of £149. If it be assumed that the parties who supplied the coals became creditors to Lindsay only, and not to the defenders, the defenders would be debtors to the bankrupt estate. But the pursuers maintain that Lindsay acted as an agent only, and that the defenders are their debtors, and that the defenders who supplied the 'Ariel's' cargo have intimated a similar claim, although they have not followed it up by raising an action. It is clear that if either of the claims be well founded, the defenders, who paid Lindsay for the cargoes, have a claim for re-payment. They are therefore, I think, entitled to claim the values of the cargoes in the sequestration, to the effect of having

defenders reclaimed, and argued ;—When the subject arrested was on a bankrupt estate, the claim must have been lodged in terms of statute ; a mere possibility of a claim was not sufficient. In a bankrupt estate, until a claim was lodged, the relation of debtor and creditor was not constituted.¹ The subject must be one which would be in execution.² Let it be assumed that in a case of accounting, if it were not clearly shewn that a balance was due, arrestment is competent, although no case has gone that length ; but here it is proved that there was nothing to arrest. The pursuers argued ;—If there was a *prima facie* case of indebtedness which will sustain the jurisdiction.³ It was not necessary for arrestment *ad fundandam* that there should be a subject arrestable in execution. The rules were different.⁴ In Trowsdale's case it was only laid that the thing arrested must have an exchangeable value. In that case there was no difference between arrestment *ad fundandam* and arrestment in execution.

JUDGMENT.—This is an action to recover £149, the price of a cargo of goods to have been delivered by the pursuers on the order of Lindsay, the agent of the defenders. The defence on the merits is that the defenders did not receive from Lindsay as a principal, and had no transaction with the pursuers. There is a preliminary defence that the defenders are foreigners, and have no domicile subject to the jurisdiction of this Court, and, in particular, that the arrestments which have been used to found jurisdiction have not attached to the goods.

The Lord Ordinary has sustained the arrestments as sufficient, and in his note has pointed out two difficulties, both of which require serious attention. (1) It is plain by the evidence that if the pursuers fail in this action then they will have no claim against the arrestee, who is the trustee on the bankruptcy of Lindsay. The action being for recovery of the price of the goods, if the pursuers fail, the defenders will have no claim for repetition of the price.

The Lord Ordinary has to meet the contingency of the shippers establishing direct claims against them. Their own view is that they must be guaranteed against claims by the shippers of the cargoes before they can come to any settlement with the trustee. In this state of matters I am of opinion that the defendants have an interest in the bankrupt estate which is arrestable, and which, if the goods are arrested, is sufficient to found jurisdiction—*Lindsay v. North-Railway Company*, Jan. 27, 1860, 22 D. 571, 32 Scot. Jur. 221, and *Jones* there cited, June 30, 1831, 9 S. 856, 3 Scot. Jur. 564. The Lord Ordinary maintained that even though there might be an arrestable interest in the estate of a contingent claim where there was obviously a fund for division, it did not apply to the present case, as the trustee has been unable to pay the claim. I do not think, however, that in a question of this kind the court should enter on an inquiry as to the probability of a bankrupt estate yielding or not. The estate may yet be discovered ; the bankrupt may acquire a fortune ; he may succeed in acquiring property in business which he would not have made over to his trustee, and these considerations are, I think, sufficient to meet the argument founded on the peculiar circumstances of *Lindsay*.

Lindsay v. Williamson, Nov. 19, 1835, 14 S. 27, 8 Scot. Jur. 20.

Trowsdale's Trustee v. Forcett Railway Company, Nov. 4, 1870, 9 Macph. 49, 31 Scot. Jur. 51.

Dow and Dobie, Feb. 2, 1869, 7 Macph. 449, 41 Scot. Jur. 246.

North v. Hope, July 1, 1865, 3 Macph. 1049, *per* Lord Curriehill.

No. 77.

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it from Lindsay's estate, or for credit to that amount in an accounting, if no such claim exists, it is proved that the balance will be against the debtors in an accounting with Lindsay, though if they have this claim, it will be in their favour. Thus it depends on the success of the pursuers whether the debtors are creditors on Lindsay's estate or debtors to it. If the pursuers succeed in arrestments have attached funds,—if they fail, they have not. The difficulty in this consideration,—If the Court has jurisdiction to pronounce a judgment *condemnator*, it must also have jurisdiction to pronounce a judgment *absolutor*. But here, if the pursuers were to fail, if we found that Lindsay was a partner, our jurisdiction would be at an end, and we should not be able to pronounce judgment of *absolutor*. But I suggest that merely as a difficulty, I think the case before us turns on a clearer ground.

(2) The evidence shews that, though the bankrupt has absconded, there is no reason to suppose that there is any part of his estate which is not known to the trustee; and the state of affairs is, that so far from there being any assets, there is not money enough to pay the expenses. The Lord Ordinary very properly says that the Court cannot enter into an inquiry as to the probability of the estate yielding a dividend; and if the matter were uncertain there would be a great deal of force in that consideration. But it is already certain on the evidence of the trustee that the estate cannot pay anything.

If so, the arrestments have attached nothing *de facto*, and therefore the Court is prepared to say that they have founded jurisdiction. The doctrine has never been carried so far; and I am not disposed to carry it further than it has been carried in practice.

It is suggested by the Lord Ordinary that though there are no assets at present something may happen hereafter to produce them,—the bankrupt may succeed to an estate before he is discharged, or set up in business with his own money, and these acquisitions would fall to his creditors. That is quite possible, but then in order to found jurisdiction it would be necessary to hold that the prospective estate vested in the trustee now, whereas by the 103d section of the Bankruptcy Act¹ it is provided that it vests only from the time when required by the bankrupt. Is it possible to say that the bare possibility of something coming in hereafter constitutes an arrestable interest or account? I think not, and in this point of view the trustee stands in a different position towards a creditor from the bankrupt himself. Before his sequestration the bankrupt is liable to pay his debts absolutely, and that liability subsists for his whole life. But the trustee is only bound to distribute the funds as they come into his hands. Therefore his indebtedness is measured by the amount of the funds in his hands. The moment he discharges himself of the whole of the funds in his hands his indebtedness ceases. If he never has any it never exists. But, on general grounds, I am of opinion that where it is demonstrated here, that there is no existing indebtedness or accountability, arrestment cannot be founded, and cannot found jurisdiction. I am therefore obliged to dissent from the judgment of the Lord Ordinary.

LORD DEAS.—If an action in which arrestments to found jurisdiction have been used is allowed to go on without objection, it will not do for the

¹ 19 and 20 Vict. c. 79, sec. 103.

g, in the event of its turning out in the end that there was nothing to arrest, No. 77.
 it must be held there had been all along no jurisdiction.
 it when the objection is taken *in limine*, we always allow investigation, and Feb. 2, 1877.
 depends upon the result whether the jurisdiction is to be held well founded Wyper v.
 & Carr and Co.
 If it turns out that there is nothing to attach, then there is no jurisdiction on the whole I think that is the result in the present case.

MR. MURE.—I concur in the first part of the Lord Ordinary's interlocutor. The case of *Lindsay v. The North-Western Railway*, and the other cases cited to, are, I think, distinct authorities for holding that a contingent claim on a bankrupt estate, or an interest in that estate, may be attached by arrestment so as to found jurisdiction. But in this case the question is whether there are any funds of the defenders in Lindsay's hands which admit of being attached; because, in order to found jurisdiction, there must be something to which something that can be laid hold of and fixed by the arrestment, and it may not matter how small the amount of that fund or interest may be, if there is no such fund then the arrestment is bad. Now, on the evidence it is clear that there is here no estate. The trustee says that the estate may pay a penny in the pound, and that it will not even yield enough to pay the expenses already incurred. So that as there is at present nothing to which I am of opinion that the arrestment cannot be sustained.

The Lordship's observations on the 103d section of the statute obviates any question as to the possibility of some succession afterwards emerging, because the debt would not vest in the trustee till the date of the succession; and if it should occur, a new action may be raised and fresh arrestments used.

MR. SHAND.—Having had the benefit of additional argument and your Lordship's views, I have come to be of the same opinion, namely, that it is not sufficient that funds have been attached sufficient to found jurisdiction.

I am of the opinion that the defenders have a contingent claim on the bankruptcy of Lindsay, which is a proper subject of arrestment.

It appears that the defenders have settled with Lindsay for the coals. But as the present pursuers, having intimated a claim against the debtors for the price, I think the defenders have a right to call on Lindsay's debtors to set apart a sum to meet the contingency of their being obliged to pay the price, as well as the contingency of their being in the same way required to repay a second time for the "Ariel's" cargo.

As to the second point, if it appeared that the trustee was really without any effects, though they were not ingathered, I should say the arrestment was still good. But on a renewed consideration of the evidence of the case I think the proof shews that he was not vested in any estate. He had no inquiry, and could find none. Future acquisitions by the bankrupt doubtless give the trustee a claim to recover, but the right to these would be in him after it had been acquired by the bankrupt himself. I am of opinion that the arrestment has attached nothing.

The Lord Ordinary's interlocutor was pronounced:—"Recall the interlocutor: Sustain the first plea in law stated for the defenders: In respect whereof dismiss the action, and decern: Find the defenders entitled to expenses," &c.

No. 78.

WILLIAM YOUNG, Inspector of Poor of the Parish of Perth,
Pursuer and Respondent.—*Balfour—Keir.*Feb. 9, 1877. ALEXANDER GOW, Inspector of Poor of the Parish of Caputh, Defen-
Young v. Gow. and Appellant.—*Asher—Mackay.*

Poor—Poor-Law Act, 1845 (8 and 9 Vict. c. 83), sec. 70—Parish—mission of Liability.—Held, in conformity with *Beattie v. Arbuckle, Jan. 1875, ante*, vol. ii. p. 330, that where one parish has deliberately admitted another liability for the support of a pauper, it cannot withdraw that admission and open up the question of liability on the ground that the admission made in error either as to the facts or as to the law.

Poor—Liability of Parishes inter se—Mora.—A parish after admitting liability for a pauper's aliment to a relieving parish and paying its advances subsequently intimated withdrawal of the admission, which the relieving parish refused to accept. The relieving parish, founding on the admission, frequently applied for payment, and ultimately after seven years raised an action. That the action was not barred by *mora*.

1ST DIVISION.
Sheriff of
Perthshire.
M.

AGNES HENDERSON or CAMERON, a married woman, deserted her husband, had resided in Perth and maintained herself by her industry for many years prior to 24th November 1866. At that date she became chargeable as a pauper.

The pauper had been married to Alexander Cameron, a native of Perth, who was killed in the parish of Caputh, but had been deserted by him in 1838. Cameron had not since been heard of.

On the pauper becoming chargeable, the statutory notice of charge was given by the inspector of the parish of Perth to the inspector of the parish of Caputh.

On 28th November and 5th December 1866 the inspector of Perth wrote to the inspector of Caputh directing his inquiry to certain points of information as to the pauper's history; and on 20th December the latter replied stating the result of his inquiries, and adding, "if the parish is liable, but I will write you again should I find anything to the contrary."

At a meeting of the parochial board of Caputh, held on 8th April 1868, the claim for admission of liability to the parish of Perth, in respect of the pauper Margaret Cameron, was submitted by the inspector of Perth, the meeting having considered the claim, "instructed the inspector of Caputh to admit liability." This the inspector thereafter did by letter addressed to the inspector of Perth. The advances made by the parish of Perth in support of the pauper were repaid down to 11th April 1868.

At the meeting of the parochial board of Caputh, held on 11th April 1868, it was determined to withdraw the admission given in the year 1866 to the parish of Perth of liability for the pauper Margaret Cameron, in respect that after her desertion by her husband, and prior to her becoming chargeable, she had acquired a residential settlement in Perth on her own account. The inspector of Caputh accordingly wrote by direction of his board withdrawing the admission and declining to pay the advances further in the case.

On 7th April 1868 the inspector of Perth wrote to the inspector of Caputh—"I cannot accept your withdrawal of liability in the year 1866. Had her husband been an Irishman, in the circumstances you would have had good reasons, but I would like to know where you have got to shew that the deserted wife of a Scotchman can acquire a settlement in right. If you are to abide by your retractation, please let me know what steps may be taken in the case." At the meeting of the parochial

Perth on 8th April 1868 the inspector reported the withdrawal of admission by Caputh, and that he had refused to accept of the same. And minute of meeting of the parochial board of Perth of 21st April and May 1869, 28th May 1872, 22d June, 31st August, and 28th September 1875, all bore reference to the case as still standing unsettled between the two parishes.

Letters also passed between the inspectors of the two parishes on 1st 8th May 1868, 23d April, 13th June, and 14th November 1872, 22d August 1873, 28th April and 2d July 1874, and 2d April 1875, relating to the subject. In this correspondence the inspector of Perth took up the position, not that the admission of 1867 once given was binding, but that the admission itself was in accordance with the facts of the case and the law applicable thereto, which the inspector of Caputh denied, and required the inspector of Caputh to renew the admission to avoid the expense of an action.

The action was ultimately raised by the inspector of Perth against the defender, Caputh, on 8th October 1875, to recover the amount of expenses for support of the pauper from 11th April 1868, and for relief of the advances thereafter to be made.

The pursuer pleaded;—(2) The pauper being a proper object of relief, and the advances sued for having been properly made, the defender, as inspector foresaid, is liable in repayment of the same, interest and expenses, in respect of the admission condescended on by the defender, which cannot be withdrawn.

The defender pleaded;—(3) The original admission of liability having been in excusable error as regards the law applicable to the circumstances (then undecided), the defender was justified in subsequently withdrawing the admission, and repudiating liability. (4) Defender having repudiated liability in April 1868, the claim of pursuer for aliment prior to the raising of the present action is extinguished by *mora*.

Sheriff-substitute (Barclay), on 23d March 1876, applying the law to the above facts, found—"Firstly, That the pursuer, notwithstanding the admission of liability by Caputh in 1856, having homologated the admission of liability in 1868 by the defender, and in respect of the advances following thereon, cannot recover for the advances since made to the pauper prior to the date of the action: Secondly, and separately, as to the conclusion for relief of future aliment, the pauper resided in the parish of Perth since the desertion of her husband for a period much longer than necessary for acquiring a residential habit therein, has acquired such, and cannot, in the want of proof of her husband being alive during that period, be sent to the parish of her birth: Therefore assolvies the defender from the conclusions of the action: Finds him entitled to costs."¹

The question of *mora* dealt with in the first branch of his interlocutor, the substitute in his note referred to Hay v. Jack, Feb. 15, 1853, 15 D. Scot. Jur. 234; Lemon v. Cameron, Jan. 19, 1864, 2 Macph. 454, 36 D. 233; Beattie v. Wood, Feb. 9, 1866, 4 Macph. 427, 38 Scot. Jur. 233; Beattie v. Greig, July 9, 1875, *ante*, vol. ii. 923. On the second question of settlement, the case of Greig v. Simpson and Craig, May 16, 1876, 13 D. 642, not having been decided at the date of his interlocutor, the substitute referred to the following cases—Pennycuik v. Heritors of Glasgow, March 3, 1813, F. C.; Gray v. Fowlie, March 5, 1847, 9 D. 811, 13 Scot. Jur. 363; Hay v. Skene, June 13, 1850, 12 D. 1019, 22 Scot. Jur. 286; Michael v. Adamson, Feb. 28, 1863, 1 Macph. 452, 35 Scot. Jur. 286; Hay v. Knox, June 28, 1850, 12 D. 1112, 22 Scot. Jur. 513; Hay v. Macdonald, Feb. 24, 1860, 22 D. 872, 32 Scot. Jur. 366; McRorie v. Cowan, March

No. 78. The Sheriff (Adam), on 19th June 1876, on an appeal, pronounced the interlocutor :—"Sustains the appeal, and recalls the interlocutor appealed from : Finds it proved that on the 20th December 1866 the inspector of the parish of Caputh admitted liability for the support of the pauper in his letter of that date : Finds that no facts or circumstances have been proved which are relevant to relieve the defender from the effect of the admission : Therefore finds that the parish of Caputh was effectually bound by the said admission, and that the same is still effectual : Therefore decerns against the defender in terms of the conclusions of the summons : Finds the pursuer entitled to expenses," &c.*

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The defender appealed to the Court of Session, and argued :—A series of cases enumerated by the Sheriff-substitute led up to the decision in the recent case of Greig v. Simpson,¹ whereby it was determined that a deserted wife was in the same position as if her husband was dead, and was therefore capable of acquiring a residential settlement. The decision therefore in the present case given in April 1867 was clearly given under error in law. The question was, was that admission, though given under error in law, permanently binding? The judgment of the Sheriff was founded solely on the case of Beattie v. Arbuckle.² If that judgment was sound, it was certainly applicable to the present case, though a distinction might be drawn that here the admission had been only given on for one year, and therefore the parish to which it had been given was hardly be prejudiced by its withdrawal, while in Beattie v. Arbuckle it had been acted on for six or seven years. But that judgment was a recent one and stood alone, and had not yet been followed.

The older Scotch law with regard to the effect of an admission under error in law was given in Bell's cases, 11 and 534. So far as payments under error in law were concerned, the older law was certainly altered by the case of Sinclair v. Wilson Maclellan,³ which decided that a *condictio indebiti* did not lie on a

7, 1862, 24 D. 723, 34 Scot. Jur. 365; Mason v. Greig, March 11, 1867, Macph. 707, 37 Scot. Jur. 348; Johnston v. Wallace, June 13, 1867, Macph. 699, 45 Scot. Jur. 422.

* "NOTE.—The Sheriff is of opinion that in this case a deliberate admission of liability was, after investigation, made by Caputh, which was afterwards acted on. He thinks therefore that the case falls within the principle of Beattie v. Arbuckle, January 15, 1875, 2 Rettie, 330, and that this admission of liability cannot be retracted by Caputh on the ground averred.

"The Sheriff thinks that this is conclusive of the case against Caputh. It does not appear to him that there is any evidence in process that Perth acquiesced in the withdrawal by Caputh of its admission of liability, and abandoned its claim against that parish. On the contrary, Perth from the first refused to accept of such withdrawal, and the evidence in process shows that although Perth took no active steps to enforce its claims of relief, it repeatedly demanded for payment. Caputh was perfectly well aware that Perth did not abandon its claims, but was insisting on them, and, in these circumstances, it appears to the Sheriff that there is no room either for the *mora* or prescription.

"The Sheriff thinks that this is a hard case for Caputh, as he has no doubt that, but for the admission made in 1866, Caputh would not have been liable—Greig v. Simpson and Craig, 16th May 1876, 3 Rettie, 642."

¹ May 16, 1876, *ante*, vol. iii. 642.

² Jan. 15, 1875, *ante*, vol. ii. 330.

³ H. of L. Dec. 7, 1830, 4 W. and S. 398; see also Dillons v. Mersey Canal Company, Sept. 17, 1831, 5 W. and S. 445.

In that case there were *dicta* of Lord Brougham reported which further. But these *dicta* were *obiter* merely, and the principles which Lord Brougham there applied to repetition of money paid under error in law, and thought should be applied to obligations undertaken under error in law, had never been so applied in practice. The result of judgment and its effect upon the latter class of cases was very recently considered in *Dickson v. Halbert*.¹ That was a case of an obligation created by a discharge of claims, and it was held not binding when granted under error in law. The present case was one of an obligation created by an admission. That surely was *a fortiori* of the case of *Dickson*, and if the obligation in that case was not binding, how could it be in the present.

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The strength of the opposite view mainly depended on the case of *Sinclair Wilson and Maclellan*, already referred to. But that case, though on appeal, was really decided in accordance with views then current as to English law. Yet English authorities now doubted whether the rule there laid down could be supported even as to a *debiti*.²

When an extrajudicial admission was never held permanently valid unless something had followed which put the party to whom it related in a worse position than before it was made.

JUDGMENT.—That, as applicable to an admission of liability for a debt, is hardly consistent with the terms of the 70th section of the Poor-Law Act.³

The section only refers to the temporary effect of an admission, and is subject to its withdrawal on the discovery that it had been given under mistake. As soon as the respondent found the withdrawal of the admission, it was his duty to proceed under secs. 71 and 72 of the Poor-Law Act. Consideration of these provisions confirmed the view that section 70 referred to the temporary effect of an admission. It was not applicable to the present case that the relieving parish had suffered any loss from the admission having been made and left unwithdrawn for nearly a year. There was therefore no ground for excepting this from the ordinary rule that an extrajudicial admission was not binding unless the adverse party was prejudiced.³ The Sheriff-substitute had rightly held that the respondent was barred from now putting forward his claim.⁴ The objections to the respondent were not called upon.

¹ 17, 1854, 16 D. 586, 26 Scot. Jur. 266; see also *Purdon v. Rowat's* Dec. 19, 1856, 19 D. 206, 29 Scot. Jur. 99.

² *Phibbs v. Phibbs*, May 31, 1867, L. R. 2 English App. 149, Lord Westbury, p. 170.

³ Poor-Law Act, 1845 (8 and 9 Vict. c. 83), sec. 70, enacts that where relief for a poor person is made by any poor person entitled to relief the officer of the parish shall, notwithstanding such poor person may not be settled in the parish, "afford to such poor person such interim maintenance as may be judged necessary until the parish or combination to which the person belongs be ascertained, and his claim upon such parish or combination be otherwise determined, or until he shall be removed."

⁴ *Macdonald v. Beattie*, May 12, 1860, 22 D. 1064, 32 Scot. Jur. 488; *Macdonald v. Taylor and Craig*, Nov. 26, 1863, 9 Poor-Law Magazine (1867), p. 1.

⁵ *Lunacy Board v. Bremner and Elder*, July 10, 1874, *ante*, vol. i. p. 24, 1875, *ante*, vol. ii. (H. of L.) 136.

⁶ As referred to in note, p. 449.

No. 78. LORD PRESIDENT.—In this case the pauper became chargeable in 1866 towards the end of the year. She was residing in Perth, and the inspector Feb. 9, 1877. Perth at once gave the statutory notice of chargeability to the inspector of Caputh, and claimed relief from that parish as the parish of settlement. A few days later, on 28th November 1866, the inspector of Perth wrote to the inspector of Caputh, stating that the pauper was resident in Perth, that her husband Alexander Cameron, was born in Dunkeld, in the parish of Caputh, that he had deserted the pauper twenty-eight years ago, and had not since been heard of. He then suggests a source from which information as to the history of the pauper's husband may be obtained, and concludes by saying,—“I claim relief for you in respect of husband's birth. Your admission and instruction will be sufficient.” The correspondence continues at intervals for two or three months, until 8th December 1867, when we find the parochial board of Caputh, having before them the information collected by their inspector on the subject, deliberately instructing their inspector to admit liability. The letter written by the inspector of Perth in consequence of these instructions has not been preserved. But there is no doubt that it was sent. From that time the pauper was maintained in the parish of Perth, at the expense of the parish of Caputh, until the following year, when (on 6th April 1868) the parochial board of Caputh having got more light upon the law, instructed their inspector to withdraw the admission of liability with the view of throwing the liability for the pauper's support on the parish of Perth, in which the pauper then appeared to have her settlement in her own right. That is at once met by the parish of Perth by a letter of 7th April 1868 refusing to accept the withdrawal of the admission of liability. A correspondence goes on between the two inspectors from that time down to the raising of this action, the inspector of Perth standing out throughout on the admission of 1867, and the inspector of Caputh maintaining as consistently, that he was not bound by that admission.

In these circumstances the question which now arises is, whether the parish of Caputh is bound for the future maintenance of this pauper in consequence of the admission of liability made in 1867? Now, it appears to me that the case of *Beattie v. Arbuckle*,¹ is directly in point. The Barony Parish was in that case the relieving parish, but it was also the parish which, but for the admission of liability made by Cambuslang, would have been liable for the support of the pauper. In that case the Judges of the other Division held unanimously that the admission could not be withdrawn, but was permanently binding on the parish making it.

It would require very strong reasons to induce us to go back upon that judgment, and, indeed, we could not do so according to our practice without inconsistency with the other Division, or, if necessary, with the whole Court. I only should I require strong reasons to induce me to go back upon that judgment, but I am quite satisfied that no good reasons exist. I quite concur on the grounds on which that judgment was based, and think further that it is a most excellent and salutary rule in connection with this branch of the administration. I am of opinion that an admission of liability by one parish to another is not to be lightly made; but, being made, is absolutely binding. I am not at all afraid that, as ingeniously suggested by Mr Mackay, the effect of this stringent rule will tend to prevent parishes making admissions.

¹ Jan. 15, 1875, *ante*, vol. ii. p. 330.

increase litigation. I am rather of opinion that by inducing parishes to do what they are doing before making admissions it will tend to increase litigation.

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The only distinction which Mr Mackay was able to draw between the case of *Beattie v. Arbuckle* and the present was that in the former the admission had acted on for a considerable number of years, and in the latter for only one. This is quite true. But to make any distinction between cases in respect of the length of time during which an admission has been acted on, provided the admission has been deliberately made, would, I think, be at once to disturb the law and take away its utility; and, therefore, I can give no weight to that distinction.

The pursuer, however, further contended that the pursuer here is barred by *mora*. This is a plea of which I cannot see the applicability to the present case. The admission was made to withdraw the admission in 1868. But there has been no acquiescence in the withdrawal. The inspector of Perth has continued to say, "You shall not withdraw your admission. You stand confessed, and you are bound to it." After consistently maintaining this position for seven years, his correspondence he is at last driven to raising this action. To say that he is barred by *mora* would be a most extravagant application of the law.

DEAS.—The case of *Beattie v. Arbuckle* appears to me to be directly applicable to the present case. There was there an admission of liability, the admission was acted on for several years. Here the admission was only for one year; but that, I think, shews quite sufficiently the deliberation with which it was made, and that it had the sanction of the parochial board. Apart from the inference to be thus drawn, there is, in the present case, ample direct evidence of careful deliberation before the admission was made. I do not mean to say that an admission rashly made by an inspector without proper inquiry, and the sanction by his board, would be equally binding. But that was not the case here any more than in *Beattie v. Arbuckle*. The question, in that case, was most deliberately considered by the Judges of the other Division, and unanimously decided. In relation to the poor-law we should be slow to disturb what is undisturbed. It has been settled, even although we might otherwise have been inclined to differ. But, upon the merits of the case of *Beattie*, I am satisfied the reasons preponderated in favour of the judgment.

As to the plea of *mora*, which has been attempted to be set up, I think nothing in it. It is just an innominate plea of prescription, without a foundation.

THE CONCURRED.

LAND.—The case of *Beattie v. Arbuckle* is a direct authority here, and the correctness of the judgment I am quite satisfied. Where an admission is made by one parish to another, the inspector of the parish to which it is made is entitled to assume that he need take no farther trouble in the case. Being admitted, it becomes unnecessary to preserve the evidence which has been required for litigation in a case of disputed settlement, and the very well be that important evidence is thus entirely lost. It is not

No. 78. to be forgotten that in the majority of cases in which parochial inspectors have to search for evidence of settlement such evidence is only to be obtained in a migratory population of the lowest class, often most difficult to trace, as they move about. If, therefore, an admission is not to be held binding, but may be withdrawn at pleasure, and, it may be, after it has been long acted on, serious damage may be suffered by the parish to which the admission has been made. If it be assumed that the admission has been given in error, the case is generally in which matters are no longer entire. The admission has been acted on, and the parish receiving it would be put to a great disadvantage by its withdrawal. It is therefore far more salutary in practice to have one general rule giving full effect to an admission once deliberately made than to have in each case, as it arises, an inquiry as to whether the parish to which the admission has been made would or would not be really prejudiced through the loss of evidence otherwise, by its withdrawal.

THIS interlocutor was pronounced:—"Find that the parochial board of the parish of Caputh, by their minute dated 8th April 1877, admitted liability for the support of the pauper, Agnes Henson or Cameron, and instructed their inspector to intimate to the inspector of poor of the parish of Perth, which was accordingly done: Find that, in pursuance of this admission of liability, the inspector of poor of the parish of Caputh paid to the inspector of poor of the parish of Perth the alimentary advances expended by that parish on account of the said pauper, and continued to make subsequent advances for some considerable time: Find that the facts or circumstances have been proved which are relevant to relieve the parish of Caputh from the effect of the said admission: Find that the parish of Caputh was effectually bound by the said admission, and that the same is still effectual: Therefore allow the appeal, and decern: Find the appellant liable in expenses &c.

LINDSAY, HOWE, TYTLER, & CO., W.S.—DUNDAS & WILSON, C.S.—Agents

No. 79. **ROBERT BALFOUR, Pursuer and Appellant.—Balfour—Moncrieff—SMITH AND LOGAN, Defenders and Respondents.—Asher—McKinnon**
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 Smith and
 Logan.

Condictio indebiti—Essential Error—Bill of Exchange—Overpayment—Proof.—A raised an action against B and Co., contractors, whom he employed to execute joiner work, for repetition of £100, alleging that on March B had urgently requested payment of the balance of the account he stated to be £104, 19s.; that A being at the time at a distance from his place of business, and having no means of checking the statement, made payment of £4, 19s. in cash, and by bill for £100, receiving from B an acknowledgment of £1004, 19s., marked "settled," with a receipt in full of all demands for joiner work. That A, on getting his cheques from the bank on 2d April, discovered that he had paid B and Co. £1104, 19s., and mentioned the matter to the defenders, and that B and Co. then denied that they had received more than £1004, 19s., and that A had to retire the bill. B and Co., in their defence, stated that the £100 had been agreed to be paid for B acting as architect, and (1) that there was no relevant statement to support a *condictio indebiti*, and (2) that, as the payment was by bill, the proof must be restricted to the oath.

Held (1) that A's averments were relevant and sufficient to sustain the action, and (2) that proof *prout de jure* should be allowed.

Bill of Exchange—Value—Overpayment made by Bill—Bill of Exchange

*tion—Proof—Held, per Lord President and Lord Shand (dub. Lord Deas Lord Mure), that when a payment has been made by bill, which is after- No. 79.
s duly retired, the acceptor, in suing for repetition of the amount in the Feb. 9, 1877.
n the ground that the payment so made by the bill was made in error, was Balfour v.
e same position in regard to proof as if the payment had been made in Smith and
Logan.*

It was an action raised in the Sheriff Court at Kilmarnock at the 1st Division.
nce of Robert Balfour, cabinetmaker in Glasgow and Beith, against Sheriff of
h and Logan, joiners in Beith, for recovery of a sum of £100, alleged Ayrahire.
ve been overpaid them on a contract for joiner work. M.

The pursuer's averments were;—That, in 1872, the defenders made offer
acute for £1004, 19s. the joiner work of a new manufactory at Beith
the pursuer was about to erect. Their offer was accepted by him,
the work executed. That this sum of £1004, 19s. was the total
ent of the defenders' claims against the pursuer up to and including
March 1874. That, while the contract was in progress, the pursuer
at six several times to the defenders in various sums £1000, the last
these payments being on 9th February 1874. These payments to
not were vouched either by the defenders' I O U's or by bank-
notes and receipts, with the single exception of a payment by cheque
£100 on 9th February 1874, for which the defenders had promised but
not to send a receipt. That, on Saturday, 14th March, the defender
called on the pursuer at his house in Beith, his works not being
on that day. (Cond. 7.) "Mr Smith said that his
was in need of cash to pay their workmen's wages that day, and asked
out of the balance due to his firm on the account No. 14 of process,
the balance he said was £104, 19s. The pursuer had no means at
all, his books being in Glasgow (where his principal office was, and
his business books were kept), to ascertain the amount of previous
payments that had been made by him to the defenders, but he said to
much that his impression was he did not owe the defenders so much
£104, 19s., and asked if he, Mr Smith, had examined the markings of
payments in the defenders' books, which he said that he had done just
before coming down, and that the balance of £104, 19s. was correct."
The pursuer then paid the £104, 19s. demanded, £4, 19s. in cash,
the remainder by his acceptance at four months for £100. At the
time the pursuer received from the defender Smith an account, No.
process, for £1004, 19s. marked "settled, Smith and Logan, March
74," and gave Smith this holograph writing, No. 17 of process.—

I O U's that I may have got from you in place of receipts are
cancelled by receipt in full of all demands regarding joiner con-
for building workshops for me in Beith. ROBT. BALFOUR. To
Smith and Logan, joiners, Beith." (Cond. 9.) "The said account
is charged by the defenders in consideration of previous payments
to them, and of their receiving on 14th March the said acceptance
£100 and £4, 19s. in cash, and the said acceptance was granted by the
defender and the said cash paid by him as the supposed balance remaining
due to the pursuer to the defenders on said account, and the defender
took the acceptance and cash as the balance of said account." That
the pursuer was prevented from finding out the mistake for some days in
consequence of having, on Monday, 16th March, to go on business to Lon-
don where he was detained for more than a week, and farther, on his re-
turn home, by reason of the defenders having neglected to send a receipt
received for the £100 paid on 9th February 1874. On getting up his
accounts from the bank soon after 2d April, the date of the bank's balance,
the pursuer at once perceived the mistake, and communicated with the

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defenders. Not hearing anything from them, the pursuer, shortly before the bill of 14th March for £100 fell due, wrote to the defenders the following letter:—"Glasgow, 4th July 1874—Gentn.,—The bill I gave you some time ago, and which, as I shewed your Mr Smith by your receipts, was overpaid, falls due on 17th of this month. You will of course require to lift this bill, and I shall be glad to have a note from you per return stating that it is your intention to do so." On 15th July 1874 he wrote again in similar terms. To these letters no reply was received, and the pursuer was obliged to retire the bill when it fell due. Thereafter, and subsequently to the date of these letters, the pursuer and the defender Smith had two meetings on 5th and 7th September 1874 at the bar of the Court of Session. At these meetings Smith maintained that, inclusive of the acceptance for £100, he had received from the pursuer £1004, 19s. 6d. and not £1104, 19s. 6d. as the pursuer contended. "The payment of £100 by acceptance on 14th March 1874 was treated by the pursuer and defender Smith as a payment on account for the joiner work (No. 14 of process) and not on any other account whatever, nor was any other account or claim by the defenders against the pursuer than the account (No. 14 of process) spoken of as having been discharged and settled by the said acceptance or at the time the same was granted."

The pursuer pleaded;—(1) The pursuer is entitled to restitution of the said sum of £100, with interest as concluded for, the said sum having been paid under an error in fact on the part of the pursuer. (2) The sum having been overpaid under circumstances in which the pursuer is not the means of ascertaining the true state of the defenders' account, the pursuer is entitled to repayment. (3) The defenders having contributed to the error in fact under which the said overpayment was made, are liable to repayment of the sums sued for.

The defenders denied the material statements of the pursuer, and maintained that the defender Mr Smith was an architect as well as a joiner, and that such had been employed by the pursuer to make plans and specifications for the buildings which he had lately been putting up in Beith, and to superintend their erection. That the usual architects' fees for such services would have far exceeded the sum of £100, but that the defenders had restricted their remuneration to this sum. (Stat. 3) "On the 14th March 1874 the defender Smith, who had prior to that date received £1000 to account of the items contained in the account, No. 14 of process, went to the pursuer's house for the purpose of receiving payment of the balance of £4, 19s. 6d., and also of getting his architect's fee adjusted. He explained to the pursuer that architects usually charge 5 per cent on the cost of erection of the buildings, but it was arranged between the parties that the defenders should receive the before-mentioned architect's fees, and the pursuer granted his bill for that amount, and the pursuer, in pursuance of process, and paid the balance of the account, No. 14, in cash to the parties thereupon granted mutual discharges to each other in connection with said contract, and extras or jobbings (Nos. 14 and 17)."

The defenders pleaded;—(1) The summons is defective, and should be dismissed, in respect that it is not therein stated that the alleged payment was made by the pursuer to the defenders through ignorance or error. (2) Assuming that an overpayment, such as is alleged, had been made, the pursuer is precluded from seeking repetition, the error being solely imputable to his own gross negligence, as he could at all times, from documents in his possession, have ascertained what sums had been paid and had to pay. (4) A denial that defenders were overpaid by pursuer on the contract mentioned in the summons, or that the pursuer received the sum of £100 on 14th March 1874 towards payment

the said sum was paid to defenders by bill for the plans, schedules, &c., No. 79. mentioned in article 2 of their statement of facts.

The Sheriff-substitute (Anderson) repelled the first plea for the defenders, sustained the relevancy of the action, and allowed parties a proof of their averments. Feb. 9, 1877. Balfour v. Smith and Logan.

The Sheriff (Campbell), on appeal, recalled this interlocutor, and found grounds of action as set forth on record not relevant or sufficient in to warrant the conclusions of the action.

The pursuer appealed to the Court of Session.

Argued for the pursuer;—The Sheriff had held that as the mistake was blamable, and the pursuer had the means of avoiding it in his own hands, failed to use them, he was not entitled to recover, and he founded on *Wilson and Maclellan v. Sinclair*.¹ But the *dicta* in that case were *obiter*, did not state correctly the law of Scotland. It was not necessary that the mistake should be unavoidable. It was sufficient if the party claiming repetition had not (1) waived inquiry, (2) intended to make a donation, or (3) paid in implement of a natural obligation.² The law laid down in *Wilson and Maclellan's* case had been rejected even in England.³

Further, there was a sufficient averment which received support from the consideration of the document produced (and the present was an action of relevancy merely) that the mistake was induced by the suggestion of the defenders, or at least of one of them. That was sufficient in any view to entitle the pursuer to repetition.⁴

Argued for the defenders;—There was nothing to connect the settlement of the defenders' account with the granting of the bill. They were entitled to have the transactions looked at separately, and then it was seen what the bill really amounted to, namely, not a *condictio indebiti*, but an attempt to bind a bill and deprive it of its ordinary privilege. The pursuer's plea really meant not that he had made an overpayment, but that the bill was granted without value. This could only be proved by writ or oath. The bill was current, non-onerosity could in the ordinary case only be so proved. In the case where an exception had been made there had always been *prima facie* evidence of something suspicious. Mere averment was not sufficient. All that there was here was an averment on the one side that the bill had been granted in error, accompanied by the production of certain documents, and an averment on the other that the granting of the bill was an onerous transaction. There was nothing on record to raise a suspicion—nothing which in a suspension of a threatened charge would have warranted proof *prout de jure*. The present case must be treated as in the same position, otherwise the privilege accorded to a bill would be withdrawn so soon as it was retired, and the objection of non-onerosity, which on one day could only be proved by writ or oath, might the next be proved *prout de jure*. Farther, on the question of relevancy, this case came directly within the judgment in *Wilson and Maclellan v. Sinclair*. The pursuer here had means of knowledge, of

¹ 7, 1830, 4 W. and S. 398, 3 Scot. Jur. 123.

² 1, 7, 9; Ersk. 3, 3, 54; *Brown v. Graham*, March 7, 1848, 10 D.

³ *See* *Leading Cases* (7th ed.), vol. ii. pp. 421 and 427; *Kelly v. Solari*, Mees. and Wel. 54; *Townsend v. Crowdy*, 1860, 8 C. B. Rep. N. S. wall v. Tomlinson, 1871, L. R. 6 C. P. 405; *Kendal v. Wood*, 1871, Ex. 243.

⁴ *See* *Monkland Canal Company*, Sept. 17, 1831, 5 W. and S. 445, 4 D. 28.

Mon v. Taylor, Nov. 4, 1874, *ante*, vol. ii. p. 75.

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which he did not avail himself, and could not now be heard to plead essential error caused by his own negligence.

Replied for the pursuer;—(1) He was in the same position now as he had paid in cash. The bill was removed by his retiring it, and the result was simply that, through whatever medium, the defenders had paid £100 too much. The law applicable to bills of exchange did not enter at all into the question. But (2) taking the argument as if the bill were still current, the averment was not that the bill was an accommodation bill in which case the question of value could probably only have been referred to writ or oath. But here the pursuer's case was that he had paid under essential error as to value; that he had believed he was granting a bill for value, when, in truth, he was not. Such a case was an exception to the general rule. Besides, there were circumstances appearing on the record, and on the productions, which raised a *prima facie* case of suspicion. In such cases the Court was in use to allow a proof at large.¹

LORD PRESIDENT.—There is no doubt that the pursuer was owing the defenders an account for joiner work amounting to £1004, 19s. And there is as little doubt that the whole of that account was paid, prior to 14th March 1874, in the various instalments set out on record, excepting the small balance of £4, 19s. That was the state of the account on 14th March 1874, when the pursuer and the defender Mr Smith met in Beith and made a settlement of the balance of that account. But, instead of then paying £4, 19s., the pursuer paid that he paid £104, 19s. in the circumstances condescended on.

Article 7 of the pursuer's condescendence sets forth—(reads article 7, *supra*, p. 455). It is further averred that the pursuer was much hurried in the day in question, being on the eve of leaving on a business visit to London. And he gives a satisfactory enough account of the lapse of time which elapsed before he found out the error which he had made.

When the mistake was ascertained, observe what followed, according to the pursuer's statement. He first made a verbal communication to the defender Mr Smith, who undertook to look into the matter, but took no further notice. He then wrote the letters of 4th and 15th July, which were not read. And lastly, there were the two meetings in September at the bank. Throughout the whole of this time, the pursuer avers, the defenders were satisfied that they were entitled to the payment of £104, 19s. made on March 14th on their account for joiner work, and for nothing else. They make no mention of any other claim against the pursuer, or that his acceptance of 14th March for £100 was given in settlement of any other claim distinct from their claim for joiner work.

The question is whether these averments of the pursuer are relevant to sustain an action of repetition of the £100 as paid under essential error. They are relevant for that purpose, and that the Sheriff is mistaken in his decision. It is quite true that a party, having made a payment

¹ Anderson v. Lorimer, Nov. 21, 1857, 20 D. 74, 30 Scot. Jur. 50; v. Taylor, Nov. 4, 1874, *ante*, vol. ii. p. 75; Smith v. Stark, Dec. 16, 1874, S. 150, 4 Scot. Jur. 191; Beveridge v. Henderson, Nov. 25, 1841, 4 Scot. Jur. 37; Macdonald v. Langton, Dec. 23, 1836, 15 S. 303, 9 D. 172; Bannatyne v. Wilson, Dec. 13, 1855, 18 D. 230, 28 Scot. Jur. 9; Bell v. Dryden, Nov. 25, 1824, 3 S. 320; Hunter v. Georges's Trustees, 13, 1834, 7 W. and S. 333, 6 Scot. Jur. 312.

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before he can recover, shew that the error was not induced by his own mistake, but was due to adverse circumstances, or to the proceedings of the other party. If, however, the averments of the pursuer here are true, the error was wholly brought about by the statement of the defender Mr Smith, and if made as averred in article 7 of the pursuer's condescendence they are true, and false in the knowledge of the defender. To say that that is not sufficient to sustain the relevancy of the action is most startling.

The defender has suggested in debate that an additional difficulty is introduced by the payment having been made by bill and not in cash. Had the payment been made in cash I think there would have been no more to say. What I ask, is the peculiar effect of payment by bill? It is merely to postpone receipt of the cash by the payee during the currency of the bill. At the time of the four months in the present case the defender was to recover, and he got £100, which was just £100 in excess of his claim on his account with the bank. I am therefore at a loss to see what difficulty is introduced by payment having been made by bill. If we were here in a question with an acceptor, or between drawer and payee, during the currency of the bill, undoubtedly the acceptor would not be able to refuse payment except on a plea of non value by writ or oath, unless, indeed, he could qualify circumstances so as to enable him to overcome the strict rule. But the bill has been retired by the acceptor paying the sum due on it. Now, it seems to me that the privilege of retiring bills and promissory-notes must be something very different from what we have always understood it to be if it can interfere with the course of law in a case like the present.

When a bill is retired by the acceptor when it falls due, what more does the holder want? Is it not just as if he had got cash at the time the bill fell due? If he got through error more than he should have got, what is the difference between his getting it in actual cash or through the medium of a bill? He has therefore, been able to see no specialty in the case. The question still remains whether the sum paid by bill by the pursuer to the defender was due, or whether it was paid under error such as will entitle the pursuer to recover. The averments are sufficient. But of course they must be proved. I am, therefore, recalling this interlocutor, and sending the case to proof in the ordinary way.

DEAS.—As regards the relevancy of the action I certainly think it was necessary that something more should be said than merely that an overpayment had been made. But I think the vagueness of the summons in this respect was amply supplied by the statements in the condescendence, and therefore that the defender was wrong in throwing out the action as irrelevant.

The fact, however, of the payment having been by a bill raises a question of immateriality with respect to the mode of proof. The account, which bears to have been led on 14th March, does not shew on the face of it when and in what way partial payment had been made.

It had been the practice to receive and credit, in an account current, bills when discounted as partial payments, and to restore the contents to the debit account when the bills were not duly retired by the proper debtor, there has been room for regarding the bills as mere items in the account current, and not entitled to the extraordinary privileges of bills of exchange. But there is nothing of that kind here. The payments by the appellant were sometimes

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made in cash and sometimes by cheques on his bank account. A peculiar mode of acknowledging the payments was occasionally adopted by the respondents, granting their I O U's in place of receipts, and afterwards receiving back the I O U's cancelled. But that peculiarity does not affect the present question. The material fact bearing on the mode of proof is that the bill referred to is only bill, so far as appears, which passed between the parties. It was given subsequent to the last item charged for work in the account, and bears the words "for value received," and not "for value in account." These circumstances are strong in favour of the defenders' right to stand upon the bill as proof of debt, unless gainsayed by their writ or oath.

I am not satisfied that because the bill was ultimately taken up from the account by the pursuer this made the defenders' position with respect to the mode of proof no better than if the question had been one of error in making a payment. In a question with the bank the pursuer could not avoid making the bill. There was no error in making that payment. The error, if there was one, was in granting the bill; and in dealing with that question of error, the court disposed to assume that the defenders are in the position of having their claim vouched by a bill, so that an exceptional case must be made out against them to deprive them of that advantage. But, taking the case so, I have come to the conclusion that this is one of those exceptional cases in which proof by bill is admissible. Among the circumstances which lead me to this conclusion are the following:—

First, The defenders' averment of value in the record is accompanied by an allegation of specific value, viz., in architect's fees, said to be incurred by Mr Smith, one of their partners, and communicable by him to the firm.

Second, Nevertheless, there is no distinct averment of the employment of Mr Smith as an architect in the record. The claim is rather rested thereon as a general employment.

Third, It is quite common for builders to furnish sketches or plans of buildings as were here contemplated, on condition of getting the work done. I looked at what are called the plans in process, and they appear to me to be of the kind I have mentioned. There is no plan among them bearing the signature of either by an architect or anybody else. There is not even a signed specification. The plans, such as they are, are apparently by different hands, and many of the so-called specifications are just unsigned pencil notes, all very much as might be expected where the tradesmen had undertaken to supply their own plans.

Fourth, It has been attempted by the defenders to represent that the meeting of 14th March, at which the account for joiner work was settled and granted, was really a meeting for the purpose of settling Mr Smith's account as architect. But it is not alleged that any account for these fees had been rendered or that any discharge for them was given in exchange for the bill.

Lastly, The letters of July tell against the defenders. It is inexplicable if the true state of matters had been what they now aver, no claim should have been asserted to architect's fees, and not a word of answer, denial, or explanation given by the defenders to the pursuer's calls upon them to retire the bill as overpayment.

Putting all these things together, and taking the case as one of privilege in granting to a bill, I still think that there is enough to take it out of the grasp of writ or oath, and to authorise an allowance of proof before answer *jura*.

LORD MURE.—On the first point I have no doubt that there is here a relevant set out in the record. I have looked into the judgment of Lord Brougham in the case of Wilson and Maclellan, and I can find nothing in that judgment, taken by itself, which can be held to foreclose the pursuer from asking a full averment. But in the subsequent case of *Dixons v. The Monkland and Company*, 5 Wil. and Shaw, p. 447, Lord Brougham uses expressions which seem to me exactly to meet the present case. He there says,—“I do not think that it is necessary, in order to dispose of this case, to raise the general question whether a party can recover money paid under a mistake in law, or without the knowledge of all the facts, when there is nothing against good conscience in retaining the money—that is to say, where the payer has not been induced to pay by any ignorance impressed upon him, as it were, by the person owing it to be paid, or any other fraudulent interposition which would make contrary to a good conscience for him to retain it.” Now, there is here, I think, a sufficient averment of ignorance impressed upon the pursuer by Smith. There is a distinct statement by the pursuer that he was in doubt whether the sum claimed was due, that he had not his books at command to examine, and that he was assured by one of the defenders that the sum was due, and that on trusting he paid it. That, I think, is quite sufficient to satisfy even the most liberal interpretation of the judgments in the cases above referred to.

On the second question, there is more difficulty, from the fact of a bill having been used in one view, the medium of payment. But looking to the facts, so far as they appear on the pleadings and productions, I think the difficulty disappears. A bill was certainly granted. It was discounted, and subsequently retired by the bank, the money having been paid by the bank to the defenders, and the question raised is whether by means of that bill an overpayment was made by the pursuer to the defenders. Now, there is no doubt that a payment to the bank on account of the bill was made over and above the sum due on the account for joiner work. The defenders, however, say that the payment represented by the bill was not on account of joiner work at all but of Smith's services as architect, and that, in respect of the bill, this alleged transaction can only be inquired into by writ or oath. But the way in which this comes out as alleged in the record, coupled with the other circumstances, and particularly the fact that the bill is drawn by Smith and Logan, while the contents are alleged to be a payment to Smith alone, raises, to my mind, a very special case, and a description which, even if the question had been raised in a suspension of the bill, would, I think, have fallen under the exception to the rule, and in which a proof at large, but before answer, would have been allowed on the authority of the class of cases of which *York v. Gossman*, 23 D. and Smith v. Little, 8 D. p. 265, are illustrations. That being so, the pursuer is not, I think, in a worse position in the matter of proof than he would be if the alleged overpayment had been made directly in cash.

SHAND.—I concur in your Lordships' judgment.

On the first point, I cannot doubt that the statements made in article 7 of the pursuer's condescendence are relevant. Assuming the correctness of these statements, the defender obtained the overpayment in consequence of his own misstatements, which were erroneous. If a tradesman, by sending in his account for payment, and thus by plain implication representing it to be still due, obtains payment twice, it is surely too plain for argument that he could

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not be heard to maintain that he was entitled to keep the money because if customer had examined his vouchers he would have found the first receipt, and avoided the mistake. The present case is substantially the same. The money is said to have been paid under the mistaken belief, in fact, that it had not been paid already. If that be established the pursuer is entitled to repayment; I may add that, in my opinion, the fact that the defenders' representations induced the error is not essential to the pursuer's success. The defender has no right to retain money paid to him under a mistake in fact, which is the case in this.

I am satisfied that the sound rule applicable to such cases is that stated by Mr Justice Williams in the case of *Townsend v. Crowdy* thus:—"Since the case of *Kelly v. Solari* it has been established that it is not enough that the pursuer has the means of learning the truth, if he had chosen to make inquiry. The limitation now is that he must not waive all inquiry."

On the second question, whether the pursuer is shut up to proof by oath, I am quite clear that he would not be so in a reduction of the bill on the ground that it had been granted under error as stated on the record. If the averments are relevant, and a reduction is not insisted in, is there any reason for limiting his proof while you give him his full remedy in this action? I think not.

But apart from this, the bill no longer stands in the way as an operative bill. It is now merely a piece of evidence which is mainly useful for showing how the alleged overpayment was made. Therefore, though conceding that the bill is not a bill, and that had we been dealing with the bill during its currency, and that out a reduction in an action for payment, there would have been a bar to the proof to writ or oath, I hold that the bill being out of the way of nothing to preclude a proof at large of the footing on which the overpayment was made, though made in the form of a bill.

THE COURT recalled the interlocutor of the Sheriff, and remitted the bill to him to allow the parties a proof of their averments in common.

JOHN CARMENT, S.S.C.—THOMAS CARMICHAEL, S.S.C.—Agents.

No. 80.

Feb. 10, 1877.
Clift v. Portobello Pier Co.

HENRY CLIFT, Appellant.—*Campbell Smith*.

THE PORTOBELLO PIER COMPANY, Respondents.—*Kinnear*—*A. J. Kinnear*.

Public Houses Regulation Act, 1828 (9 Geo. IV. c. 58, secs. 19 and 20).—Transfer of Certificate—Master and Servant.—A public company, as part of a refreshment room, engaged a manager on a written contract of service of the conditions of which was that he was to apply in his own name for a license to sell exciseable liquors on their premises, which license he was bound to assign to such person or persons as the directors may require. His engagement was terminable at a month's notice by either party. He obtained the license at the company's expense, and during its currency was summarily dismissed without a month's notice. The company applied to the Sheriff for an order that he should assign the license to their nominee.

Held (1) (*dub.* Lord Shand) that, even if rightfully dismissed without notice, he was not bound to execute an assignation of the license, which could only be transferred by the act of the licensing magistrates; but (2) that as the license was the property of his employers, he was bound to deliver it up to them if wrongfully dismissed.

1ST DIVISION.
Sheriff of Midlothian.
M.

ON 2d May 1876 Henry Clift was engaged by the Portobello Pier Company, on a formal written contract of service, to act as manager of their refreshment room. His engagement was to commence at 1st June 1876 and to be terminable by either party on a month's notice in writing.

was one of the conditions of the contract that Clift should apply for No. 80.
 tificate and license for the sale of exciseable liquors in the company's
 shment rooms, "which he shall be bound to assign to such person or
 ns as the directors may require."

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 bello Pier Co.

ift accordingly applied for and obtained a certificate and license to
 from 15th May 1876 to 15th May 1877.

126th June 1876 Clift was dismissed from the service of the Porto-
 Pier Company without notice,—as he asserted, unjustifiably,—and as
 ompany maintained, for sufficient fault.

these circumstances the Portobello Pier Company presented a peti-
 in the Sheriff Court at Edinburgh against Clift, praying the Sheriff
 ally to "ordain the respondent to assign and deliver the said certifi-
 and license to and in name of D. S. Fraser, who has been appointed
 amateur in room of the respondent."

he respondent pleaded in defence;—(1) The petitioners' statements
 not relevant or sufficient to support the prayer. (2) The application
 competent. (3) The respondent having been improperly dismissed,
 bound to assign the license. And (4) It is contrary to public policy
 the prayer of the petition should be granted.

he Sheriff-substitute (Hallard), on 10th July 1876, pronounced this
 leucator:—"Finds that on 2d May last the respondent became the
 oners' pier-master and manager, under an engagement terminable by
 party at a month's notice in writing: Finds that on 27th June last
 tioners dismissed the respondent without such notice: Finds that
 ult of any justification of this step, the same must be held illegal,
 violation of the contract between the parties: Finds that the peti-
 being in breach of one part of their engagement, are not entitled to
 against the respondent another part thereof: Further, *et separatim*,
 that the engagement between the parties not having been brought
 close *habili modo*, the same must be held as subsisting, as also
 pondent's right to hold and retain the certificate and license in
 as an incident thereof: Therefore, and in respect of the foregoing
 ga, sustains the defences to the foregoing effect: Dismisses the peti-
 Finds the respondent entitled to expenses," &c.

1 Sheriff (Davidson), on appeal, on 14th July 1876, pronounced this
 cutor:—"Recalls the interlocutor appealed against: Finds that the
 dent has been dismissed from the service of the petitioners, and
 is bound to assign the certificate and license, which he obtained
 servant, to such person or persons as they may require: There-
 terns and ordains the respondent forthwith to assign and deliver
 l certificate and license as craved: Finds the respondent liable in
 20," &c.

respondent appealed to the Court of Session.

ed for the appellants:—

That was demanded from him by the respondents was that he
 execute a deed which would have no legal validity. A transfer
 cense could only be effected by the licensing magistrates in the
 provided by the Home Drummond Act (9 Geo. IV. c. 58), secs.
 120. They had inserted in their agreement of service a con-
 which was contrary to public policy, and could not therefore be
 d. The petition should therefore be refused. 2. Even if the con-
 was legal, it was a part of a mutual contract, and a party to such
 who had failed to implement his part, as the respondents had
 y dismissing him without notice, could not sue for implement of
 posite part.

ued for the respondents;—Such a deed as they required the appel-

No. 80. lant to sign was necessary under the circumstances to enable them to maintain a transfer of the license to their new manager, in terms of the statutory enactment founded on by the appellant. He had been dismissed without sufficient fault, and was therefore not entitled to notice, but he was thereby absolved from his obligations under the contract.

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LORD PRESIDENT.—If, after Clift had been dismissed by the Portobello Company, they had in simple terms requested him to hand over the certificate by which he was entitled to sell spirits on their premises, I should have thought that they were quite entitled to make the demand. I agree in the conclusion that when a servant is dismissed, under whatever circumstances this may be, he is bound to leave behind him whatever is the property of his master. The certificate was the property of the company, although it was taken in the name of Clift. But they have mistaken their position, and have presented a petition the prayer of which, as it stands, we cannot in any circumstances grant. The petitioners have mistaken their remedy. No man is entitled to assign a certificate for the sale of spirits. The only way in which it can be transferred is by act of the licensing magistrates, just as some kinds of property may be transferred by decree of this Court which cannot be assigned. The petitioners seek their right under the contract, that the assignment shall be granted, and it was given in terms of the prayer of the petition Clift would be bound to assign the certificate to Donald S. Fraser. No doubt, under the contract he was to assign the certificate,—that is, he was bound to do so if he could; and if it were in his power to assign it, there is a great deal of force in the contention that his masters are not entitled to enforce that part of the contract which they do not perform their own part of it. But I do not think that the company can assign the certificate. It was the property of the company, and I think, therefore, they are entitled to have delivery of it; but I do not think that they are entitled to ask that it shall be assigned to them.

I am, therefore, disposed to advise your Lordships to pronounce an order for delivery of the certificate. But inasmuch as the company have mistaken their remedy, they must be held liable in expenses.

LORD DEAS and LORD MURE concurred.

LORD SHAND.—I concur in the result at which your Lordships have arrived. The petitioners aver that—"By the said contract it was agreed that the respondent should apply for a certificate and license for the sale of liquors, which certificate and license he is bound to assign to such person or persons as the petitioners, through their directors, should require." He applied for the certificate, and it appears to me that he did so practically as the servant of the company. It is true that therefore the certificate was their property. If the company had given him a month's notice of his dismissal, and demanded the certificate, it is clear that he had no power to retain it. If the petitioners thought that the possession of the certificate would be a facility for their obtaining a transfer they were entitled to get it.

I do not, however, concur in your Lordship's view that assignment is an incompetent form of dealing with the certificate. It is true that no assignment is complete and effectual without the sanction of the licensing magistrates, but if the employers thought that the transfer of the certificate would be facilitated by an assignment, it was, I think, competent to stipulate for this. As, however,

copy of the certificate is enough for the pursuers' purpose, I am not disposed to differ on that point.

I do not think it makes any difference that the petitioner was dismissed on a notice and without justification. A contract of service is peculiar in this respect, that although the parties to it may stipulate for notice, yet the master terminate the contract at any time, and the servant is then bound to leave service. He cannot longer insist in remaining in the house, or office, or other premises of the master, against the master's will; but must make his pecuniary arrangements, and if necessary enforce it. On the day Clift left the company's service he was bound to give up the certificate, and also, in my opinion, to assign it if not subject to the condition that the assignation should only be acted on in effect of obtaining the transfer by the magistrates. If the petition had been remedied to this limited effect I should have been disposed to give it; but that the certificate should be assigned to Donald S. Fraser, without making that Fraser was not at once to act upon it, and to continue to do so without any transfer by the magistrates. This might possibly have exposed the petition to serious consequences. I am not, therefore, prepared to grant the prayer of the petition without qualification, and with that result.

As to the question of expenses I am not disposed to differ. But, looking to the facts of defence, which shew that the defender claimed a right of property in the certificate, I rather think no expenses should have been allowed to either

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His interlocutor was pronounced:—"Recall the interlocutors of the Sheriff-substitute and the Sheriff, dated respectively the 10th and 14th July 1876: Decern and ordain the appellant to deliver to the respondents, the Portobello Pier Company, the certificate mentioned in the record: Find the respondents, the Portobello Pier Company, liable to the appellant in expenses, both in the Sheriff Court and in this Court," &c.

THOS. LAWSON, S.S.C.—W. N. MASTERTON, S.L.—Agents.

ANDER GREIG (Inspector of New Deer), First Party.—*Asher—Jameson.*

No. 81.

ROSS (Inspector of Nigg), Second Party.—*Kinnear—Taylor Innes.*

Feb. 10, 1877.
Greig v. Ross.

Settlement of Illegitimate Child—Forsfamiliation.—Held that an illegitimate child, living apart from his mother, on attaining the age of puberty was forsfamiliated, and had then a settlement in his own right in the parish in which he resided.

Settlement.—Held that permanent disability to earn a livelihood, when incurred with mental incapacity, did not prevent a pupil from having a settlement in his own right when he reached the age of puberty and was forsfamiliated.

ROSS or PIRIE, who was the illegitimate son of Alexandrina Ross, born in the parish of Nigg on 5th May 1860. He lived with his mother in Nigg from his birth until October 1868. His mother was in service a year after his birth, but contributed to his maintenance until his marriage to George Robertson, in 1868, when George Ross went to Nigg with her and her husband, first in Aberdeen, and afterwards in Glasgow. George Ross, while supported by his mother's husband, earned a salary varying from 2s. 6d. to 4s. a-week. In September 1871, when

2D DIVISION.
I.

No. 81. George was eleven years and four months old, he met with an accident from which he never fully recovered. Robertson died in November 1872, having his settlement in New Deer. George continued to live with and be supported by his mother until February 1873, when his mother's mother took him to her house in the parish of Raheen. Immediately on his arrival there application was made on his behalf for parochial relief, as having no occupation, and being wholly disabled. On 6th March 1873 he was ordered by the inspector to be committed to the poorhouse, and this order was confirmed by the parish board on 26th April. His grandmother refused to send him to the poorhouse, and, with occasional charitable assistance, supported him in her house until 24th December 1874, when he was allowed to go out. He was then fourteen years and seven months old. Statutory notice of this relief was given to the parish of Nigg, as the parish of his birth, and to the parish of New Deer, as the parish in which was his mother's settlement as derived from her husband. The inspectors of these parishes presented a special case to the Court setting forth the above facts, and submitting the following questions:—“(1) Whether the pauper, George, or Pirie, is chargeable on the parish of Nigg as the parish of his birth? Or (2) Whether said pauper is chargeable on the parish of New Deer as the parish of his mother's settlement?”

Argued for the first party;—A legitimate child, whose father was living on attaining puberty, had its settlement in its birth parish, and retained the settlement derived from its father.¹ An illegitimate child took its derivative settlement from its mother;² but the tie was severed on the child becoming a *minor pubes*. There being no *patria potestas* the child then had a settlement in his own right in the parish of his birth.

Argued for the second party;—(1) It was admitted that at the age of puberty the child took his settlement from his mother, and his settlement was not lost by the child attaining the age of puberty. In the case of Craig, founded on, the child had been for some years in the mother's house. Its father had been dead for some time.³ More was the case of a legitimate child, which was in a different position than that of an illegitimate child. This child had been maintained by his mother until he was fourteen years old, and the mere fact of his attaining fourteen years of age did not make him independent. The mere fact of the death of a child's father had been said by Judges, by a majority and minority in Craig's⁴ case, not to emancipate the child when he had attained puberty. That point could not therefore be said to have been settled in that case. In other cases, however, it had been said that the mere attaining of puberty did not forisfamiliate or emancipate a child.⁵ The mother was held to come into the father's place on his death, as head of the family.⁶ (2) An offer of the poorhouse

¹ Craig v. Greig and M'Donald, July 18, 1863, 1 Macph. 1172, 35 Scot. Jur. 670.

² Hay v. Thomson, Feb. 6, 1856, 18 D. 510, 28 Scot. Jur. 191; Cairns v. Adamson, Feb. 28, 1863, 1 Macph. 452, 35 Scot. Jur. 286.

³ Craig v. Greig and M'Donald, *supra*, Lord Justice-Clerk's opinion.

⁴ Craig v. Greig and M'Donald, *supra*, Lord Ormisdale, p. 1189, 35 Scot. Jur. 1194.

⁵ Fraser v. Robertson, June 5, 1867, 5 Macph. 819, 39 Scot. Jur. 435; *nan v. Waite*, June 28, 1872, 10 Macph. 908, 44 Scot. Jur. 496.

⁶ Ferrier v. Kennedy, Feb. 8, 1873, 11 Macph. 402, Lord Deas, 40 Scot. Jur. 274.

to this pauper before he attained puberty, and in that case he must
 id to have been pauperised as a pupil, in which circumstances*the
 h of his mother's settlement was liable.

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THE JUSTICE-CLERK.—In this case the pauper was born on 5th May 1860 in
 parish of Nigg. He therefore attained puberty on 6th May 1874. In
 1874 he was allowed out-door relief in the parish of Rosskeen, where
 his mother resided. The question is, whether his birth parish, Nigg,
 or Ferrier, the parish of his mother's derivative settlement, is to be liable in
 to the parish of Rosskeen for the period of his chargeability.

As illegitimate, as long as he was in pupillarity the parish of the pauper's
 birth was the parish of settlement of his mother. The mother here was
 married to another man than the father of the pauper, so she took the
 settlement of her husband, and although that husband died before this child
 attained puberty that cannot be of any moment.

An ordinary case, where a legitimate child lives in family with its father
 and the father dies while it is still a pupil, on attaining the years
 of majority the child is forisfamiliarised. That is the case of *Craig v. Greig* and
 the decision which is of the greater importance because there was a
 dissenting opinion, which caused the point to be most carefully considered;
 in questions of this kind it is chiefly important to discover what has been

ingeniously argued in this case that as the child was illegitimate the
 settlement of his mother's husband could have no effect in forisfamiliarising him, and
 the decision of *Greig v. Macdonald* did not apply. But the mere fact of there
 being such thing as *patria potestas* in the case of an illegitimate child brings
 the case more clearly under the general rule, that where a child attains the
 age of majority, and becomes a *minor pubes*, the parish of his birth becomes his
 parish, and he loses the derivative settlement which he had during his
 pupillarity.

In the case of *Ferrier*, Lord Deas doubted whether, in the case of a father
 dying and leaving the mother as head of a family of pupil children resident
 with her, the children would become forisfamiliarised by the mere fact of attain-
 ing majority; but in this case there is no necessity for considering that ques-
 tion, as the pauper was not resident with his mother when he became charge-
 able.

It is said that this pauper, at the age of eleven, received an injury, which has
 rendered him incapable of maintaining himself, and it was argued with
 much force that that injury occurring in pupillarity was similar to lunacy or
 idiocy, and prevented the pauper acquiring a settlement for himself, and that
 his settlement must continue that of his mother. I do not think that is so.
 The incapacity of a lunatic or imbecile to acquire a settlement is not because he
 is unable to support himself, but because he has no mind, and can do nothing
 to acquire a settlement.

On the whole matter, I think we should unsettle the law if we answered these
 questions otherwise than the first in the affirmative and the second in the nega-

THE LORDS.—It has been authoritatively settled in the case of *Craig v.*
Macdonald, 18th July 1863 (1 Macph. 1172), that the settlement

No. 81. of a pauper boy seventeen years of age, whose father died when he was in pupillarity, was his own birth parish, and not the birth parish of his father, although the latter had been the pauper's settlement so long as he was in pupillarity.

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The only material difference between that case and the present is that in the former the pauper there was a legitimate child while here he is an illegitimate child. But to see how this difference can be held to affect the question to be disposed of. A legitimate child takes the settlement of his father so long as he is in pupillarity; but in the case referred to, of *Craig v. Greig and M'Donald*, it was determined that his own birth parish becomes his settlement immediately on attaining the age of puberty, the father having previously died. Now, in the place of the father having died while the pauper was in pupillarity, in the present case the law he had no father, and consequently he had for his settlement from the beginning the birth parish of his mother; but I can see no reason why it should continue to be his settlement after he attained the age of puberty, more than that the birth settlement of the father should not have continued to be the settlement of a legitimate son after he had attained the age of puberty, as was determined in the case of *Craig*. The *patria potestas*, or paternal authority, never existed in the present case, and in the case of *Craig* it had not even existed while the pauper was still in pupillarity. In both cases, however, the pauper's mother survived the date when the pauper attained the age of puberty, and was alive when he became chargeable; and in both, also, the pauper was to have been, for some time before he became chargeable, unable from physical weakness to maintain himself, and was to some extent supported by his mother, but in neither does it appear that the pauper was afflicted with mental incapacity.

In these circumstances, I feel myself bound to hold that the pauper in the present case, on his attaining the age of puberty, lost his mother's settlement, and therefore that the first alternative question submitted to the Court must be answered in the affirmative, and the second in the negative.

LORD GIFFORD.—I am of the same opinion, and I rest my opinion exclusively upon the case of *Craig v. Greig and M'Donald*, which was a judgment of the whole Court, and which I think virtually decides the present case. In the case of *Craig v. Greig and M'Donald*, a father, who had no residential settlement, but whose birth settlement, died leaving a pupil son. This son survived pupillarity, and at the age of seventeen became chargeable as a pauper, and the majority of the whole Court held that the son was forisfamiliated, had lost his father's settlement through his father, and had acquired, at the date of becoming chargeable, a new settlement in the parish of his own birth. I cannot distinguish that case from the present. Here the father, instead of being dead, is entirely unknown to the law, the pauper is regarded as *filius nullius*, and he certainly never was under the *patria potestas*. Now, although an illegitimate child, while in pupillarity follows his mother's settlement, this does not apply when the child has attained the age at which, and is in circumstances in which, he could earn his own maintenance. If after this he becomes a pauper without having acquired a residential settlement, then I think it is the parish of his own birth, and not his mother's birth, which is liable.

There was a question raised as to whether the chargeability of this pauper should not draw back in point of time to the date of the offer to receive

the poorhouse. An offer of that sort, however, will not fix chargeability, unless it be accepted. Such an offer is in fact often used as a test as to whether a pauper really requires parochial relief or not, and if the offer is rejected this is taken as proving that no chargeability has arisen.

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THE COURT pronounced this interlocutor:—"Find (1st) that the pauper, George Ross or Pirie, is chargeable on the parish of Nigg as the parish of his birth; (2d) that he is not chargeable on the parish of New Deer, the parish of his mother's settlement: Find the party of the second part liable in expenses," &c.

STUART & CHEYNE, W.S.—MACGREGOR & ROSS, S.S.C.—Agents.

THOMAS WOODHEAD, Pursuer.—*Sol.-Gen. Macdonald—Moncreiff.*
GARTNESS MINERAL COMPANY, Defenders.—*Asher—Mackintosh.*

No. 82.

Feb. 10, 1877.
Woodhead v.
Gartness
Mineral Co.

Personal Servant—Reparation—Master's liability for fault of servant.—By a majority of seven Judges, *diss.* the Lord Justice-Clerk), that the rule which imposes upon a master responsibility for injury caused by the fault of a servant, while employed in his service, applies only in cases where the person injured is a stranger, not connected with the work in which the servant is engaged, and that in other cases the master is only responsible for personal

Contract Servant—Reparation—Common Employment—Coal Mines Regulation Act, 35 and 36 Vict. cap. 76.—A miner in the employment of a contractor driving a level in a mine belonging to a company, whose manager and assistant manager were in charge of the mine, was killed owing to the negligence of the underground manager, who was admittedly a competent person. The case was conducted under special rules in compliance with the Coal Mines Regulation Act. In an action of damages at the instance of the miner's father against the company, *held* (by a majority of seven Judges), that the company was liable, as the miner, by becoming a member of the organisation of the company, taken upon himself the risk of injury from the fault of other members of the company for redress except against the person in fault—(*diss.* Lord Justice-Clerk) who held that the company were responsible for the proper execution of their part of the work, by their servants, to the contractor and his

Observation (per Lord President) that in cases of common employment the employer is free from responsibility, not because the injured and injurer are both his own hired and paid servants, but because he is not personally in fault, and that he warranted the injured workman against the perils of the work.

Observations on the rules culpa tenet suos auctores, and qui facit per alium tenetur.

Reparation.—*Observed (per Lord Justice-Clerk)* that, as it is now the law, however independent a contract may be, if the work is a common one, the contractor cannot be made liable unless his servants be incompetent or his supervision insufficient, an issue should not be allowed unless there are averments in support of either of these points.

THOMAS WOODHEAD, miner, Airdrie, raised an action of damages against the Gartness Mineral Company, concluding for £1000 as damages due to him by them as having caused the death of his son, David Woodhead, a miner, in their pit No. 2 at Airdrie on 19th July 1876.

2D DIVISION,
with four
consulted
Judges.
1.

The defenders pleaded that the accident was not caused through their negligence.

The case was tried before the Lord Justice-Clerk and a jury on 22d July 1876, on an issue as to whether the death of David Woodhead

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occurred through the fault of the defenders. The facts of the case as appeared from the evidence led were as follows:—In June 1875 Gartness Mineral Company had sunk their pit No. 2 to the depth of working level, east and west. Having to make some alterations at pit-head they discharged their miners, of whom David Woodhead one, but at the same time they entered into a contract with two men Samuel and George Gardner, to drive the east level—the west being already exhausted—at fixed rates per ton for coal and per fathom for cutting roads, &c. This contract was signed on 22d June 1875, the Gardners commenced working under it on 24th June with six miners employed on three shifts of eight hours each. David Woodhead was one of the miners so employed by the Gardners. At the same time the company entered into another contract with a different contractor to continue the sinking of the shaft of the pit, and these two operations were conducted simultaneously. The pit shaft was divided by a vertical partition, the north division being used by the miners employed in the east level, and the south division by the sinkers. At the west level the miners' division of the shaft was boarded over so as to form a cage-seat for the cage to rest upon when it came down. The shaft in which the cage worked nearest to the coal face was distant four feet from that face, the flue of the furnace coming between the cage and the shaft. This open space at the side of the shaft and between the cage and the shaft was partially covered by a plank five feet long, and nine inches broad, which formed a connection along the side of the shaft between the east and west levels. The rest of the space consisted of an opening five inches wide for ventilation, and a ledge a few inches high along which it was just possible to walk. The miners were in the habit of crossing from the east to the west level by the plank above mentioned when they went to breakfast at the furnace at the west level, or to go into the cage from the west side, or to put hutches on to the cage at the west side. As the sinkers were in the pit for sixteen hours out of twenty-four, full hutches were only raised to the pit-head when the sinkers were away, and so full hutches used to accumulate at the pit-head and were transferred from the east level to the west to await the sinkers being raised.

The Gartness Company had an underground manager or agent named Colin Beveridge, who was employed in the various pits of the company looking after the works. On 19th July the contractor for the shaft applied to have the shaft better ventilated, and Beveridge, who

* "Gartness Colliery, 22d June 1875.—I hereby offer to drive the east level (double or treble shifting the same when required) a distance of 10 fathoms, 6 feet wide, and to brush to sandstone rib a height of about 4 feet for the sum of 7s. per fathom, and 2s. per ton for coal (clean) delivered on the cage at the pit-bottom; also to drive your dook a distance of 10 fathoms (double or treble shifting when required) 6 feet wide, and brushing to sandstone rib a height of 4½ feet or thereby, for the sum of 10s. per fathom, and 2s. per ton of clean coal, delivered on the cage at pit-bottom; also to put places off the level at 3s. 6d. per fathom, and 2s. per ton for clean coal delivered on the cage at pit-bottom.

"I likewise agree to put on a bottomer, you allowing me 2s. 6d. per fathom the same; and I further agree to brush and keep the working-places at the level (overhead) of output, the coal from level and dook excepted.

"These rates to be increased or diminished ten per cent for every fall of rise or fall on the wages during the contract.

"Messrs The Gartness Mineral Company (Limited)."

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ers of Ormiston, the manager of the pit, proceeded, in order to create No. 82.
 after draught, to take up the plank above mentioned which covered
 space at the side of the cage between the east and west levels. Feb. 10, 1877.
 rly after this was done the miners on the shift at work in the east Woodhead v.
 came to the pit-bottom to be taken to the surface, and when David Gartness
 Woodhead was proceeding as usual, in ignorance of the plank being re- Mineral Co.
 moved, to cross to the west level in order to get in at the west side of the
 he fell into the uncovered hole and down the shaft, a distance of
 it ten fathoms, and was killed.

was proved that copies of special rules framed in accordance with
 on 52 of the Coal Mines Regulation Act, 35 and 36 Vict. cap. 76,
 posted up in the pit, and that David Woodhead had signed a copy
 the rules. The pay-sheets between the Gardners and the Gartness
 Company contained certain deductions from the amounts paid for
 "mid" and "doctor." The Gartness Company adduced evidence to
 show that it was a common practice for coalmasters to let certain
 in the mines to contractors, who employed and paid their own
 men; and that it was also common for individual miners to employ
 their own drawers—indeed that that was the most common arrange-
 ment. School fees and medical attendance were in these cases kept off
 the contractors or off the miners, and in regard to school fees and every-
 else the drawers were treated as workmen in the pit exactly the
 same as the others. The parties admitted that Colin Beveridge was a
 competent person for his duty, and that the appointments of the colliery
 were sufficient. At the time when the accident occurred no bottomer
 was engaged by the Gardners, but the defenders averred that Samuel
 himself acted as bottomer, and that they had credited them with
 accordingly. Evidence was led to the effect that if Gardner was
 as bottomer he knew of the plank being removed, and should have
 warned Woodhead of the risk he ran.

The defenders produced at the trial special rules framed under the
 Mines Regulation Act," and founded upon the 52d section of that
 Act in the terms of many of the special rules, as shewing that all the
 men in the mine were under the control of the owners, and that they
 were engaged in a common work.*

The following were the section of the Act and the special rules particularly

in 36 Vict. cap. 76, sec. 52—"There shall be established in every
 mine in which this Act applies such rules (referred to in this Act as special
 rules) for the conduct and guidance of the persons acting in the management of
 the mine or employed in or about the same, as, under the particular state and
 circumstances of such mine may appear best calculated to prevent dangerous
 accidents and to provide for the safety and proper discipline of the persons
 acting in or about the mine, and such special rules, when established, shall
 be observed by the inspector who is inspector of the district at the time when
 they are established, and shall be observed in and about every such mine
 in the manner as if they were enacted in this Act.

Every person who is bound to observe the special rules established for any
 mine in contravention of or fails to comply with any of such special rules
 shall be guilty of an offence against this Act, and also the owner, agent, and
 manager of such mine, unless he proves that he had taken all reasonable means,
 having regard to the best of his power enforcing the said rules as regula-
 ting the working of the mine so as to prevent such contravention or non-
 observance, shall each be guilty of an offence against this Act."

Rules.—"In these special rules the word 'agent' means a person having,
 by the owner, care and direction of any mine, or of any part thereof, and

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"The Lord Justice-Clerk charged the jury, and gave the following directions:—

"1. That it is not a sufficient ground in law to exclude liability

superior to the manager; the word 'manager' means the certificated manager of the Act, and includes the plural as well as singular; the word 'overman' means a person employed and acting under the manager, and includes plural as well as singular; the word 'miners' means every person employed in the mine, in cutting, or excavation, or removal of coal, ironstone, shale, fire-clay, or other minerals, metals, or materials.

"2. Generally the mine (or division of the same, when divided in terms of the statute) to which the manager has been appointed, shall be under the control and daily supervision of the manager, whose duty it shall be to carry out and see carried out the various provisions of the Act, so far as incumbent on him, or on those acting under his control and directions, and to see that sufficient materials and appliances are always provided for the proper carrying out of all necessary operations.

"3. Subject to the control and supervision of the manager the whole of the operative details shall be under the care and charge of the overman. The overman shall see that the workmen of every class, in their several departments, discharge their duties; and shall receive and attend to all reports made to him as to the state of repair of the air-courses, machinery, mid-wall, trap-doors, roads, and working-places. He shall cause remedies to be provided when required, and shall see the general and special rules faithfully and vigorously carried out, and he shall have power to hire and discharge workmen.

"5. He shall attend to the ventilation, in terms of general rule No. 1, and the observance of the other general rules in sec. 51, so far as these, from their nature, can be observed by himself, or fall to be observed by others under his charge.

"9. The pit-headman, during the several shifts, if more than one, shall be subject to the control and supervision of the manager, have charge of the workmen employed about the pit-head, and each workman shall act under his direction. He shall observe that at all times there is sent down the pit a stock of timber for props and other necessary purposes, for the use of the miners and other workmen, and report to the manager if at any time he observes, or is reported to him, that there is a deficiency of such timber or other articles. He shall superintend and direct the safe removal from the cage of all loaded timber arriving at the pit-head, and see to the safe replacing of the return timber in the cage. He shall be in attendance in the morning, or at such other time of the day as the miners' shift commences, and shall see that no person is allowed to go upon the cage until the engineman has ascertained and reported to him of so doing, in terms of special rule 16. He shall regulate the number of men descending at a time, taking care that not more than four to a single cage, or eight to a double cage, shall ride on such cages respectively, and no cage shall be used without a hutch.

"10. The pit-headman (in absence of some other person specially appointed for the purpose, and independently of the manager or overman) shall, at least in every twenty-four hours, carefully inspect the ropes, chains, and pit-head frame, and other apparatus used for the lowering and raising of cages, so far as exposed to his observation; and if he discovers, or becomes aware of, any defect or weakness likely to produce danger, he shall stop the lowering of men or materials until such defect or weakness be remedied. He shall also be careful to prevent the fall of any stone, coal, or other material into the shaft from the surface, and shall communicate to the manager any necessity for a skilled person being employed to rectify any defect in the shaft, ropes, chains, pit-head frame, and other apparatus.

"28. It shall be the special duty of the roadsman, in their different positions, if more than one, to observe that an adequate supply of timber for props and other necessary purposes is always ready at the place where the miners

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of the defenders for the negligence of their servant, Colin Beveridge, Beveridge was a competent person, and that the colliery was well nited, if the deceased was not a fellow-servant with Beveridge under defenders, but was the servant of an independent contractor.

2. That on the terms of the contract, No. 7 of process, the employers deceased were not servants of the defenders, but were independent actors.

3. That the provisions of the Mines Regulation Act do not create the ion of master and servant between the mineral owner and the ser- of an independent contractor under a contract for part of the work e mine.'

and his Lordship gave these directions 'subject to the opinion of the and with liberty to the defenders to move the Court to enter the in their favour, although returned against them, if the Court shall opinion that these directions are erroneous, and that the defenders vly entitled to a verdict.'

To which directions the defenders excepted, and called upon the Lord ice-Clerk to give the following directions to the jury :—

1. If the jury are of opinion that the defenders exercised due care in the Beveridge, and furnished him with suitable means and re- for the performance of his duties, the defenders are not liable to

for the use of the miners in supporting the roofs and sides of their work- ces, and to report to the manager or overman if they shall observe any f such timber. For the purpose of carrying out this rule roadmen are red to call upon drawers, putters, and drivers, whether employed by the e miner, to convey such necessary timber from the pit-bottom, or other of general delivery, to the working-places in connection with which they oyed.

2. Such miners and other workmen are, and shall be, generally subject control and orders of the agent, where one has been appointed, and of nager and overman ; but they shall also be subject to any directions e roadman, engineman, fireman, or bottomer may give, in their re- e departments, for the purpose of preventing the workmen from infringing ausing them to comply with any of the provisions of the Act, or of the d or special rules.

3. If, while at work, or at other time, any miner or workman shall dis- or be informed of, the existence of any obstruction in the ventilation, or ion, or impurity in the air of the mine, or the existence of any defect in le, roofs, or in any other parts thereof, he shall be bound to give instant ation of the circumstances to the manager, overman, roadman, or fireman, e these defects may be remedied, and danger therefrom averted.

4. As a matter of common safety, miners, drawers, and all other workers all observe, or who shall come to the knowledge of any damage to or de- r in any road, roof, or air-course, or in any roof, permanent or temporary e, or in the shaft, buildings, cube, or other appliance or work, devised for g, maintaining, and promoting the effective ventilation of the mine, shall nd instantly to communicate such damage or deficiency to the manager, m, roadman, fireman, or other person in charge, so that the same may be ith repaired or rectified.

5. In like manner, every miner, drawer, or other workman, who shall ob- r come to know of any defect or flaw in the cage, ropes, or chains, or part of the engine, machinery, and gearing, used in or about the mine, y the sufficiency thereof may be impaired, shall be bound forthwith to nicate the same as above.

6. No miner or other workman shall be permitted to introduce into the ny stranger or person employed by them on any pretence, without the : of the owner, agent, or manager."

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the pursuer for the consequences of the accident, although the jury should be of opinion that the accident was caused by the fault of Beveridge.

"2. If the jury are of opinion that the defenders exercised due care in selecting Beveridge as overman or underground foreman, and the Messrs. Gardner as contractors for the work specified in the contract, and furnished the said persons with suitable means and resources for the performance of their work, the defenders are not liable to the pursuer for the consequences of the accident, although the jury should be of opinion that it was caused through the joint fault of Beveridge and both or either of the Gardners."

"But the Lord Justice-Clerk declined to give any of the directions to the jury, to which ruling the defenders excepted."

The jury found unanimously for the pursuer, with £160 of damages.

The Gartness Company presented a bill of exceptions, and asked that the verdict be entered up for them.

The cause was argued before the Second Division in November, 1876, and was on 11th December sent to seven Judges.

Argued for the Gartness Company;—(1) Woodhead having entered the mine, which was under the special rules framed in accordance with the provisions of the "Coal Mines Regulation Act," must be held to have been in the same employment with Beveridge, the underground foreman who represented the owners. As by statute every mine must be managed as one organisation, and it is illegal to treat it otherwise, and an official is set over every one in the mine, such a relation was established between all the workers in the mine as to make them all fellow-workmen. The special rules were the law of the mine, and that being so, none of the persons employed in the mine could be held to be strangers to another. The test was, were they all under the control, not necessarily of the same master, but of the same employer. Here all in the mine—overman and miners alike—were subject to the control of the owner of the mine. All matters, such as when the miners were to go to work, carry it on, or leave off working, were under the control of the owner of the mine. The principle was thus let in that where such control existed it created the relation of common employment, and the employer was not liable for injury to the workmen.¹ This had been so far that where such a right of control existed the owner was held liable for the faults of the servant.² The right of control in contracts such as the one averred here out of the category of independent contract,³ and the employer with the reserved right of exercising control became liable for injuries caused by the contractor or his servants. Woodhead in becoming a worker in the mine undertook all the risk of the incident to such employment, and was therefore not entitled to compensation against the owner of the mine for injury caused by a fellow-workman in the mine.⁴ If the master supplied good materials and an efficient substitute for himself to look after the mine—both of which it was

¹ Wigget v. Fox and Henderson, Feb. 20, 1856, 25 L. J. Exch. 188.

² Sadler v. Henlock, Jan. 22, 1855, 24 L. J., Q. B. 138.

³ Stephen v. Thurso Police Commissioners, March 3, 1876, ante, p. 535.

⁴ Bartonshill Coal Co. v. Reid, and Bartonshill Coal Co. v. M'Gill, 17, 1858, 20 D. (H. L.) 13, 3 Macq. 266, 30 Scot. Jur. 63; Abraham v. Houlds, Jan. 12, 1860, 5 Hurl. and Nor. 143; Degg v. Midland Railway, Feb. 21, 1857, 1 Hurl. and Nor. 773; Wilson v. Merry and Cunningham, 29, 1868, 6 Macph. (H. L.) 84, 40 Scot. Jur. 486.

done here—then the community of interest among the workmen knew the risks they were undertaking would bar any claim against master. Apart from these points there was evidence in the case to show that Gardner, the direct employer and fellow-workman of Woodhead, was to blame for the accident, and that had been held in England sufficient to exclude all right to recover.¹ This question had been considered in a recent Scotch case,² but it had been left an open ques-

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posed for Woodhead;—To relieve the owner of a pit from such a claim as this it was necessary (1) that the men should have been hired by the same person; and (2) that they should be employed in a common work. Woodhead was certainly not hired by the same master as Beveridge, though to a certain extent it might be said that he was employed in a common work. The Legislature never intended the special rules to have the effect contended for by the defenders. If they had that effect they would completely alter the rights of parties in such matters. These rules are compulsory under the statute, but they were only framed for the purpose of securing the safety of all the persons in the mine. Such control was reserved to the owners and their representative was not confined to the mechanical part of the work, such as excavating the coal. Such a control as that was necessary to constitute such a relation was contended for.³ The carrying out of a contract for the driving of a level and the general supervision of the mine so as to avoid explosions of gas or roofs falling in were very distinct things. The power of dismissal of workmen conferred on the overman was limited to cases of recklessness or disobedience by which the safety of the mine and the miners generally would be endangered. The contract between Gardner and the Gartness Company was of a different description from those in the cases of *Sadler v. Henlock*, and *Wigget v. Fox and Garton*, founded on by the defenders. This case was almost exactly the same as many already decided in which the injured person had been held entitled to recover against the owner.⁴

Longgood v. Bryan, June 20, 1849, 18 L. J. C. P. 336; *Armstrong v. White and Yorkshire Railway Co.*, Jan. 23, 1875, L. R. 10 Exch. 47.
Lums v. Glasgow and South-Western Railway Co., Dec. 7, 1875, *ante*, p. 215.

Gray v. Currie, Nov. 16, 1870, L. R. 6 C. P. 24; *Reedie v. London and Western Railway Co.*, July 6, 1849, 4 Welsby, Hurl. and Gor. Exch. 244; *Mason v. York, Newcastle, and Berwick Railway Co.*, May 22, 1850, 5 Hurl. and Gor. Exch. 343.

Lean v. Russell, Macnee, and Co., March 14, 1849, 11 D. 1035, and 9. 1850, 12 D. 887, 22 Scot. Jur. 394; *Rapson v. Cubitt*, April 28, 1850, 12 D. 887, 22 Scot. Jur. 394; *Meeson and Welsby*, 710; *Warburton v. Great-Western Railway Co.*, 7. 1866, L. R. 2 Exch. 30; *McCredie v. Denny*, Feb. 22, 1865, 3 Macph. 7; *Scot. Jur.* 277; *Gregory v. Hill*, Dec. 14, 1869, 8 Macph. 282, 42 Scot. Jur. 220; *Calder v. Caledonian Railway Co.*, June 16, 1871, 9 Macph. 833, 43 Scot. Jur. 220; *Wyllie v. Caledonian Railway Co.*, Jan. 27, 1871, 9 Macph. 3; *Scot. Jur.* 220; *Wright v. Roxburgh and Morris*, Feb. 26, 1864, 2 D. 748, 36 Scot. Jur. 371; *Quarman v. Burnett*, 1840, 6 Meeson and Welsby, 499; *Knicht v. Fox*, Nov. 5, 1850, 5 Welsby, Hurlst. and Gor. Exch. 721; *Shiels v. Edinburgh and Glasgow Railway Co.*, July 4, 1856, 18 D. 28 Scot. Jur. 539; *Morgan v. Vale of Neath Railway Co.*, July 4, 1856, 18 D. 28 Scot. Jur. 539; *Lovell v. Howell*, Feb. 16, 1876, L. R. 1 C. P. Div. 556; *Kourke v. Whitmoos Colliery Co.*, May 3, 1876, L. R. 1 C. P. Div. 556; *Maun v. Dames*, Feb. 6, 1867, 36 L. J. C. P. 181.

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LORD PRESIDENT.—This is an action of reparation, raised by the father of a miner who was killed while working in a coal mine belonging to the defendants. The pursuer claims damages from the defendants on the ground that his son was killed through the negligence of a servant of the defendants.

The pit in which the accident occurred was comparatively a new one, but had been sunk only to the depth of the Virtuewell seam of coal. This seam had been wrought to the west for twenty fathoms, at which distance the coal was found to stop. The shaft was being sunk to a greater depth by a party of sinkers, who at the date of the accident had carried their operations ten feet below the working level. In this condition of the mine two miners of the name of Gardner contracted with the defendants through their manager Ormiston to drive the east level of the Virtuewell seam fifty fathoms, six feet wide, and receiving payment at a certain rate per fathom, and so much per ton for coal delivered at the pit-bottom. The Gardners engaged other miners, among whom was the deceased, Woodhead, to work with or under them in performing the contract work. At the time of the accident there were then two sets of men engaged in the mine, one in sinking, and the other, under the direction of the Gardners, in driving the east level. Neither the Gardners nor the men engaged in sinking had any charge of or right of interference with the ventilation or the general arrangements of the mine. Beveridge, a servant of the defendants, was overman or underground manager, and took charge of the arrangements of the mine underground. It is admitted by the pursuer that Beveridge was a competent person for his duty, and that the appointments of the mine were sufficient.

It is in evidence that contracts of the same kind as that which the pursuer had with the defendants are quite common in practice, and that it is a common practice for individual miners to employ and pay their own men, the owner of the pit and his manager having nothing to do with the matter so far as engagement and payment of wages are concerned.

It is not disputed that this mine falls under the operation of the Coal Regulation Act, 35 and 36 Vict. cap. 76, and that special rules were made and duly published to all concerned under sec. 52 of that statute, "for the conduct and guidance of the persons acting in the management of this mine, and for the employment in or about the same, to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in or about the mine."

The duties of Beveridge, the overman, are by rule 3d defined thus—"The overman shall be subject to the control and supervision of the manager, the whole operative part of the mine shall be under the care and charge of the overman. The overman shall be responsible for the workmen of every class, in their several departments, discharge their duties, and shall receive and attend to all reports made to him as to the state of the air-courses, machinery, mid-wall, trap-doors, roads, cubes, and other places. He shall cause remedies to be provided where needed; and shall enforce the general and special rules faithfully and vigorously; and he shall have power to hire and discharge workmen."

Very special and detailed rules are prescribed for the conduct of "miners and other workmen." Among other things it is provided by rule 52 that "all workmen shall be generally subject to the control and orders of the agent, who

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been appointed, and of the manager and overman ; but they shall also be set to any directions which the roadsman, engineman, fireman, or bottomer give, in their respective departments, for the purpose of preventing the men from infringing, or of causing them to comply with, any of the provisions of the Act or of the general or special rules."

persons in the position of the deceased, employed by contractors like the miners, or those contractors themselves, were held to be exempt from any of the special rules, the policy of the statute and the object of the special rules in many cases be entirely frustrated. But that such persons are as much within the provisions of the statute and the special rules as miners and work-employees and paid directly by the owner of the mine, is made clear not by the general purview of the rules, but particularly by a provision in rule 1 for the purpose of carrying out a direction as to conveying wood for use to the working-faces all drawers, putters, and drivers, "whether employed by the owner or the miner," are to be subject to the orders of the roadsman.

The death of the miner Woodhead was caused by the negligence of the overman Beveridge, in having incautiously removed a plank while making an alteration in the arrangement for the ventilation of that part of the mine which at the time occupied by the sinkers.

In reference to this state of the facts, as disclosed in the evidence, the Justice-Clark directed the jury—" (1) That it is not a sufficient ground in law to exclude liability on the part of the defenders for the negligence of their servant Colin Beveridge, that Beveridge was a competent person, and that the deceased was well appointed, if the deceased was not a fellow-servant with Beveridge under the defenders, but was the servant of an independent contractor. And on the terms of the contract, No. 7 of process, the employers of the deceased were not servants of the defenders, but were independent contractors. And that the provisions of the Mines Regulation Act do not create the relation of master and servant between the mineral owner and the servants of an independent contractor under a contract for part of the work in the mine."

The defenders excepted to these three directions, and their exception raises a question of the greatest importance in this branch of the law: Whether the owner of a coal mine is responsible for the negligence of the overman of the mine causing injury to a miner employed and paid wages, not directly by the owner but by a contractor for piece-work such as the Gardners? If this liability attaches to the owner of the mine, its effect and extent must, I apprehend, be the same as if the person injured had been a stranger travelling along a highway ground, injured by an explosion or similar disaster caused by the negligence of the mineowner's servants, employed either underground or at the surface.

Now on this subject has undergone a great deal of discussion during the many years, both here and in England, and I agree with the observation of Lord Colonsay in *Wilson v. Merry and Cunningham* that it has been decided and matured not only by this ample discussion, but also by the constant occurrence of new classes of cases requiring its application. As his Lordship recently remarks,—“The constantly increasing scale in which mining and quarrying establishments are conducted, by reason of new combinations and concentrations of capital and industry, has necessarily called into existence extensive organisations for management, more gradations of servants, more separation of duties, more delegation of authority, and less of personal

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presence or interference of the master. The principles of the law, however, adds, "have sufficient elasticity to enable them to be applied notwithstanding such progressive changes in the manner of conducting business."

As the result of the whole authorities, it appears to me that one of the conditions, subject to which every man must become a member of one of the great organisations of labour, is that he shall take on himself all the perils incident to the work he undertakes, without looking to any one to guarantee him against, or indemnify him for, injury sustained from the occurrence of such perils. This does not interfere with the principle of personal liability for the consequences of personal wrong or negligence, but it excludes notions of what, for the sake of distinction, I shall call secondary responsibility.

I would not have it supposed that this principle is limited in its application to what I have called great organisations of labour. It is equally applicable to smaller establishments, and to every kind of establishment—equally to a common joiner's shop, or to a domestic establishment, where the members of the family, the guests, and the servants, are daily exposed to risks caused by one another. But the principle is more clearly illustrated when considered in its application to the great organisations of mining or manufacturing industry. If two miners are employed and paid by the same master, and while one is hewing at one working face the other by negligence injures the first, the master is not answerable, because it is said they are engaged in a common employment—that is to say, they are engaged in the same work as servants of the master. But if the legal principle were applicable to this case only it would cease to be a principle, and degenerate into a mere artificial and arbitrary rule. It is not because the wrongdoer is, in a technical sense, the servant of the master that the master is not answerable. It is of no moment to the injured workman whether his injury be caused by a servant of the same master or by one who has undertaken some function in the mine upon what is called an independent contract. The injury in either case is the same. The liability of the wrongdoer is the same. But the mineowner is free from responsibility, not because the injured and the injurer are both his own paid servants, but because he is not personally in fault, and has not exposed the injured workman against the perils of the work. On the other hand, if the injury was personal fault of the mineowner in selecting for the work an incompetent person, from whose incompetency the injured workman suffered, the mineowner would be equally liable whether the incompetent person selected by him was a servant or what is called an independent contractor. In all cases his liability must rest on personal fault, and where there is personal fault it will be his by liability.

This reasoning is, perhaps so far, not directly applicable to the circumstances of the present case. But it is, I think, useful in elucidating the principle which all the decided cases must be referred, if the law as now developed and matured is to be reasonable and consistent.

In the present case the injured miner is said to have entered the mine as the servant of the mineowner, but of the contractors, the Gardners; and it is inferred that if a servant of the mineowner injure him by his negligence the mineowner shall be answerable, on the footing that the injured miner is a stranger to the mineowner. If this be so, then the Gardners must be held liable in like manner for the negligence of the miners employed by them. The complaint of any person employed by the mineowner, or of any person

d by an independent contractor, as, for example, in this mine, by the contractor for the sinking of the shaft, an operation carried on simultaneously with the owner's driving of the east level. The result would be to create each squad of men into a distinct organisation, and these separate organisations must, in my view, be taken to be strangers to each other as much as if they were working separate mines. Nay, each miner who employs and pays his own drawer must make a separate establishment, and each miner would be answerable for the negligence of his own drawer; while the mineowner would be answerable as the servant of his who by negligence inflicted an injury on a drawer, but he would be exempt from liability though his servants by negligence killed any one of his miners.

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These results, which appear to me dangerous if not also absurd, are reached by overlooking the great principle, as I venture to call it, that a workman who enters and undertakes on entering a mine all the risks naturally incident to work—a principle which seems to me necessarily to exclude all secondary liability.

When whole persons engaged in a mine form one organisation of labour for one end (however different their functions may be), and are all subject to the same control, exercised by the mineowner or those to whom his authority is delegated. This community of labour and of subjection to control arises from the very nature of the work and from the necessity of providing against danger arising for that purpose the maintenance of discipline. But it is systematically made even more directly binding on all by the statute and the special rules enacted under its authority. The persons employed in a mine, superior or inferior, contractor and workmen, of whatever class or whatever their duties may be, are by those rules erected, so to speak, into one community, and all their relative duties assigned to them, and who owe each to his fellow-workman many duties which it would be impossible to enumerate. To such a community as this, and to its individual members, the mineowner is under well defined obligations, but to hold that his obligations and liabilities to individual workmen depend on whether they are technically his servants or are employed by a contractor for piece-work in some limited portion of the mine, would be inconsistent with legal principle, would also, I think, introduce confusion where it is desirable that everything should be as clear as possible; and where the statute makes the interdependence of the whole community and their necessary reliance on one another for safety the regulating principle of their association and the basis of all the special rules for their conduct.

It seems to me that the principle which I have been endeavouring to expound has been mainly involved in the consecutive judgments of the House of Lords in *Hill Coal Company v. Reid* (3 Macq. 266), of the Second Division of this House in *Wright v. Roxburgh and Morris* (2 Macph. 748), and of the First Division of the House of Lords in *Wilson v. Merry and Cunningham* (5 Macph. 807, and 6 Macph., H. L., 84). In the last-named case the present Lord of Session said—"I do not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is in any technical sense the fellow-workman or *collaborateur* of the master."

In the majority of cases in which accidents have occurred the negligence has no doubt been the negligence of a fellow-workman. But the case of the contractor-workman appears to me to be an example of the rule and not the rule.

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In the Bartonshill case the injured man was a miner working below ground. The wrongdoer was the engineman at the pit-head charged with working the engine for letting down and bringing up the miners to and from their work. In Wright v. Roxburgh and Morris the injured men were ordinary miners, and the wrongdoer was underground manager charged with the ventilation of the mine, whose fault consisted in an imprudent and reckless act committed in a different and lower level from that in which the injured men were working. In V. v. Merry and Cunningham the wrongdoer was underground manager, and not been in the employment of the mineowner at the same time as the injured miner. In all of these cases it was contended that the injured and the wrongdoer were not fellow-workmen. But this technicality was entirely disregarded, the risk from which the injured parties suffered was nevertheless held to be one of the risks of the mine which all persons employed in and about the mine ran on themselves without any recourse against the mineowner.

It was suggested in the course of the pursuer's argument that since in these cases occurred judgments have been pronounced by both Divisions of the Court inconsistent with the interpretation now put on these prior cases; and it will be proper, therefore, before I conclude, to examine these more recent judgments.

In Wyllie v. Caledonian Railway Company (9 Macph. 463) the pursuer was engaged in delivering cattle to the railway company, to be carried by rail. He was acting on behalf of his master, to whom the cattle belonged, and was assisted by the servants of the railway company in putting or driving the cattle into trucks, when a train coming into the station struck against the trucks in which the cattle were being put and injured the pursuer. The accident occurred due to the fault of the servants of the railway company in charge of the trucks which struck the trucks. The pursuer sued the company for damages. The defence was that the pursuer was a volunteer in the service of the railway company for the time, and so was engaged in a common employment with the persons who caused the injury. The First Division held that the pursuer was in the same position as if the cattle had been his own, that he was giving to the railway company's servants were receiving, delivery of the cattle under a contract of carriage, and therefore repelled the defence. The pursuer, who was as much a stranger to the railway company as if he had been bringing an invalid lady into a first-class passenger carriage and had been injured by the sudden and violent motion of the carriage caused by the fault of the company's servants.

In Calder v. Caledonian Railway Company (9 Macph. 833), the pursuer was a British Railway Company, having running powers over a portion of the

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can line, duly despatched a train in terms of arrangements between the companies, which was driven by the pursuer, and which came into collision with a Caledonian train on the Caledonian line through the fault of a pointsman in the Caledonian company's service, in consequence of which the pursuer was injured. It was held by the First Division that the North British engine-driver (pursuer) was the servant of that company only, and the pointsman being the servant of the Caledonian company only, the former was a stranger on the Caledonian line such as a person driving a carriage along a turnpike road is a stranger to the trustees and their servants, and that the Caledonian company must be as answerable for injury done to the pursuer by their servants as the trustees of a turnpike road would, in the case supposed, be answerable for the upset of a stage by the fault of their servants.

In the case of *Adams v. The Glasgow and South-Western Railway Company* (215) was in its circumstances substantially the same as the last-mentioned case, and my brother, the Lord Justice-Clerk, in giving judgment observed—That the fact that the latter company had the right of running over the land of the former, and was subject to the rules of the former in doing so, had no effect in making the deceased the servant of that company than the use of a private wharf or pier, or the use of a private road, would convert the use of it into servants of the proprietor."

It is, therefore, none of these cases in the least degree disturbs or touches the principle on which, I think, the case now before us ought to be decided.

There is a case of *Gregory v. Hill* (8 Macph. 282) which stands in a quite different position. Whether the facts of that case may be so represented as to justify the decision consistently with the principle established by *Stonhill* case, by *Wright v. Roxburgh*, and by *Wilson v. Merry and Graham*, it is not of much use to inquire; for I am bound to say that the judgment adopted by the Judges then sitting in the Second Division in *Gregory v. Hill* are not reconcileable with the principle which I have involved in those previous cases. But *Gregory v. Hill* is a single case: and when a question of importance like the present is referred to a court of seven Judges, no single judgment of either Division can be allowed to have exclusive authority, particularly when the single judgment was produced by the Division making the reference to the Court of seven. I am not only justified, but bound, to say that great as is the deference, I willingly pay to the very able and learned Judges who sat in *Gregory* including my brother, the Lord Justice-Clerk, I cannot concur in their

reasons which I have now explained, at greater length than I should have done, but which I hope may be excused by the importance of the case, and my inability to concur in the law laid down by the presiding Judge. On the whole, I am of opinion that the law applicable to the case is well stated in the heads of the directions which the defenders asked his Lordship to give, and which was refused.

JUSTICE-CLERK.—The propositions which I laid down to the jury are in substance two, although they are somewhat expanded in the directions given. The first was that the defenders were liable if the person injured was not the servant of the Gartness company, but was the servant of an independent contractor. The second was that on the terms of the contract in this case Gardner

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was an independent contractor, and that the deceased was his servant, and the servant of the defenders; and that the provisions of the Mines Regulation Act, and the rules of the pit under them, did not affect the relations of parties in this respect.

I remain of opinion that these directions were sound. As to the second, I felt at the trial, and still feel, that this is rather a slender example of an independent contract; and if the judgment now proposed had gone no further than to find that Gardner occupied a somewhat hybrid position, half servant, half contractor, and so was a fellow-servant with Beveridge, I should not have done more than indicate my dissent. But the first of the propositions covers much ground, and the views on which it is challenged are so wide in operation, that holding, as I do, that the point is conclusively settled by a series of adjudicated cases, I think it right to state my opinion a little in detail.

The liability of a master for personal injuries caused to another by the negligence of a servant, depends very much on the measure of care and precaution regards others which the master himself is bound to observe, in the use of his property, or the exercise of his rights. The standard by which this is regulated is not absolute or uniform, but will vary according to the relation which the master has to the thing done—the person who is injured in the doing of it, and the consideration in respect of which it is done. In general, if a man uses his property as to injure a stranger—that is, one who has no connection in or connection with the act itself or him who does it, one who is entitled to be, and doing what he is entitled to do—the liability is absolute; nor does it signify to the person injured whether the act was done carefully or negligently, or whether it was done by a servant or not. The liability consists in the doing of the act itself, and is proved to be a wrong by the act.

On the other hand, and at the other end of the scale, are instances where the known risk is voluntarily encountered, not in the discharge of any obligation, but on a footing purely gratuitous. In cases such as these the liability may be reduced to the lowest measure of care or precaution which a prudent man might be expected to take for himself, or which in the circumstances might have been reasonably contemplated; and sometimes it may appear altogether.

The present case relates to a class distinct from either of these; and I discard altogether illustrations drawn from them, as throwing no light on the question before us. We have to deal with a case in which the parties are not strangers to each other, because both were participant in the act. Neither was the risk encountered gratuitously. It was encountered in the execution of an onerous contract for a valuable consideration. When two persons enter into a mutual independent engagement that a certain operation shall be performed, either by both jointly or by one on the premises of the other, that for a valuable consideration, neither can complain against the other of the accidental consequences of the act, for they have both agreed that it shall be done. But each is bound to the other that his part of the contract shall be carefully and skilfully performed, and is of course liable for negligent or defective performance; and this liability is incurred to every one who is engaged in the execution of the contract for the behoof of the other party. The negligence of one of the parties to the contract, in its execution, is an incident of the contract, but a breach of it. The law on this head is well settled, and the master's liability flows directly from the obligation to perform the contract.

contract. Nor can it make any difference, as has been often decided, whether the contract is to be performed by both parties jointly, or by one on the premises or other. In the latter case the party to the contract who comes on the premises of the other undertakes for himself and his servants that they shall carefully; and the other undertakes that, as far as he and his servants are concerned, the premises shall be safe for the contractor and his men. Of all here is no room for doubt.

It is in this class of cases,—namely, cases in which the risk is encountered in the execution of an onerous contract,—that an exception has been admitted in England, and has been extended to Scotland since the *Bartonshill* case, founded on the peculiarity of the contract of service. It is held that when a master employs several servants to work for his interest he does not come under any obligation for the acts of the fellow-servants towards each other beyond taking reasonable care that the servants are competent for their work, thus removing them out of the class of mutual contract, and reducing it to the category of that in which the risk is voluntarily and gratuitously encountered. This exception has been defended on various grounds; sometimes it has been said that the consideration of the master's liability is the consideration of the wages given, sometimes that the servant knows of his risk, and must be held to undertake the contract. These are not legal principles, but legal inferences. The former is the consideration for the stipulated service, whatever that may be; the fact that a person knows of the risk, and voluntarily encounters it, may not lead to the inference that he undertakes it, according to the nature of the relation to the wrongdoer or his master. These, however, are not representative principles so much as deductions drawn from the peculiarities of the contract of service. But whatever be the foundation of this exception, of which I say a word afterwards, the exception and its limits and definition have long been settled by a uniform course of decision.

I have no intention of going over the well-trodden ground of authority on this subject; but as it seems to be supposed that the observations made in the House of Lords in the case of *Wilson v. Merry and Cunningham* in 1868 have shadowed out some new principle applicable to such cases, I shall select my illustrations from cases for the most part subsequent in date to that judgment. I shall also define the exception from the reported opinions of two high judges in two very recent cases. The case of *Howells v. Landore Steel Company* (R. 10 Q. B. 62) was decided in 1874, six years after that of *Wilson v. Merry and Cunningham*. It raised precisely the same question as occurred in that case, namely, whether a colliery manager was a fellow-servant with the workmen employed by him. There could have been no dispute that both were occupied in the same undertaking, and belonged to the same community, whatever that may be; and if there is any foundation for the defenders' contention here this would be conclusive of the case, and it was immaterial whether the men were fellow-servants or not. Lord Blackburn, however, did not so treat it. It had not occurred to him that the judgment in *Wilson v. Merry and Cunningham* went to the law applicable to fellow-servants, and he so applies the precedent. "It is a rule of law," he says, "that a master who employs a servant (not an independent contractor) is responsible for the negligence of that servant in matters in which he is negligent; but then there is this exception, which has been established by a long course of decisions, that with regard to a fellow-servant the master is not held so responsible, because this negligence is taken as one of the ordinary risks which

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No. 82. the servant contemplates and undertakes when entering into his employment. Applying this clear statement of the law, and the exception, to the case before him, Lord Blackburn proceeds—"It is essential for the plaintiff's case to show that Thomas (the manager) was a servant of the defendants, and I think he was; and I cannot see anything in sec. 26 to make him, although a servant, not a fellow-servant." Of the decision in *Wilson v. Merry and Cunningham* he says—"The decision of the House of Lords is distinct at least as far as this goes, the fact that the servant held the position of vice-principal does not affect the non-liability of the master for his negligence as regards a fellow-servant."

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Now, this, although delivered in an English case, is high and conclusive authority to this extent, that it represents the matured opinion of the Common Law Courts in England. If sound, these views seem to establish these three propositions:—First, that the liability of the master is the rule, and exemption the exception. Secondly, that the exemption does not cover the case of two persons working in the same occupation, if they are the servants of different masters; and Thirdly, that the Court of Queen's Bench had not discovered in the case of *Wilson v. Merry and Cunningham* any rule under which common occupation without common service would have liberated the master of the wrongdoer, because otherwise the question decided could not have arisen.

The same lesson may be learned from the still more recent and not less authoritative exposition of the rule in the case of *Rourke v. Whitmore & Company*, May 3, 1876, L. R. 1 C. P. Div. 556. The facts of that case are in some analogy to the present. In that case a mining company, as before, was working their colliery by a contractor, and they put the services of the contractor's engineer, who was their servant, at the disposal of the contractor. The engineer slept at his post, and one of the contractor's men was injured. Now, in the present case we have before us, excepting that the engineer was directly obeying the contractor's orders. Both were engaged in the same occupation at the time of the occurrence, and there could not have been a more favourable opportunity for giving effect to the supposed exception built on *Wilson v. Merry and Cunningham*. But Lord Coleridge found no novelty in the law applicable to the case. He said—"The case raises a question which it is always difficult to decide, though the principles on which it depends are well established. The difficulty arises from the difficulty of ascertaining whether the facts bring the case within one or other of two well-defined rules." He then states the facts, and concludes—"If, under these circumstances, the plaintiff and Lawrence were both in the employ of Whittle, the plaintiff is, upon the principle laid down in *Prior v. Fowler* and several subsequent cases, debarred of his remedy. If Lawrence was not in Whittle's employ, then the defendants are liable." This is precisely the law laid down and excepted to in the present case, and certainly what Lord Coleridge found no such doctrine as that contended for in the case of *Wilson v. Merry and Cunningham*. Indeed, the opinion quoted is entirely consistent with the existence of any such rule.

The received canon, therefore, requires service under the same master in any case within it. It is also necessary that the injury should have been received while both were engaged in the work of the common service. It has been often held, the latest example being the case of *Lovell v. Howell*, 1876, L. R. 1 C. P. Div. 161.

But when we turn from the exception to the rule, some broad lines of distinction are sufficiently evident and have always been recognised. With

work under the same master they are working in one interest and for the benefit of the same man. They are appointed and paid by the same man; but, it is much more important, they are responsible to the same man, and the same man is responsible for them. I take it that this element in a common contract of service lies at the root of the exception based on it. The same person is responsible for the conduct of the servants towards third parties, and he is responsible to his own servants that each shall be chosen with reasonable care.

In common service each servant represents the same master. But when persons enter into a contract for the execution of work to be done either by servants of both or by the servants of one, there is no such identity of responsibility. Each party to the contract is liable for his own servants, but is not liable for the servants of the other. The servants of each work for the best of their own master, and represent him only. As neither selects the servants of the other, neither can have any responsibility as to their qualifications. First it is fixed, first, that neither is liable for the neglect of the servant of the other party to the contract; and secondly, that each is liable for the neglect of his own servant if the servant of the other is thereby injured.

The first of these points has long been put at rest by separate decisions, applicable to contracts of the nature of that before us—contracts, namely, for work done on the premises of the other party to the contract. The case of *Rapson v. Mees and Welsby*, 710, may be taken as an example of the rest. The defendant of the premises in that case was held to have no responsibility for the gas-servants any more than he would have had for the servants of anyone else. The second point, which is its necessary counterpart—the liability of the contracting party for the negligence of his own servant, if the servant of the other is injured in the course of executing the contract—has been the subject of a number of decisions relating to contracts of all classes, and in every variety of circumstances in which the question could arise. I shall allude to seven of these in the English Courts and four in our own—which have established principles beyond controversy.

First, the well-known case of *Abraham v. Reynolds* in 1860, 5 Hurl. and C. related to a contract of hiring. A corn-dealer hired a horse, cart, and driver as a carrier, and in loading the cart at the warehouse the carter was injured by the fault of the servants of the corn-dealer. Both were engaged at the same time in executing the contract; their occupation therefore was the same, but it was held that the carter was not a fellow-servant, and found the corn-dealer liable for his servant's negligence.

The second case I consider of importance as well as of authority in this discussion is that of *Indermaur v. Dames* in 1868, 36 L. J. C. P. 181, decided in the Court of Exchequer Chamber in England. In that case the doctrine was clearly established by Justice Willes—a very high authority—(1) That one who works for an independent contractor is in a position entirely different from that occupied by a casual visitor; and (2) that where work is contracted to be done by one person on the premises of another the obligation of the latter to take care by him or his servants that the premises are safe is precisely the same as that incumbent on the contractor and his servants to work safely. The case in which the important principles were fixed was a very simple and conclusive example. The plaintiff was a journeyman gasfitter, who was employed by a contractor in the execution of a contract to fit up two patent regulators in the defendant's works. The operation was all but completed, and the plaintiff went

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to the premises to see whether the apparatus was working properly, and through an open trap in the building. The main defence was that the contract was completed, but this was not sustained. The obligation on a person who made a contract for work to be done on his premises, to see that these premises are safe for the persons who are to work on them, is laid down in the most reserved terms both by Mr Justice Willes in the Court of Common Pleas, by Chief-Baron Kelly in the Exchequer Chamber.

Before adverting to the cases in our own Courts subsequent to that of *Indermaur*, all of which affirmed the same principle, I pass over an interval of several years to a case decided in 1875, in which all the authorities were reviewed by the Court of Queen's Bench. The case was one in which, within the limit of compulsory pilotage, a licensed pilot was killed, in the act of going on board a vessel, by the carelessness of the crew in permitting one of the ship's boats to run over him. The Court held the owners liable, on the ground that the pilot was not a fellow-servant with the crew. Lord Blackburn's observations harmonize so completely in all respects with the views I have endeavoured to explain, that I quote the following important passage:—"The law is to a certain extent determined by the case of *Indermaur v. Dames*. There is an obligation on the part of the occupier of property, whether fixed or moveable, to those who are invited, express or implied, to come on that property, to take, by himself and his servants, reasonable care that the person so coming shall not be exposed to an unusual danger. And that obligation extends to the workmen sent by a master to repair part of the machinery. Mr Justice Willes, in delivering judgment in that case, after referring to the undisputed law that there was such an obligation on the part of a shopkeeper to his customer, and that there was no obligation to a servant, proceeds to give the reason of the judgment in those terms—'The class to which the customer belongs includes persons who are not as mere volunteers or licensees or guests or servants, or persons whose employment is such that danger may be considered as bargained for, but who are engaged in a business which concerns the occupier, and upon his invitation, express or implied, to come on the property. In *Morgan v. Vale of Neath Railway Co.*, 33 L. J. Q. B. 260, which was decided in date later than *Indermaur v. Dames*, the reason why a servant cannot sue his master for negligence of a fellow-servant was put on the ground that it was not a part of the contract between master and servant that the servant should be responsible to the master for such risks. In the more recent case of *Merry and Cunningham* in the House of Lords, a Scotch case, it was held that the owners of a colliery were not responsible to their servants for an injury occasioned by the negligence of the general superintendent of the mine, to whom the defendants had delegated their whole power and authority. It does not appear from the report that the cases of *Morgan v. Vale of Neath Railway Co.* and *Indermaur v. Dames* were brought to their Lordships' notice; but the Lord Chancellor (Lord Cairns) seems to me to have arrived by independent reasoning at the principle that the exemption from liability was from the contract between master and his servant, and to base his judgment upon it. He says: 'The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that which he, the master, has contracted the servant to take with his servant to do. The master has not contracted or undertaken to execute in person the work connected with the business.' 'At all events, the servant may choose for himself between serving a master who does and a master who does not attend in person to his business.'"

his judgment embraces in a very incisive and succinct manner all the legal positions which we are now considering. The first sentence states a general principle, which, if sound, is all which is necessary for the decision of this particular case; and the remarks made on the case of *Wilson v. Merry and Cunningham* entirely corroborate the impression I have indicated.

Four cases to which I mean to refer from our own decisions are—(1) *Gregory v. Hill* (8 Macph. 282), (2) *Wyllie v. Caledonian Railway* (9 Macph. 833), (3) *Calder v. Caledonian Railway* (9 Macph. 833), and (4) *Adams v. Glasgow and South-Western Railway* (*ante*, vol. iii. 215). But for the reason your Lordship has made I should have thought the first of these the first of the series. It was the case of a contract for the joint work of a servant in the course of construction, and the contractor's servant was injured by the negligence of the servant of the proprietor who was engaged in doing the work of the house. I should have thought that there could be no example of the rules laid down in the case of *Indermaur* and in the case I have just quoted; nor do I see that any other judgment could have been excepting in direct violation of them. It was a unanimous judgment of the Second Division, and carried the weight due to the names of Lord Cowan, Lord Benholme, and Lord Neaves. It had one distinctive feature. In it was introduced for the first time the notion that *Wilson v. Merry and Cunningham* altered or enlarged the former law, and this contention was deliberately stated and overruled. I quite agree with your Lordship in thinking the case to be entirely at variance with the view on which it is proposed to decide this case, but it was in conformity with the preceding as well as the subsequent cases. For it is a mistake to suppose it was a solitary judgment. The case was that of *Wyllie*, in which the servant of a customer was injured by the servant of a carrier, while both were engaged in putting goods into a cart under a contract of carriage. The same contention was again maintained, and again overruled. Lord Ardmillan in deciding the case said—"None of the cases quoted to us support the propositions maintained by the defender's counsel in this case, and the decision in the case of *Wilson v. Merry and Cunningham*, however important and authoritative, is not here in point. The case of *Adam v. Reynolds* (5 Hurl. and Nor. 143) has, I think, far more direct and immediate application to the present case than any of the other cases quoted to us, and the opinions of the Judges in the case of *Gregory v. Hill*, pronounced in a case favourable to the pursuer, are in accordance with the principles explained by Lord Pollock and the other Judges in *Exchequer* in the case of *Abraham*." It is not stop to analyse the cases of *Calder* and of *Adams*, the details of which are familiar to your Lordships, and which were decided on precisely the same legal and broad ground. In the case of *Calder*, the Sheriff, Mr Dickson, delivered his judgment on the cases of *Abraham v. Reynolds* and *Gregory v. Hill*, and his judgment was affirmed and his views generally approved of by the other Judges.

And in deciding the case of *Adams*, the last of the series, my brother Lord Macmillan, who was not one of the Judges who decided the case of *Gregory v. Hill*, referring to the case of *Calder*, took occasion to say—"This judgment is given to all the more weight that it followed on the case of *Gregory v. Hill*, and is not two years before on the same grounds and to the same effect." The case of *Gregory v. Hill* has been founded on in many other cases, and has never, as I know, been called in question until now.

These opinions are important, not only as confirming the case in question,

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which, as I humbly think, it does not require, but as shewing that the series proceeded on one broad ground, and that the distinctions which have been since discovered had no part in the decisions.

This concludes my summary of the authorities, which are all in one direct line. There is neither authority nor *dictum* the other way. It will not escape observation that in every one of these cases the parties contracted voluntarily as to the full knowledge of the risk. But that element was the very foundation of the claim against the master of the wrongdoer, who knew when he sent his servant to perform his contract that he would be answerable if the servant, through negligence to perform it, and injury resulted from his failure.

I think in this branch of the law, of all others, we ought *stare decisis*. I think we may be liable to exception on principle, but it is at least intelligible and practical, for it never can be difficult to say whether one man is a servant of another. I cannot say so much for the new rule. What is not a common occupation may give rise to tenfold perplexity, as the phrases which do not express any legal relation always does. I do not know what is meant by being a member of a community. If a firm of ironworkers undertake to construct an iron roof over a railway station I presume their men must work so as not to endanger the servants of the railway company. Are the servants of the railway company and the company itself not bound because the firm has become a member of the same community?

Before concluding my remarks on this head I would point out the truth of the observations of the Lord Chancellor in the case of *Wilson v. Mackenzie*. They are supposed to create some obligation or invitation to formulate some rule in this case, never judicially announced or applied for the future administration of this branch of the law. The same thing was attempted, as I have said, in the cases of *Gregory* and of *Wyllie*, but met with no encouragement from the Court. I think, and always have thought, that the view proceeds on a misapprehension of the true scope of these remarks. If rightly understood, are not only weighty from the quarter from which they came, but in the highest degree just and salutary. They give no sanction ever to what is now proposed. The Lord Chancellor simply said that there were other cases in which a person by voluntarily encountering a known risk might liberate a master from absolute liability for his servant's fault, as that of servants under the same master. I entirely appreciate the import of the remark, as embodying or indicating considerations which have been overlooked.

I have already said that the effect of the rules of law on the relation of fellow-servants to each other and to their master is to eliminate that category of mutual contract, and to reduce it to that of the third category of instances to which I referred in the outset. This third category stands apart both from the case of a stranger who has done nothing to invite the servant and from that of the contractor who undertakes for a valuable consideration to encounter it. But when we come to consider the case of persons who voluntarily expose themselves to hazard, not in pursuance of any duty or obligation, or for any valuable consideration, but on a footing purely gratuitous, a new set of principles comes into play. If, from curiosity, or love of science, or for adventure, a man attends a hazardous experiment, or ascends a dangerous pass, he does so at his own risk, and he has no right to demand at the hands of the conductor of the experiment who permits his presence, or the owner

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tain pass who from friendliness sends a guide or a ghillie with him, more utmost than reasonable care—such care as he would take for himself. Reason is obvious. The master in such cases is under no obligation to do at all; and a man is not entitled to convert acts of civility or hospitality into an excuse for fastening on his friend or his entertainer a responsibility, which he would otherwise never have incurred. In this way may be solved all illustrations as to guests and visitors which obscure rather than illuminate the question. If a committee of the British Association choose to go down a mine, they must take the safeguards of the mine as they find them. It would be an entirely different thing if the owner had engaged, for ordinary professional assistance, the services of a medical man to visit the pit periodically. The distinction manifestly lies in the element of contract and valuable consideration. It may, and the reverse has been held, that the moral obligation implied by invitation or encouragement may not amount in special cases to legal obligation. But that requires some element equivalent to a direct undertaking. It is apparent that the principle of presumed acceptance of the risk which obtains in the case of fellow-servants has a much wider application. But it has no application in cases of onerous contract. In the present case the contractor, if he undertook, undertook that his men should not endanger or injure the property of the Gartness company, and the Gartness company undertook that it should be safe for the contractor and his men, as far as they or those employed were concerned.

It is, however, before concluding, say a word on the second question—Was the contractor an independent contractor? I think he was, although the contract is a small and homely one.

The contractor undertook to execute a specific and definite operation, namely, to prepare the mine in which he was to drive for the operations of the colliery. This he was not entitled to complete by himself and his own servants. It was not payment for piece-work.

The test of whether one man is a fellow-servant of another is not necessarily the engagement or payment of wages. It is whether the two men are both employed by the same master, and the same master is responsible for them. If a master is allowed to engage a man under him, the master is as much responsible for the sub-servant as he is for the principal servant. But here it seems that Woodhead was responsible only to Gardner, and that Gardner only responsible for him, as was found in the case of *Reedie v. London and North-Western Railway*, in 1849, 4 Welsby, Hurl. and Gordon, 244.

The Mines Regulation Act and the consequent rules are of no moment except inasmuch as they make the owner's liability to keep the pit safe more clear. The rules are not such that every master may make for the regulation of his own premises, and do so without regard to his liabilities to independent contractors or their servants, and certainly not such as to make the latter servants of the owner in any sense. This was necessarily so in the cases of *Adams* and of *Calder*, in which the company running the line of the other was entirely subject to the bye-laws of the latter, and have been directly decided in the case of *Reedie*, above referred to, and in the recent case of *Warburton v. Great-Western Railway Company*, L. R. 2

On these grounds I cannot concur in the judgment proposed.

DEAS.—This case belongs to a branch of the law which can hardly be

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said to stand in a satisfactory position, and I am not surprised that there should be some difference of opinion about it.

If the maxim *culpa tenet suos auctores* were held to be the general rule in questions of liability for fault or negligence, the law would be consistent and of easy application. But when that maxim is applied exceptionally to relieve the master from liability to his servant for the fault or negligence of a fellow-servant, it does not sufficiently justify this exception simply to say that a servant takes all the risks incident to his contract of service. You must go further, and affirm that one of the risks so undertaken, as incident to the contract of service, is the risk of injury from the fault or negligence of fellow-servants. That is an exceptional application of the maxim *culpa tenet*, and when you have departed from the rule, it is not easy to justify the somewhat invidious exception. To say that the risk is included in the wages is not to my mind a satisfactory explanation. To be this as it may, a course of decisions not to be gone back upon has established as a principle, in the contract of service, that the servant thereby undertakes to relieve the master from responsibility for the fault or negligence of other servants selected, engaged in the common service, and by that principle we must be guided.

The maxim *respondeat superior* might be reasonable enough in times when masters had slaves, serfs, and dependants, so completely at their beck and call, anxious to study their masters' humour, that you could not distinguish between them when they were acting according to the pleasure of their masters or upon their own uninfluenced responsibility. But the development of intelligence among the lower orders, the spread of education, and the progress of law and order have so largely changed all this as to render it matter of regret that statutory authority had not introduced a more extensive application of the maxim *culpa tenet* than that which has been less satisfactorily introduced by judicial decision.

Meantime we must take it, as I have said, as a fixed principle in the contract of master and servant, that the servant undertakes to relieve the master of liability from the fault or negligence of others employed in the common service, and is understood to be reasonably qualified to be so employed.

The only inquiry, therefore, in each case—and consequently the only inquiry in this case—is, what is to be regarded as the common service?

I do not think that inquiry is fully satisfied by ascertaining who is the master who pays the servant. These may often be important elements in the question of liability, but they are not essential or conclusive elements. There may be sub-servants, or assistants hired and paid by servants, and yet both the servant and the hired may be engaged in a common service, the risks of which are held as undertaken by each of them respectively.

We see from the evidence in the present case that it is a common practice for coal-miners to employ and pay their own drawers; and we see that this practice is recognised and regulated by rule 28 of the statutory regulations applicable to mines generally. The authority of the pit-headman to require the timber to support the roofs and sides of the workings to be carried generally by the miners, to the places where it is required to be used is, by that rule, explained to extend to drawers, putters, and drivers, whether employed by the owner of the mine or by the miners themselves. It would be very incongruous if the classes of persons thus employed and paid were to be regarded and dealt with as not entitled to the same rights, and not to be held to the same risks, with the other workmen in the mines.

was disposed to think that they are all on the same footing. At all events, No. 82. of opinion that the service of which the deceased undertook the risks was common service of the mine. He was not only bound by the general and special rules of the Coal Mines Regulation Act, but he signed the special rules, accepted a copy thereof as rules brought to his personal knowledge, and by him and his fellow-workmen were to be regulated. He saw on the first of these rules who his fellow-workmen were to be—it being there explained the word “miners” means every person “employed in the mine, in the excavation or removal of coal, ironstone, shale, fire-clay or other minerals, or materials,”—and he saw also that the words “manager” and “overman” meant the general manager and overman in authority over himself and the other workmen in the mine. If, then, he undertook the risks of any of these rules, surely he undertook the risks of the general service of the mine. By rule 2 of the special rules the mine is declared to be under the control and supervision of the manager; and, subject to this general supervision, places the whole operative details, and the superintendence of the work of every class, under the overman, who, by rule 5, is specially charged with the execution, in terms of general rule No. 1 of the statute, and bound to observe all other general rules of section 51 of the statute, “so far as these, from the nature of the work, can be observed by himself.”

By rule 9 (of the special rules) the pit-headman, subject to the control and supervision of the manager, has the charge and direction of the workmen employed at the pit-head. He is to “superintend and direct the safe removal from the mine of all loaded hutches arriving at the pit-head, and see to the safe removal of the return hutches on the cage,” and he is in like manner to regulate the work of the men and see to the safety of the men descending in the cages, no matter in what department of the mine the loaded hutches or the men may come.

In the present case, we see from the evidence that at the date of the accident, the sinkers hired by the defenders were employed in one part of the mine, and the miners, including the deceased, hired by the contractors to drive the road, were employed in another part of the mine, coal was habitually taken to the pit-bottom and brought up from both sets of excavations, and the men employed at both were habitually ascending and descending under the control and charge of the same pit-headman, who, by rule 10, is taken to be bound to carefully inspect all the appliances for raising and lowering the coal, and if any defects are discovered, to stop the raising and lowering of the coal and materials till these are remedied.

In the same manner, the engineman, the roadsman, and the fireman are all invested with powers in their respective departments to interfere with, direct, and regulate the miners (which means, as we have just seen, all persons employed in excavating, or removing minerals, metals, or materials in or from the mine in whatever way may appear necessary to secure safety, order, and efficiency in the working of the mine. They may, for these purposes, cause the miners to stop from working, or they may on some occasions even order them to work more than their own. For instance, rule 28, which lays on the roadsman the duty of providing an adequate supply of timber to support the roofs of the workings, bears—“For the purpose of carrying out this rule, the roadsman is empowered to call upon drawers, putters, and drivers, whether employed by the owner or miner, to convey such necessary timber from the pit-

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No. 82. bottom, or other place of general delivery, to the working places in contact with which they are employed."

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Then, in rule 52, we have a sort of summing up of the provisions which have been noticing, which is expressed thus—"Such miners and other workmen and shall be generally subject to the control and orders of the agent, who has been appointed, and of the manager and overman; but they shall not be subject to any directions which the roadsman, engineman, fireman, or other men may give in their respective departments for the purpose of preventing them from infringing or ceasing to comply with any of the provisions of the Act, or of the general or special rules."

Under all these circumstances I really cannot doubt that the service of the risks were accepted by the deceased was the general service of the mine, unless it can be shewn that the single fact of his wages being payable to Messrs Gardner, as contractors, places him in a different category from that which he otherwise would have been.

The question upon that point can hardly, however, be said to arise for the 2s. per ton specified in the contract with Gardner to be paid to the defenders for clean coal from his excavations, delivered by him at the bottom of the pit, was to be increased or diminished ten per cent for every day of rise or fall on the wages during the contract; so that the defendants were substantially in the position of contributing to the wages paid to the Gardners to their men.

I consider it, however, unnecessary to rest upon this specialty. I find nothing in the decided cases to lead me to think that the mere payment of wages affords a conclusive test one way or other of the class of persons who in cases of this kind are to be regarded as fellow-workmen or partners. We see from the evidence in the present case that it is a common practice in pits for coalminers to employ and pay their own drawers, and rule 28, which I have already quoted for a different purpose, we have a definition of the practice in a more extensive form, of miners employing (on their own account paying) assistants or men under them, such as drawers, putters, drivers, over whom the roadsman, and by necessary inference also the manager and overman, are to have precisely the same powers when they are employed by the miners as when they are employed by the owner of the mine. It would be very anomalous if incidental arrangements of this kind should be allowed to vary and disturb the general relation to the owner and to each other of the body of workmen in the mine.

Take, for instance, the position of Samuel Gardner himself. The evidence bears—"I likewise agree to put on a bottomer, you allowing me 2s. 6d. per day for same." That was just in substance an undertaking by the defendant to pay the bottomer's wages. Suppose that had been done, I do not see how the position of the bottomer, in questions like the present, as to the liability of the defenders either by him or for him, could consistently have been distinguished from the position of others employed in the mine. As it happened, Samuel Gardner himself acted as bottomer, and his wages of 2s. 6d. per day were credited to him and his brother, so that he was himself in reality the bottomer of the defenders.

It will not be understood that I rest upon the fact that the rules I have referred to were introduced by Act of Parliament. If these rules had been introduced, *ex proprio motu*, by the owners of the mine, printed and distributed

be thoroughly and personally known to the men, and agreed to by them, No. 82.
 and have attributed to them the same effect, with this difference only, that
 it then have been open to consider whether they contained anything con- Feb. 10, 1877.
 to the principles of the common law by which the men might have been Woodhead v.
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have not thought it necessary to enter upon a review of the authorities and
 upon this branch of the law in Scotland and in England. As counsel
 case of *M'Lean v. Russell, Macnee, and Co.*, March 9, 1850, 12 D. 887,
 occasion to make myself acquainted with all these authorities and deci-
 prior to that date, and I have since had occasion, on repeated occasions,
 to reconsider them, along with the subsequent cases, except two or
 very recent cases, which, in so far as not cited at the bar, have been kindly
 it under my notice by one or other of your Lordships. They have been
 read and commented on at the bar and on the bench, and I shall only
 cite one of them—*Gregory v. Hill*, Dec. 14, 1869, 8 Macph. 282, because I
 myself bound to say, with all respect for the Judges by whom that deci-
 sion was pronounced, that I concur in thinking it cannot be supported.
 In the whole, I am of opinion that the law laid down by the presiding Judge
 was not correct, and that the law which his Lordship was asked to
 apply would have been correct.

ORMIDALE.—The argument which we have heard in this case has had
 to do with the defenders' bill of exceptions alone in the first instance, and it is
 for the Court now to determine whether, and how far, the bill ought to
 be allowed or disallowed.

The defenders maintain their exceptions on the grounds (1) that they are not
 the pursuer for the death of David Woodhead through the fault of their
 agent and manager, Colin Beveridge, in respect that these persons were at the
 time of the accident fellow-servants of the defenders, engaged in the same com-
 munity; and (2) that even supposing Woodhead and Beveridge were not fel-
 lows of the defenders when the former was fatally injured, the defenders
 are liable, in respect that, engaged, as they were at that time, working in
 the pit for the purpose of putting out the coal, the injury received by the
 deceased through the fault of the other was an incident of the work, the risk and
 consequences of which the sufferer must, in a question with the defenders, be
 made himself undertake.

In the soundness of the first of these grounds of non-liability, where the
 facts are sufficient fairly to raise it, there can be no doubt, having
 seen the numerous decided cases on the subject. It is sufficient, however,
 to refer to the cases of the *Bartonshill Coal Co. v. Reid*, and of *Wilson v.*
Cunningham, both of which were ultimately decided in the House
 of Lords. In these cases the distinction was fully explained between the posi-
 tions of parties directly answerable for their own wrongful acts, to whom the
dupa tenet suos auctores applies, and parties who may be liable, not for
 their own wrongful acts of themselves directly, but for their servants, on the principle
per alium facit per se, or of parties who, though standing in the rela-
 tions of masters or employers to the wrongdoer, may nevertheless escape liability
 on the ground maintained for the defenders, that the
 injured and he who caused the injury were fellow-workmen or colla-

No. 82. *borateurs* within the meaning of the doctrine which protects the master's responsibility for injuries sustained by one servant or workman through a wrongful act of another.

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The question in the present case, under the first branch of the defense, argument, is whether they are to be held, in respect of the doctrine of *colliery*, as explained in the cases referred to, free from responsibility for the sequences of the injuries sustained by Woodhead through the negligence of overman, Colin Beveridge. The latter was at the time the servant of the defenders, and it is expressly admitted that he was "a competent person in duty, and that the appointments of the colliery were sufficient." It is an indisputable fact that Woodhead and Beveridge were, when the former was injured, engaged in the same pit of the defenders, and in the prosecution of the same work and object, viz. the operations necessary for turning out the coal. In these circumstances it seems to follow, on the authority of the cases which have been referred to, that the deceased David Woodhead must be held to have undertaken all the risks arising from the fault of Beveridge or others engaged along with him in the same common work and object. But then it was admitted that while Beveridge was the servant, and engaged at the time of the injury in the service of the defenders, Woodhead was the servant, not of the defenders but of the Messrs Gardner, who were engaged in the pit as independent contractors. Whether the circumstance of the Messrs Gardner being independent contractors, supposing it were true, can operate against the defenders, with the effect of making them liable in the present action, is the question which is afterwards considered in dealing with the second branch of their argument. It must be first ascertained how the fact stands.

Now, the question of fact whether the Messrs Gardner were independent contractors, or merely the servants of the defenders, engaged in their pit in the work, depends upon whether they were under the control and subject to the interference of the defenders. It is not enough to make them independent contractors that they had the power of engaging, paying, and dismissing men acting immediately under them, for if that were enough it is obvious that the evidence of some of the witnesses in the present case that even in every coal-pit would stand in the position of an independent contractor. The true test is the right of control and interference which the defenders possessed in reference to the Messrs Gardner and their men. That this is so is, I think, well and clearly illustrated by the recent Scotch case of *Stephens v. Commissioners of Police of Thurso*, 3d March 1876, and the still more recent English case of *Rourke v. The Whitemoss Colliery Company*. In both cases the question whether certain individuals were independent contractors or merely the servants of other parties was held to depend upon whether they had reserved and exercised a control over the operations of the former.

Did, then, the defenders in the present case, while they contracted and arranged with the Messrs Gardner to carry on a certain portion of the work in their pit, retain and reserve to themselves such a power of control and interference as to prevent the Messrs Gardner being held as independent contractors? That they were not independent contractors, or anything more than servants engaged by the defenders to do part of the work in their pit, to be paid by the piece, appears to me to be made sufficiently clear by the evidence in the case, including the rules under and by which the whole work was regularly carried on. Thus Samuel Gardner, one of the alleged independent contractors,

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ness adduced by the pursuer, says—"Up to and at the time of the accident any person who acted for the company and looked after the machinery and operation of the pit was Colin Beveridge, who discharged the duties of underground manager, roadsman, and foreman." The evidence of the same witness and to the engagement by him of a bottomer, the payment of his wages, the control of him in regard to his work and duties, denotes very plainly, I think, that the true relation of the Messrs Gardner to the defenders was merely of parties who had engaged to work in their service by the piece, and not independent contractors. And George Gardner, again, the other alleged independent contractor, who gives similar testimony, states among other things—had no charge in regard to the ventilation and safety of the arrangements of the pit, Ormiston (the defenders' manager) and Beveridge (their overman or ground manager) giving such directions about these matters as they thought

any doubt remained on this point, looking merely at the parole evidence, I think, entirely removed by the rules and regulations to which all persons in the pit were subject in carrying out the operations. I refer to the special rules established by the authority of section 52 of the Mines Regulation Act (3 and 36 Vict. cap. 78), and not the general regulations specified in section 3. The latter are set out specifically in the Act itself, and are indispensable in relation to which the Act applies; but the former are left to be prepared by the manager of the mine, subject to the approval of a Secretary of State, in accordance with the particular state and circumstances of such mine." Accordingly, the rules so prepared and approved of in reference to the defenders' mine as they are "for the conduct and guidance of the persons acting in the management of this mine, or employed in or about the same, to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in or about the mine." The regulations so established for the management and guidance of all persons in the defenders' pit were, it is not unnecessary to observe, subscribed by the deceased David Woodhead, as appears from the evidence of the manager Ormiston. As might be expected, therefore, the regulations cannot be examined, in connection with the evidence in this case, without it being seen that they lead unavoidably to the conclusion that the defendants, Gardner, and those who were immediately under them at the time of the accident, including David Woodhead, were subject in all things relating to their conduct in the defenders' pit to the orders and guidance of the defendant manager Ormiston, and their overman or foreman Beveridge; and it would be difficult to conceive a case in which the interference and control of the defenders with the alleged contractors could be greater or more unnecessary. To be satisfied of this, it is only necessary to observe the terms of rule 3 as to the duties incumbent on the manager and overman on the one hand, and the terms of rules 52, 55, 69, 70, and 71, taken as examples on the other, of the duties of the miners or workmen, on the other hand.

It is not, I am able to understand the view which was pressed in argument for the defenders, that these regulations were not intended to serve any other than police objects. These may be, in one sense, the objects of the rules, but that is not all. They were also intended to regulate the whole working of the colliery, and the co-operation of all the persons engaged in carrying on that work for the benefit of the defenders, cannot, I think, be doubted. Thus by rule 3 it is provided that, subject to the control and supervision of the manager, the whole

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operative details shall be under the care and charge of the overman; by rule 52 it is provided that "the miners and other workmen shall be subject to the control and orders of the manager and overman." According to it was held in *Howells and Others v. The Landore Siemens Steel Co. (Limited)*, 4th Nov. 1874, Law Rep. 10, Q. B. 62, in reference to the fact of a master for a fatal injury caused by a servant to a fellow-servant, the fact of the manager who caused the injury being appointed pursuant to the Mines Regulations Act, 1872, did not put him in a different position from he would have held had he been simply appointed manager, and consequently that the defendants were not liable to the representatives of the deceased his death.

I must own my inability, therefore, to understand how—having regard to rules referred to, enforceable as they are by the defenders, their manager, man, and other head people—the Messrs Gardner can be regarded as independent contractors, or as anything else than persons working under the control and subject to the orders of the defenders. And if this be the true position of Messrs Gardner, and of the workmen immediately under them, it follows in accordance with well established law, that David Woodhead, the workman who was fatally injured, and Colin Beveridge, who by his culpable negligence caused the injury, must be regarded as fellow-workmen, engaged in the same employment, and that consequently the pursuer, whatever may be his claim for reparation against Beveridge, has none against the defenders. The case of *Wigget v. Fox and Henderson* is a precedent for this—if precedent were necessary—very much in point. In that case there were principal contractors—Fox and Henderson—who had undertaken to execute the whole of certain work in connection with the Crystal Palace, and as to these parties occupying a perfectly independent position no question arose. But under them part of the work was contracted to be done and paid for by the piece by Moss and other sub-contractors, and although the parties thus sub-contracting had their own work to do the piece-work, these men were held to be the fellow-servants of the principal contractors; and one of the former having been killed by the fault of the latter it was decided that the principal contractors were not liable for the compensation in respect that the workman who received the fatal injury was a fellow-servant of the workman who caused the injury. In the course of the discussion remarked by Baron Martin, in regard to the position of Moss,—"The question of master and servant existed between the defendants and him, and in my opinion that an action by a stranger for the negligent act of Wigget would have been properly brought against Fox and Henderson, and not against Moss. The real test is whether the defendants could interfere in the work done by Moss. Now, it is clear from the regulations that they could. I observe that the same test applied by Compton, J., in *Sadler v. Henlock* (24 L. J., Q. B. 13) says the real test is whether the employer has any control over the person employed, and whether the payment is by the day or piece can make no difference. Accordingly, in delivering the judgment of the Court Baron Alderson said:—"Here both servants were at the time of the injury engaged doing the work of the whole contract, and for the contractors, the defendants, must think that the sub-contractor and all his servants must be considered as fellow-servants for this purpose the servants of the defendants whilst engaged in the work, each directing and limiting his attention to the particular work for the completion of the whole work; and that otherwise we could

effect to the principle which governs such cases." So, accordingly, it appears to me that in the present case Woodhead, who received the fatal injury, Beveridge, by whose negligence the injury was caused, must be held to have at the time of the accident fellow-workmen in the employment of the defendants, who are consequently, on the doctrine of *collaborateur*, not liable for the consequences.

The only difference of any materiality founded on by the pursuer between the case of *Wigget v. Fox and Henderson* and the present was, that while in the former the sub-contractor's men were paid by the defenders, in the latter the pursuer's men were paid by them, and not by the defenders. But it is shewn that this is of little or no importance in determining whether the pursuer are independent contractors or not—that question being governed by other considerations, and especially by the control or interference exercised on the part of the defenders. Besides, the allusion in the contract in the present case to wages, and in the pay-sheets to deductions for "doctor" and "school," in connection with all the other circumstances as disclosed in the notes of the case shew plainly, I think, that the Messrs Gardner, and those immediately under them, were in reality just ordinary workmen of the defenders; and if so, enough for the determination of the case in favour of the defenders.

It was further maintained by the defenders, under the second branch of their argument, that even supposing the relation of fellow-servants did not exist between Woodhead and Beveridge, or, in other words, assuming that while Woodhead was the servant of the defenders, the former was the servant of the latter, as independent contractors, still the defenders would not be liable as pursuers, in respect that Woodhead, by working in the same pit with Beveridge in operations necessary for putting out coal for the defenders, was technically a servant of theirs or not, must be held in the present case to have undertaken all the risks of the work and workmen in including the risk of negligence on the part of Beveridge. This contention was maintained in argument by the defenders on the same ground substantially that on which the doctrine of *collaborateur* is rested; and in support of their contention reference was made by them to the opinion of Lord Chancellor in the case of *Wilson v. Merry and Cunningham*, to the effect that he said "the liability or non-liability of the master to his workmen can only depend on the question whether the author of the accident is not, or is, in any sense, the fellow-workman or *collaborateur* of the sufferer. In the cases in which accidents have occurred the negligence has no doubt been the negligence of a fellow-workman, but the case of a fellow-workman must stand upon higher and broader ground." Now, although in the number of the cases of claims of reparation for injuries to workmen which have been decided it was enough for the decision that the parties—he who was injured and he who had caused the injury—were fellow-servants in a strictly technical sense, the principle itself upon which the decision proceeded was such as to apply, I think, to other and different circumstances, where no such technical relation of fellow-servants could be said to exist. It is not because the injured party causes the injury, and the party who suffers by it, were fellow-servants at the time of the accident in the same common work that the employer of both is not responsible for the consequences. That is the statement of circumstances, and of itself announces no principle of

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liability or non-liability. But the principle of non-liability arising out of circumstances is, that the injured party by engaging with others in the same—or to use a figurative expression which I observe has been used in analogous cases—having embarked in the same boat, must be held to have taken all the risks and dangers incident to the position in which he has voluntarily placed himself.

This is a principle which, on the mere statement of it, suggests many various cases depending on circumstances different from that of the injured party being fellow-servants engaged under the same master in the common work. Thus, for example, take the case of a person going into a pit or other dangerous work with the permission, or even on the invitation of the owner, that, I apprehend, would make no difference—of the owner, for the purpose of prosecuting some scientific inquiry, and while there receiving serious injury caused by the culpable negligence of one of the workmen, who was competent and fit for his duty—it is clear, I think, beyond any serious question, that, for the same reason and on the same principle as that which is applied to the present or any other case where the injured and injuring parties are in the relation of fellow-servants engaged in the same common work, the action would lie at his instance against the owner. Or, suppose the case of a person, the owner of a yacht or carriage voluntarily accompanying him or her on a sail or drive being injured through the negligence of one of the crew or the driver of the carriage, it can scarcely be doubted that an action would lie against the owner would be untenable. In all such cases, and they may be multiplied indefinitely, the same principle or rule, that the injured party must be held to have undertaken, in a question with the owner, all the risks and perils incident to the position in which he had voluntarily placed himself, would apply.

Independently, however, of mere hypothetical examples, the rule or principle in question has been recognised by the Courts in several litigated cases, that of *Wilson v. Merry and Cunningham*, in such a manner as to show that it is not confined to that of fellow-servants engaged under the same master in the same common employment. In *Southgate v. Stanley* (25 L. J., 1874), which was a case, not of master and servant, but of householder and visitor, it was held that an action did not lie at the instance of the latter against the former for negligence which might have been that of one of the servants of the house. The ground upon which the Court proceeded is thus stated by Baron Pollock,—"I think," said his Lordship, "this case rests on the general principle which governed the Court in deciding the circumstances in which a servant cannot maintain an action against his master, and which stands as the law on the subject. Mr Gray truly stated the principle on which such cases rest to be, that persons in one establishment are sailing in the same boat, and that no action will lie by one servant against a master for an injury to his fellow-servant. So, a son cannot bring an action against his father for an injury to a person who volunteers his assistance bring an action on account of a chance happening through a servant or other member of the family, but he is himself for the occasion one of the family." And the same view was expressed by the same learned Judge in the case of *Abraham v. Reynolds* (26 L. J., 173), and in *Potter v. Franklin* (31 L. J., Q. B. 30), it was held that a master was not liable for the consequence of injuries caused through the negligence of a servant.

wants to persons voluntarily assisting them, although not strictly their fellow-servants, or servants at all of the master. No. 82.

was disposed to think, therefore, that the defenders cannot be made responsible for the injuries caused to the deceased David Woodhead by Colin Beveridge, as these two persons are to be held to have been fellow-servants engaged at the same time in the same common work under the same master or not, it is sufficient that at the time of the accident they were engaged in the same kind of work, and working for the attainment of the same object, although the one (Beveridge) had the defenders themselves as his immediate master, and the other (Woodhead) had for his immediate masters the Glasgow and South-Western Railway Company, and Adams v. The Glasgow and South-Western Railway Company for the pursuer, are authorities to the contrary, for in both these cases, peculiar in their circumstances, it was held that the person injured and the person causing the injury were neither fellow-servants nor engaged in common employment, but stood rather in the relation of strangers to each other. The case, however, of Gregory v. Hill, which was also cited and relied upon by the pursuer, is certainly a more formidable authority to which there it seems to have been held that the immunity of an employer from the consequences of an accident caused by the fault of his workmen can only be maintained if the person injured and the person injuring were at the time of the accident engaged as fellow-servants in the same common work under a contract with the same common master. But it appears to me that this is a view which cannot be sustained consistently with the other cases to which I have referred with the exposition of the true principle given in the House of Lords in the case of Wilson v. Merry and Cunningham.

In regard, then, to all the authorities, and considering that, notwithstanding the decision in Gregory v. Hill, and the remark which, it appears, fell from the Lord President in regard to that decision on a former occasion, the present case has been referred for the decision of seven Judges, I assume that I am not precluded from expressing the opinion I have formed.

It is that, in accordance with the views I have now expressed, the first and second exceptions to the directions which were given at the trial, and the third exception to the directions which were refused to be given, will fall to the ground. The remaining two exceptions do not appear to me to require to be

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THE JUDGE.—As I have come to the same conclusion as the majority of your Lordships, and substantially on the same grounds, I do not think it necessary to state the general import of my opinion. The rule, the application of which is here in question, as I understand it, is this, that where two persons are engaged in one common employment, with a common object, and under the same regulations and control—more especially in a case of the kind now before you, where the employment is known to be attended with considerable risk, arising in many, if not most, instances from the negligence of the workmen—each workman engaged in that employment is held to have assumed the risk in view when he undertook the employment, and is not therefore

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entitled to demand reparation for injuries caused by the negligence of a fellow-workman from the employer of that workman.

The law was so laid down by Lord Cranworth in the case of the Earl of Devon v. The Great Western Railway Co., when his Lordship, in moving the reversal of the decision of the Court of Session, said (3 Macq. 284)—“When the workman contracts to do a particular sort of work, he knows, or ought to know, to what risk he is exposing himself; he knows if such be the nature of the risk that wants to be taken on the part of a fellow-workman may be injurious or fatal to him, and against such want of care his employer cannot by possibility protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He cannot say that the blame was wholly that of the servant. He cannot say the master was not engaged in the work at all, for he was party to its being undertaken. The principle, therefore, seems to be opposed to the doctrine that the responsibility of a master for the ill consequences of his servants' carelessness is applied to the demand made by a fellow-workman in respect of evil resulting from the carelessness of a fellow-workman when engaged in a common work. It is, again, when illustrating what constituted a fellow-workman in the same rule, his Lordship said (p. 296)—“The man who lets the miners down a mine in order that they may work the coal, and afterwards brings the coal up together with the coal which they have dug, is certainly engaged in the same work with the miners themselves. They are all contributing directly to the same common object of their common employer in bringing coal to the surface.”

Such is the clear opinion of Lord Cranworth; and the law is laid down in very similar terms by Chief-Justice Shaw in the American case of *Putnam v. Boston Railway*, mentioned by Lord Cranworth with approbation, as being in the same volume of Macqueen, p. 317-319. This rule has no doubt been so laid down in cases where the labourers were the servants, in the same sense of the word, of the same master. But the rule was said by Lord Cranworth in the *Bartonshill* case, to be one of universal application; and it has been so dealt with. Because about the date of that decision, viz., in the case of *Degg v. The Midland Railway* (1 Hurl. and Nor. 773), the rule was held to apply to a party who was a stranger, who voluntarily engaged himself as a servant of a railway company, and who was injured by the railway company's servants. It was there strongly contended that the rule had no application except in the case of hired servants acting under the same employer: but this contention was rejected on the ground that the party injured voluntarily took to assist, when in the knowledge of the risk he might run. It was, I think, a decision to the effect that it is not essential, in order to free a party from liability for a claim of this description, that the party injured should be a servant, in the strict acceptation of the term, directly employed and paid by the same master as the workman who causes the injury. In the subsequent case of *Abraham v. Reynolds* (5 Hurl. and Nor. 143), Chief-Baron Pollock lays down distinctly that the rule is one which, in his opinion, cannot be limited to the case of a master and his servants. For he says (p. 148)—“The case of a master and servant is only one of a class. The question has hitherto arisen between master and servant; but it appears to me that the learning on the subject has not been exhausted.” And there is, I conceive, authority to the same effect in the opinion of the present Lord Chancellor in the case of *Wright v. Carter and Cunningham*, which has been read by your Lordship.

not therefore think that the decisions can be held to have restricted the case of parties standing towards each other in the relation of paid s of the same master ; and I am of opinion that the question as to the application of the rule is quite open for decision. That being so, it appears to me that the circumstances of this case are of a description seem not only to admit of, but to call for its application ; and I have o this conclusion for substantially the same reasons as those which have clearly explained by your Lordship in the chair. There can, I think, doubt upon the evidence in the case that the deceased was under an tion of the nature described by your Lordship. He was a party who, at e of his death, had voluntarily undertaken all the ordinary risks of a m in the defenders' colliery ; and had subjected himself to the special nd regulations applicable to that work, which it is proved were duly up for the guidance of the miners who were there employed. It is in e, moreover, that the deceased had been engaged as a miner in the works before the occurrence in question, under the direct employment of the m ; but that, in consequence of some temporary change in the arrange- working the coal in the east level, his services had been transferred to m, who had undertaken to work the coal in that part of the pit, subject isting organisation. Now, had the accident occurred at the time when ned was employed and paid directly by the defenders, it cannot admit, upon the decided cases, that no claim for reparation would have lain e defenders ; and I am unable to find any satisfactory grounds for hat the mere circumstance that the deceased was then working as one ctor's gang, and was not paid directly by the defenders, should make nence in the application of the rule. The deceased was still subject to tations established by the defenders for the conduct of their works, to extent as he was when employed directly by them ; and having thus ly continued under the supervision and direction of the underground ; roadman, and overseers employed by the defenders, and undertaken gent risks, it appears to me that the case comes fairly and directly e operation of the rule.

GIRFORD.—The two leading questions of law in this case (for there is e as to questions of fact) are—First, Was the deceased David Wood- the legal acceptance of the words as applicable to cases like the present, workman or *collaborateur* with Colin Beveridge, through whose negli- was killed ? and, Second, Assuming that David Woodhead was not, in sense of the words, a fellow-workman or *collaborateur* with Beveridge, he, David Woodhead, in such a position and in such circumstances as n and his representatives from making the defenders answerable for of Beveridge ? If either of these legal questions is answered in the e then the verdict cannot stand, for in such case the defenders must n point of law not answerable for the negligence of Beveridge. erence to the first of these questions, viz., Whether the late David d and Colin Beveridge were or were not in the eye of law fellow-work- *collaborateurs* in this pit, No. 2, I have come to be of opinion, though ut some hesitation, that this question must be answered in the affir- I think that David Woodhead and Colin Beveridge were, *quoad* the uestion, fellow-workmen or *collaborateurs*. Of course the difficulty is

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that they had separate and independent masters. The two men were selected and employed and were not paid directly at least by the employers. Beveridge no doubt was the servant of the defenders, but the defenders did not employ David Woodhead. They did not select him; he was selected and employed by the Gardners alone. It was a mere accident that he had formerly been employed in the pit. He might have been at the time of engagement an entire stranger to it—brought by the Gardners from a distance without any previous consultation with or notice to the defenders. The defenders do not even seem to have approved of the employment further by allowing Woodhead to work. They had nothing to do with his wages as to amount or as to conditions of payment, and undoubtedly Woodhead had been dismissed by the Gardners alone without the consent of the defenders against the will of the defenders. Still further, the defenders seem to have had no immediate control over the details of Woodhead's work provided he complied with the general and special rules of the pit. The Gardners have employed Woodhead in any part of their contract work—in driving level through stone or clay, in brushing the roof, in excavating coal—or in any other incident of the work. With all this the defenders had nothing to do; certainly Woodhead was not their proper or immediate servant, and all they could insist in besides obedience to the rules was the execution by him of his special contract. It was said that under special rule 3 Beveridge had dismissed Woodhead, and probably this is true, because the owners have general power to engage or dismiss all workmen; but this is only to the safety of the pit. Such absolute power must be vested somewhere. Beveridge dismissed Woodhead without cause or reason and without any shewing that in his judgment dismissal was necessary for safety. Beveridge the defenders might be liable in damages. It seems to be clear that, under the regulations, the servant of an independent contractor could not be the servant in any proper or even in any legal sense of the defenders.

But it does not follow that because the two men have not the same employers, or are not under the direction of the same person as to the work and are not paid by the same person, they may not yet be in the law "fellow-workmen or *collaborateurs*." In every extensive mine servants or workmen often require to hire at their own expense assistants, whom they pay, and with whom, except indirectly, the master has no concern. It is in evidence in the present case that it is a common practice in all mines—more common than the reverse—"for individual miners to hire and pay their own drawers," and the coalmasters have nothing to do with the drawers except in exceptional circumstances. So it used to be common in the districts for agricultural labourers to have each their own bondager or ploughman with whom the farmer had nothing to do, but whose work was paid for by the ploughman or principal servant. Such practices will always be common where workmen are paid by piece or by amount of output, as in mines, for the skilled miner to make the most of his acquired dexterity in his labouring work is done by his assistant; and yet I cannot doubt that the assistant and his drawer would be held as fellow-servants in a claim by either of them for damages against the master. In the strictest possible meaning of the word they would be *collaborateurs*, liable to each other for their individual faults, neither of them having a claim against the master for the fault of the other. The present case is a more difficult case than that of hewer and drawer.

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suffers in degree, because the contract with the Gardners and their contract their assistants were a little more extensive and a little more express. In consequence, the Gardners were just miners and colliers working by the piece. Instead of day-wages for themselves and assistants they were to be paid 7s. per ton and colliers' wages at 2s. per ton for coal put out from the level or in the case of driving it. It was a small contract, 50 fathoms of level and 40 tons of dook, and though so many as fifteen or sixteen men were employed by the two Gardners, that was because the work was urgent, and they were to work in shifts of five or six at a time. I am of opinion that in the circumstances of the present case the sub-workmen hired by the Gardners were simply fellow-workmen or *collaborateurs* with the Gardners themselves, in consequence, and in so far as the present question is concerned, fellow-workmen with Beveridge, the underground overman. I really cannot regard them as different from what it would have been if the work had been in no way, and the two Gardners who were to work, and did work themselves, had hired his subordinate drawer or assistant. This might have been the case if the work had not been pressed, or if Gardner's contract had been a smaller. It would be very difficult to hold that in a question with a pit-miner's drawer or a piece-worker's assistants are strangers or third parties to whom the mineowner is liable for the *culpa* of all his servants.

Where there may be special cases figured where the contract is so large, or the position of the contractors so independent, or his right to occupy the mine so diverse of that of the owner, that different rules might come into play. I apply myself to the circumstances of the present case, and I hold, though I do not without difficulty, that in the circumstances here Beveridge and Woodhead were all in the eye of the law fellow-workmen or *collaborateurs* in pit No. 2, and this notwithstanding the fact that they were all under separate arrangements as to engagement, payment of wages, and details of work. It does not require payment of wages, or even contract of employment to constitute the relationship of fellow-servants or *collaborateurs*. A person who willingly, or it may be from pure good nature, assists in doing their work, though gratuitously and without any contract, is a fellow-servant to this effect, that he has no claim on the master for the wrong of another servant whom he was not assisting—*Degg v. Midland Railway Company*, 26 L. J., Exch. 171; *Potter v. Falkner*, 31 L. J., Q. B. 30. These cases, and there are others, shew that the personal bar excluding the recovery of damages against the master may be reared up even where there is no contract of service with the plaintiff, and no wages of any kind either stipulated or paid.

I am here specially to notice that it by no means follows that because Woodhead and Beveridge are held fellow-servants or *collaborateurs* in the present claim against the mineowner, that therefore David Woodhead would be held as in other questions or to all effects the servant of the mineowner. It is quite possible that by assuming the place of a fellow-workman or *collaborateur* David Woodhead might bar himself from making the present claim against the defenders, and yet in a question with a third party he might nevertheless be held a servant of the defenders at all. In short, it is possible that persons may be fellow-servants or *collaborateurs* in the same work without being servants of the same master, or perhaps without being servants at all in the strict and proper sense of the word; and in determining, as upon the whole

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I now do, that David Woodhead and his representatives have no claim against the defenders, because in substance David Woodhead and Colin Beveridge were fellow-servants or *collaborateurs*, I do not in the least fix or determine that the defenders would have been liable to third parties for the fault or negligence of David Woodhead. In short, a party may, by volunteering to act with servants and in various other ways—and agreeing to serve contractors in such a manner as this seems to be one of the ways—bar himself from holding the mineowner liable for the *culpa* and negligence of his servants, and yet he may not in the legal sense become the servant of the mineowner, so as to make that mineowner liable to third parties for his, the contractor's, servants' faults.

But these considerations naturally lead me to consider the second question raised in this case, which is—That apart from Beveridge and Woodhead being fellow-servants or *collaborateurs*, and even supposing that they were so in the legal sense of these words, was their relative position such that David Woodhead could not claim against the defenders for reparation for the fault or negligence of Beveridge, but can only claim reparation against Beveridge himself, whom alone can be ascribed personal or individual fault?

This question may be stated more generally thus—In what cases is a master or employer liable in reparation or damages for the fault or *culpa* of his servant where no fault or *culpa* of any kind can be imputed to the master himself?

Now, before answering this question, I remark that the general principle is that *culpa tenet suos auctores tantum*. As a general equitable principle, one ought to be made responsible for the fault or crime of another, with which fault or crime he has nothing to do, and for which he is not in any way to blame. In so far as proper criminality is concerned—that is, where there is no fault or malice in the criminal alone—no one but the criminal himself is punishable therefor; and this is the law of most civilised countries, exceptions or rather exceptions being introduced very sparingly, and to secure some advantage or supposed advantage to the public. But these exceptions are so rare among civilised nations, that they may be left out of view; and it may be taken as an almost absolute rule that the criminal alone is answerable for his crime. No one is to be punished for the offence of another. Accordingly, if a master is answerable for the fault of his servant, the rule is not so absolute as to make the master answerable for his servant's crime or intentional fault. In such cases the general rule applies—*culpa tenet suos auctores*. Of course, if the crime has been incited or induced or commanded by the master, the master will be responsible for all the consequences, and will himself be punishable criminally, but that will not be because he is answerable for his servant's crime, for in such cases the master himself is criminal, accomplice, or, as we say, art and part in the crime.

But undoubtedly one exception is admitted to this very general rule—That if a *culpa* or fault holds or makes answerable the person in fault, or the master alone, and that is the case where a servant in the proper exercise of his duty or employment causes by his fault or negligence injury to a stranger or third party, in such a case the master will be answerable to the stranger or third party for the consequences, just as if the master himself had committed the fault or negligence; and the real question in the present case is, How far this exception extends, and, in particular, does it extend to cases where the person in fault stood in a relation to the servant in fault similar to the relation in which late David Woodhead stood to Beveridge, the defenders' overman.

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am quite aware of the difficulty and danger of laying down general rules, and of going beyond the specialties of the particular case with which we are dealing, and yet I feel compelled in the present case, in order to decide authoritatively the precise question before us, to seek for some general principle which may be applicable to all similar questions. I do not think it would be wise to proceed upon specialties, for I am of opinion that a very general principle is fairly raised here, and one calling for the announcement and application of a general principle. I am disposed to state the general principle—That a master is only responsible for injuries or damages occasioned by the fault of his servant (the master himself being blameless) when the injury is done to third parties or strangers. I think such claim is only competent against members of the public with whom the master has no contract, and who are not placed in any special relation to the master in reference to the employment of the servant in fault. It is not in every case that a master is liable for his servant's fault or negligence. This rule is subject admittedly to very many exceptions. For example, as already noticed, the fault must be committed by the servant while he is in the course of his ordinary employment. The rule does not extend to faults committed while the servant is not acting as such—when he is absent from his service on leave—when he is not in any sense on duty, or when he is acting on his own account and not on that of his master. Again, the master is not responsible when the fault of the servant amounts to proper self-defence when it is intentional and malicious—although I am aware there are cases in which the master's responsibility has been extended to acts done recklessly or in a fit of temporary anger.

And, in like manner, the master is not liable to every person who may be injured by the fault or negligence of his servants, even when acting in the course of his employment. It is now quite fixed that the master is not responsible when the person injured is the fellow-servant and acting in the same employment with the servant who is in fault. But there is the highest authority for saying that this is not the only case in which a master is not responsible for his servant's fault. It is not the rule or principle, but only an exception or example thereof, and in seeking for the rule I do not think we can do better than say that of this, that a master is liable for his servant's fault only when third parties or strangers are injured thereby. Of course this still leaves the question whether a person who is to be considered a third party or a stranger in such circumstances? I think the only answer that can be given to this is, that where a person voluntarily places himself in such a relation to the master or to the establishment or organisation carried on by the master, that he must have known he was exposed to the risk of the negligence of servants, then he can no longer hold a stranger or a third party, and action against the master will be

in such instances occur of such relationships. Thus, although a master will not be responsible if his coachman negligently runs down or injures a pedestrian in the street, he will incur no liability to a friend whom he has invited to ride in his carriage, and who is injured by the carelessness of his generally trusted coachman. The foot-passenger on the public road is a stranger, but a friend or acquaintance who has accepted a drive in the carriage will not be considered such. In like manner, a guest who accepts of my hospitality cannot bring any action against me although he has been injured by the fault or negligence of my butler or footman or cook, for he is not a stranger but a guest,

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and he must have had in view the risks of the carelessness of my servant. He takes this risk himself, provided only that the servants were competently selected with reasonable care. The illustration often given that the master, whom the cook has through carelessness scalded will have no action against the master, will equally apply though the cook's carelessness has accidentally scalded or injured not her fellow-servant but her mistress' daughters or child. No action will lie at their instance any more than at that of the kitchen against the master of the house. It would be quite otherwise if the cook or butler's carelessness have injured a passer-by on the public street.

I take, then, the case of a master being liable for the fault or negligence of a servant to be a very limited exception to the far more general and almost universal, rule that in cases of crime or *delict* or *quasi delict* or *culpa* is the person to blame who must alone bear the consequences. The master is not responsible, except in the solitary case where an entire stranger who has entered into no relation with the master is injured by the servant's fault occurring in the ordinary course of the servant's duties.

Now, applying this to the case of a coal-pit or mine like the present, it very seldom happens that any one voluntarily entering such a mine occupies the position of a stranger. There should be no strangers in a coal-pit. Even the Government inspector who goes there in discharge of his public duty is not to be held a stranger or entitled to a stranger's privilege; and possibly even a miner may be figured, for example, the public officers of justice executing a warrant in search of a criminal; but leaving such special cases out of view, I am of opinion that all the miners, in the statutory sense of that word, and that the contractors and sub-contractors and their servants, who become parties to the general rules and parts of the general organisation of such a mine, must be held to take their risk of the accidental negligence or mistakes of all the other persons, all of whom they have the means of knowing, and regarding whom they may make any inquiries they please, and that the owners of the pit or the persons engaged in working it are not liable for such accidental fault or carelessness unless it can be shewn that they are personally to blame for having employed improper or incompetent persons. Every one who enters a pit, whether as a permitted visitor actuated only by curiosity or by love of science, or as a man who accepts employment there and makes himself acquainted with the organisation, must take the risk of the carelessness of all the employees, and can only claim damages from the persons who are actually in fault.

It is on this view that the general and special rules under which the question was worked become of importance. All these rules have the sanction of the statute, and were specially assented to and subscribed by the deceased Woodhead. They shew that the pit No. 2 was worked as one undertaking, an establishment, organised on one system governing all persons employed in any way in or about the workings, so that all who accepted employment there were members of one federation or organised body, and as such all were held to be responsible, although it might be in separate departments, in carrying out one common purpose. In such a case I think every one who enters the pit as a member of the organisation must be held to accept the risk of the accidental carelessness or negligence of other members, and that his only remedy lies against the individual wrongdoer.

On these grounds I think the verdict must be entered up for the defendant.

and SHAND.—The jury by their verdict in this case have found in substance the death of the pursuer's son was caused by the fault of Beveridge, the defenders' underground manager; and, giving effect to the directions of the learned Judge who presided, this necessarily led to a verdict against the defenders on the issue. The defenders did not by their directors, or otherwise by servants, interfere in the arrangements or management of the pit in which the accident took place, and it is not suggested that they were themselves guilty of any fault or negligence. It is not alleged that there was want of care in the selection of servants, or in placing at the disposal of these servants all that was required for the safe conduct of the operations. Indeed, it was expressly admitted at the trial that Beveridge was a competent person for his duty, and also, that the appointments of the colliery were sufficient. The ground of defence is thus simply fault on the part of the defenders' servant without any fault on the part of the company; and in these circumstances I am of opinion that the defenders are not liable in damages, that the first and second exceptions are well founded, and that the first direction asked by the defenders should have been given.

The directions given made the verdict turn entirely on the question whether Beveridge, the underground manager, was a fellow-servant of the deceased.

The directions were substantially (1) that if Beveridge was not a fellow-servant with the deceased the defenders were responsible for his fault; (2) that attention on the defenders' part that Beveridge was a fellow-servant was required by the terms of the contract with the Gardners, by whom the deceased was directly employed; and (3) that the Mines Regulation Act, including, I think, the special rules framed in compliance with the Act, did not affect the question. The directions in effect stated that inasmuch as Beveridge was not a fellow-servant of the deceased the defenders were responsible for his fault. With deference to the learned Judge, this direction seems to me *prima facie* to be subject to the objection that it is at variance with the latest authoritative statement of the law in the leading case of *Wilson v. Merry and Cunningham* (6 Macph. 84), in which the Lord Chancellor said—"I do not think the liability of the employer to his workmen can depend upon the question whether the author of the fault is or is not in any technical sense the fellow-workman or *collaborateur* of the worker. . . . The case of the fellow-workman appears to me to be an example of a rule and not the rule itself. The rule, as I think, must stand upon higher and broader grounds." A similar view had been previously expressed by Chief-Justice Pollock in the case of *Abraham v. Reynolds* in the Court of Exchequer in 1860 (5 Hurl. and Nor. 143), when he stated that the case of master and servant was only one of a class, and that the learning on the subject was by this time exhausted. Unfortunately, though the cases which have occurred for many years have been very numerous, no general rule or principle by which future cases may be tested and decided has yet been laid down. The difficulty in the way of doing so is now increased by the circumstance that it is far from easy to reconcile a number of the decisions with one another, or to extract from them and formulate any rule of clear, general, and certain application.

The ground of action in this class of cases is fault, and the broad principle applicable to that ground of liability is expressed by the rule *culpa tenet suos* &c.

It cannot, I think, be doubted that this rule is founded on reason. It gives sanction to a sound legal principle, and is in accordance with good sense. It

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appears to me to be most difficult to find a good reason for holding anyone who is himself free from fault liable for the consequences of the fault of another, in the absence of any contract or obligation, either express or to be inferred by direct and necessary implication, to undertake such liability. The rule has, however, been made the subject of a large class of exceptions, or perhaps it should rather be said, the rule has been virtually set aside in a large class of cases in which the law has professed to give effect to another general principle, viz. *qui facit per alium facit per se*, or, as otherwise expressed, *respondet superior*. The cases to which I refer are those in which an injury has been sustained through the fault of a servant by a stranger to the master. If the question is still open, and the principle to be applied to these cases had now to be fixed for the first time, it appears to me that the rule *culpa tenet suos auctores* is a sound one, and that liability on the ground of fault, apart from contract, should not to be imposed on any one who has not been personally guilty of fault. The other principle of *respondet superior* is, in my opinion, carried beyond its reasonable scope and extent, and is indeed misapplied when it is used to create or infer liability for any acts of an agent or servant except such as are truly authorised either expressly or as the legitimate result of the agency or employment. The Lord-Justice Bramwell in giving the opinion of the Court of Exchequer in the case of Degg v. The Midland Railway Company in 1857 (1 Hurl. and C. 100) indicates the view now stated in these words:—"The law, for reasons of convenience, more than on principle, makes a master liable in certain cases for the acts of his servants, not only in cases in the nature of contract, which depend on different considerations, but in cases independently of contract, such as negligence in driving in the public streets when damage is thereby done." In the case of Bartonshill Coal Company the reason for imposing liability and applying the maxim *respondet superior* is thus stated by Lord Cranworth—"The master is considered as bound to guarantee third parties against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business. Third persons cannot, or at all events may not, know whether the particular injury complained of was the act of the master or the act of the servant. The person sustaining injury in any of the modes I have suggested has the right to say—I was no party to your carriage being driven along the road, or your shooting near the public road, or to your being engaged in business at home; if you choose to do or cause to be done any of these acts it is to your servants I must look for redress if mischief happens to me and its consequences. A large portion of the ordinary acts of life are attended with some risk to third persons, and no one has a right to involve others in such risk without their consent. These considerations are sufficient to justify the wisdom of the rule which makes the person by whom or by whose orders these risks are increased responsible to third persons for any ill consequences resulting from want of due skill or caution." The reasons thus given for imposing liability on the master humbly appear to me rather to explain the grounds upon which an exception to the general rule has been introduced than to afford good reasons for its introduction or adoption. The suggestion that third persons may not know whether the particular injury complained of was the act of the master or of the servant obviously places the rule on no higher grounds than those of expediency. It affords no good reason for the injustice of holding one person who is free from fault responsible for the fault of another.

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fact that a large portion of the ordinary acts of life, such as using the public with a cart or carriage, shooting game upon enclosed land, building a house round adjoining the highway, and the like, are attended with some risks to persons, and so require the exercise of care, does not appear to me to afford reason for imposing liability on those who are in the performance of ordinary and legitimate acts only—who are themselves exercising an ordinary common law right with due care on their part, and who are thus guilty of fault. If I direct my coachman to drive along a public road in a manner a pace dangerous to others, liability for injury caused will justly follow on the ground of personal fault, of culpa, and on the principle *qui facit per se facit per se*,—that is, on the ground of authority given to do the act which is dangerous to others, which is the proper case for the application of the rule. But if I have chosen an experienced and careful man, and directed him to drive carefully, and so as to avoid danger to third parties, or have employed skilful and careful men as gamekeepers, or as workmen in the erection of my house, it seems to me that my use of the highway in the one case, or of my own property in the other case supposed, being one of the “ordinary acts of life,” not only attended with danger to others, and only dangerous when individual fault is committed, ought not to infer liability on my part should injury result from the fault of my skilled coachman, or gamekeeper, or the builder engaged in my service. I see no good reason in principle for distinguishing the liability on the part of the master to fine or punishment for the consequences of reckless driving, or reckless firing, or careless building, in the cases I mention, and liability for the civil consequences arising from the same fault. A reckless or careless act of the coachman or gamekeeper or builder, being authorised, ought not in principle to infer liability in one respect more than the other.

There is as much—or I should rather say as little—principle for holding a master liable for criminal as for civil consequences in the case supposed. In the exception to the rule *culpa tenet suos auctores* in the case of strangers, based on the principle *qui facit per alium* is, in my opinion, a misapplication of the latter principle, for I think that principle ought to receive effect only with respect to acts authorised expressly, or which are the proper result of implied authority given.

Regarding it, however, as settled by the law as now administered that on grounds of supposed convenience,” or of more than doubtful principle, liability exists to a stranger or third party on the part of a master (who is guilty of no fault) for injuries caused by the fault of a servant acting in his service, there is neither reason nor expediency in making a farther or wider class of exceptions to the rule which renders a person responsible for his own fault only. If the injured be a stranger, it is said he must have a remedy because he has no ready means of knowing whether the injury occurred through the fault of the master or the servant, and because he has been subjected to risks without fault. These observations, however, do not apply in the case of persons who are not strangers, but who are placed or voluntarily place themselves in certain positions and relations which necessarily subject them to certain known risks to persons who enter a common employment, permanently or for a time, or for a short, —who are to become members for the time of the circle of service, family, or organisation, or establishment,—and by so doing undergo risks which are not naturally incident to their position, in consequence of which they are injured. There is no good reason for extending the exception to the ordi-

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nary rule to such cases, to the case of proper fellow-servants or persons volunteering to take part in the servants' duties—to friends who may visit them—the members of a family, or their guests or visitors,—or to any of the many permanent or temporary, of any organisation or establishment in which, however variously occupied, are working towards one common end or purpose—should any of these persons receive injury by the fault of one, it may be a large circle, with whom he is naturally brought into contact.

The question in each case appears to me to resolve into this :—Is the person who complains of the injury a stranger or third party as regards the person who is sought to be made liable for the fault of his servant or agent? Is he one to whom it can be said that no relation subsisted between him and the person whom he seeks to hold responsible for the fault of another, which made the risk he underwent and the consequent injury a natural incident of his position? Unless it can be shewn that he is in this position,—that he was, in the language of the Lord Chancellor in the Bartonshill case, in a position “external to the master and his servants,”—the ordinary and reasonable rule of *culpa tenet auctores*, and not the exception of that rule, applies.

As regards the question, who is to be considered a stranger and so entitled to hold the master responsible for the consequences of the fault of his servant, I am humbly of opinion that the decisions have gone as far as they should allow—some of them indeed too far; and when the cases are considered I think it is not difficult to perceive the reason of this. There appears to be that the cases in which strangers claimed and obtained damages against the master of a servant in fault were so common that they came to be regarded as examples of a broad and general rule, imposing liability for the fault of others, rather than examples of an exceptional and limited class of circumstances in which an exception to the general rule of *culpa tenet auctores* was admitted. It is remarkable that in the case of *Priestley v. Fowler* (3 Ex. and Wel. 1), which occurred in the Court of Exchequer so recently as 1837, which is now generally referred to as the earliest authority in the law as to claims of damages for injuries caused by fellow-servants or *collaborators*. Abinger, in delivering the judgment of the Court, said :—“It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we have liberty to look at the consequences of a decision the one way or the other. In that case, on general principles, it was held the servant could not sue. But in most of the cases in this country and in England, indeed in almost all of them which have occurred since that time, it has been assumed in the courts that the ordinary rule or principle was in favour of liability against a master not in fault for the consequences of fault on the part of his servant. This question has been discussed from this as the starting point, and has been put, Is there a good reason why the master should not be responsible in such a case? If it be said this is merely a form of stating the question which was affected the result, I do not agree in the observation. On the contrary, the form of the question having assumed a general rule or principle against the master and imposing liability on him, and so having laid the *onus* on the master to exempt him, has, I think, materially affected the result to the prejudice of the law. The true position of the parties where fault is the ground of action is stated by Lord Cranworth in the Bartonshill case :—“Where an injury

d to any one by the negligence of another, if the person injured seeks to
e with its consequences any person other than him who actually caused the
ge, it lies on the person injured to shew that the circumstances were such
make some other person responsible"—and if the question had been always
sented, and it had been fully recognised that the person injured must
s shew that he was in the position of a stranger to the master sought to be
responsible, I greatly doubt if the liability of the master would have been
d so far as the cases have gone.

the present case I think it has not been shewn that there are grounds for
g the defenders to be responsible to the deceased workman Woodhead, or
representatives, for the consequences of the fault of Beveridge; for I think it
t be said with truth or propriety that Woodhead, in the work in which he
engaged, was in the position of a stranger or third party in a question with
defenders. His relation towards the defenders and Beveridge was such that
ring the tests stated by Lord Cranworth in the Bartonshill case and already
d) (1) he or his representatives could have no difficulty in distinguishing
er an injury sustained was the result of fault on the part of the defenders
the part of their servant; and (2) the ordinary risks or perils necessarily
st to the work in which he engaged were obvious, and such as often lead
as injury or even to loss of life, either from unavoidable accident or from
ls of others engaged in the pursuit of the same common object. The
d and Beveridge were admittedly engaged in a common employment, in
se of common work, although it is said they had not the same master.
ere working in the same pit, and with one common purpose in view, viz.,
ing of minerals to the surface. As appears from the rules by which all
in the pit were regulated, and which have been referred to in detail by
your Lordships, they had in many respects important duties to each other,
lge having not only the care of the ventilation and roads, but the duty of
ing the working place at which Woodhead was engaged, as well as the
tome by him, and Woodhead being subject to directions and even liable
nised by Beveridge. In such circumstances, and where the parties were
y working towards one common object, but were each members of the
mmunity or establishment, standing in a relation which implied important
o each other and to the defenders, the deceased cannot, I think, be regarded
ght of a stranger, to whom the defenders would be responsible for the fault
servant. The words of Chief-Baron Pollock in the case of *Abraham v.*
ls (5 Hurl. and Nor. 143) appear to me to apply forcibly to the present case;
rule applies to every establishment. No member of an establishment
tain an action against the master for an injury done to him by another
of that establishment, in respect of which if he had been a stranger he
ave had a right of action. A friend of the servant—a son or a relation
the same house, not in the character of a servant, but as a member of
e family—is probably in the same position, and such persons cannot
a actions any more than a servant could. But that is where they form
ily or one establishment for one common purpose." If it be supposed
ther miner directly employed by the defenders had fallen to the bottom
it from the same cause, and at the same time as Woodhead, I think it
ossible to find a satisfactory principle which will distinguish the two
as to make the defenders responsible for the death of Woodhead, though
uld certainly not have been responsible for the death of the other work-

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man. Both were engaged in the same pit, as members of the same establishment, working for a common object, and neither therefore was a stranger to the defenders, by whom the pit was being worked. The single circumstance in question is that the direct employers of the deceased were the Gartners and not the defenders, but that cannot, I think, overcome the effect of the other circumstances already referred to, which place the deceased in a common relation with all the other persons working in the pit.

The case of *Gregory v. Hill* (8 Macph. 282), decided in 1869, was relied on by the pursuer; but I think the grounds of decision in that case are not satisfactory. It seems to me to conflict with the principle of the cases of *the Bartonhill Company v. Wright v. Morris*, and *Wilson v. Merry and Cunningham*, and to be directly opposed to the case of *Wigget v. Fox* (25 L. J. Exch. 188), in the Court of Exchequer in England in 1856, which has been often referred to in subsequent cases, and is recognised as authoritative. It appears to me that where a number of persons are engaged together in different capacities and departments, in the common work of building a house, or a ship, or in any similar undertaking where, from the very nature of the work, they have duties to each other, and although the employment is derived indirectly from the same source—the particular classes of workmen having no direct and immediate employment from their own master—there is yet a bond of union amongst all of them as makes them one family or establishment, and precludes one of them if injured from imposing responsibility on the master of another workman, as a stranger if injured might do. The cases of *Macpherson v. Reynolds* and *Wyllie v. The Caledonian Railway Company* are distinguished from the cases of *Gregory v. Hill* and *Wigget v. Fox*, in this respect, that the persons injured were not members of the same establishment or permanently engaged in an undertaking having, strictly speaking, one common object in view. In the former the person injured was taking delivery of bales from a warehouse, and was injured through the fault of the warehouseman's servant. In the latter a servant delivering cattle at a railway station, and who assisted in putting the cattle into trucks, was injured by the fault of a servant of the company while taking delivery. In these cases the injured persons were regarded as strangers, and not as engaged in an employment having a common object, because they were severally acting independently and for separate interests from the persons with whom they were temporarily brought into contact—in the one case in receiving delivery from others, and in the other in giving delivery to others. In the former separate duty it was to take delivery. It may be questioned, I think, whether in these cases have not extended the class of strangers too far, and whether, where persons are engaged in such an act as taking and giving delivery of goods, as in mooring a vessel at a pier, all who are engaged in such work with duties to each other, and having, in a reasonable sense, a common object in view, should not be regarded as members of one body, none of whom can hold the master of the other responsible except for personal fault; but these cases have, I think, fixed the law which must be applied in similar circumstances, so long as their authority is not questioned in the Court of last resort. The cases of *Calder v. Caledonian Company* in 1871, and *Adams v. The Glasgow and Western Railway Company* in 1875, relied on by the pursuers, do not conflict with the decision to be now given in this case, for in both the persons injured were using railways as public highways, and were thus, in the view of the law, strangers in a question with the companies who were employers of the persons who caused the injuries.

have only to add, that with reference to the argument that the deceased in this No. 82.
 ought to be regarded as a stranger to the defenders in the present question
 as he was a workman for whose fault the defenders would not be respon- Feb. 10, 1877.
 to third parties, I agree in the opinion with Lord Gifford that this does Woodhead v.
 follow. The immediate employers of Woodhead, the Gardners, would have Gartness
 responsible for injuries caused by him to third parties—strangers—in the Mineral Co.
 of his work, if such a case occurred; and it may be the defenders would
 have been responsible. But I think the question of the defenders' responsi-
 bility for injuries sustained by Woodhead through their servant's fault depends
 on general considerations entirely different from those which would have deter-
 mined the defenders' liability to strangers for the fault of Woodhead. This
 question must be solved by the consideration whether Woodhead was pro-
 vided for by the defenders,—whether he was in their service, and acting
 in performing the act complained of,—while it is a sufficient answer to
 him by him or his representatives, based on the fault of a servant of the
 defenders in the mine, that he was not a stranger—that though his relation to
 the defenders was not that of a servant hired and paid by them, he was yet one
 of the general community or organisation, none of whom were strangers to the
 others or to each other.

When the case was called in the Second Division the defenders moved
 for expenses. The pursuer submitted that, as there was no notice on record
 of defence which had been sustained, and which, if it had been dis-
 missed, at the adjustment of issues, might have prevented any trial taking
 place at all, expenses should be greatly modified.

Court agreed to modify the expenses after the defenders' account
 was read.

THE JUSTICE-CLERK.—It is now conclusively settled that, however indepen-
 dent a contract may be, if the work is a common one, such as the working of a
 coal mine, the building of a house, the master or owner cannot be made liable for
 injuries unless his subordinates be proved to have been incompetent, or the mate-
 rials supplied by him insufficient, and therefore, in future, an issue should be
 made unless there are averments on one or other of these points.

THE COURT pronounced this interlocutor:—"The Lords of the Second
 Division having, along with the four Judges of the First Division,
 heard counsel on the motion to apply the verdict for the defenders,
 and on the bill of exceptions, in conformity with the opinion of a
 majority of the seven Judges, enter up a verdict for the defenders,
 and assoilzie them from the conclusions of the summons: Find
 the defenders entitled to expenses (including the expenses of the
 trial) subject to modification, and before answer as to the amount
 of modification, appoint the defenders to lodge in process their
 account of expenses, and remit the same," &c.

WRIGHT & JOHNSTON, Solicitors—RUSSELL & NICOLSON, C.S.—Agents.

JAMES BRAIK MASON, Pursuer.—*M'Laren.*

ROBERT STEWART, Defender.—*J. P. B. Robertson.*

No. 83.

Feb. 21, 1877.

—*Reclaiming Note*—A. S., 10th March 1870, sec. 1, sub-sec. 5, and
 Court of Session Act, 1868, sec. 28.—An interlocutor, approving of
 the trial of the cause, but neither appointing the cause to be tried
 nor fixing a day for the trial, held to be an interlocutor importing an

No 83. appointment of proof, which might be reclaimed against within six days with leave of the Lord Ordinary.

Feb. 21, 1877.

Mason v.
Stewart.

1ST DIVISION.
Ld. Craighill.
M.

IN this case the Lord Ordinary, by an interlocutor, dated 24th January 1877, appointed the pursuer to lodge "such issues as he proposes should be the issues in the trial of the cause in the event of the cause being sent to trial by a jury," and by an interlocutor of 7th February following replying to a plea against the relevancy of the pursuer's averments, and approving the issues lodged "as amended by the Lord Ordinary for the trial of the cause."

Against this latter interlocutor the defender reclaimed.

The pursuer objected to the competency of the reclaiming note, on the ground that the interlocutor reclaimed against was one which required the leave of the Lord Ordinary; that it was not an interlocutor appointing a proof, and so falling under A. S., 10th March 1870, sec. 1, section 5, and sec. 2, and Court of Session Act, 1868, sec. 28, but merely an interlocutor approving issues and leaving the proof still to be appointed. Even after the interlocutor was pronounced there was nothing to prevent the Lord Ordinary trying the case on the issues thereby adjusted with a jury under 13 and 14 Vict. c. 36, sec. 46.

Replied by the defender;—This was nothing short of an interlocutor appointing the case to be tried by jury, and adjusting the issue, merely the day of trial to be afterwards fixed.

LORD PRESIDENT.—This question is not attended with much difficulty, for the interlocutors of the Lord Ordinary are certainly not in the usual form. On 24th January 1877 he "appoints the pursuer to give in such issues as he proposes should be the issues in the trial of the cause in the event of the cause being sent to trial by jury; and appoints the debate on the record and said proof issues to be resumed on this day week." Now, by that interlocutor the Lord Ordinary plainly intended to keep open the question whether the case should be tried before himself or before a jury. But at the same time he had evidently in view that it was expedient that the question to be tried should be put in the form of an issue.

Then, when he hears the resumed debate on the closed record and the issues proposed by the pursuer, after repelling certain pleas for the defence on 7th February, "approves of the said issues as amended by the Lord Ordinary for the trial of the cause."

Now, that proceeding was taken under the 5th sub-section of the 1st section of A. S., March 10, 1870—"In every case in which proof is to be taken by a jury issues shall be adjusted, either at the time of proof being appointed, or on a day to be fixed not later than eight days thereafter; and the parties shall lodge the issues respectively proposed by them two days before the day so fixed." And the question comes to be whether the interlocutor approving issues can be brought under review without the leave of the Lord Ordinary. But that is settled by the 2d section of the same A. S., which provides that "the provisions of the 28th section of the said statute" (Court of Session Act, 1868) "shall apply to all the interlocutors of the Lord Ordinary hereinbefore referred to, so far as these import an appointment of proof, or a refusal to appoint, or a postponement of the same." Now, the 28th section of the Act of 1868 requires the interlocutors to which it applies final, unless reclaimed against within six days.

¹ Stewart v. Clark, March 4, 1871, 9 Macph. 616, 43 Scot. Jur. 41.

subject to be reclaimed against within that time without leave of the Lord No. 83.
 ary. Is, then, this an interlocutor which, in terms of the 2d section of Feb. 21, 1877.
 1870, imports an appointment of proof? I think it clearly does import Mason v.
 appointment of proof. To settle issues for the trial of a case is surely to Stewart.
 nt that proof shall be led. I cannot conceive a clearer implication. That
 ocutor being pronounced, it is quite competent to give notice for trial at
 tings under the standing rules regulating jury trial, independent altogether
 e Act of 1868 and the A. S. 1870, or to apply to the Lord Ordinary
 : a day for trial before him. The case was made ready for trial by the
 eutor sought to be brought under review. Therefore that interlocutor is
 lity and substance an interlocutor importing an appointment of proof.

ND DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT sustained the competency of the reclaiming note.

MACARA & CLARK, W.S.—THOMSON, DICKSON, & SHAW, W.S.—Agents.

JOHN MORRIS, Pursuer.—*M'Kechnie.*

No. 84.

CHARLES THOMAS BRISBANE, Defender.—*Asher—Jameson.*

Feb. 21, 1877.

*Superior and Vassal—Redemption of Casualties—37 and 38 Vict. cap. 94, No. 84.
 —An original feu-disposition granted in 1833 contained a clause exclud- Feb. 21, 1877.
 subinfeudation, fenced by an irritancy. The vassal was duly infeft. After Morris v.
 conveyances of the feu-right to disponees who did not enter with the Brisbane.
 r, a disponee, infeft on a disposition which did not express the manner of
 g, raised an action against the superior concluding for declarator that the
 not in non-entry, the original vassal being still alive, and that the pur-
 is entitled to redeem the casualties on payment of a year's rent of the
 s and 50 per cent additional, under section 15 of the "Conveyancing
 1874." The feu-disposition did not stipulate for payment of any casualty
 le or transfer of the property.*

efence the superior maintained, 1, That the pursuer had no title to sue, in
 (1) that he was not entered, his infeftment not being confirmed, and (2)
 infeftment was null as proceeding on an *a me* warrant and unconfirmed;
 t the irritancy clause excluding subinfeudation enabled the superior to
 l a casualty on each sale of the feu, and, therefore, that the redemption
 as twice-and-a-half times the amount of the casualty.

(1) that the pursuer had a title to sue, the Act of 1874 expressly
 ag as a confirmation of his infeftment, and giving an implied entry; and
 t as the superior could not compel an entry except on the death of a
 the pursuer was entitled to redeem at the price stated by him.

N MORRIS, accountant in Glasgow, raised this action against Charles 2D DIVISION.
 s Brisbane, heir of entail in possession of the estate of Brisbane, to R.
 t declared,—(1) That Morris was, in virtue of a disposition in his
 dated 3d and recorded 12th May 1876, duly vested and seised in
minium utile of certain subjects in Largs, of which Mr Brisbane
 e superior; (2) that, in virtue of a feu-disposition, dated 29th
 iber 1833, and instrument of sasine following thereon, and recorded
 une 1834, a certain John Paterson was duly infeft in the fee of
 subjects under an express prohibition against subinfeudation; (3)
 e casualties for the subjects were exigible only on the death of the
 ered vassal, and John Paterson being still alive the subjects were
 non-entry, and no casualties were at present due and payable by
 to Brisbane as superior; and (4) that, in order to redeem the
 casualties incident to the subjects, Morris was bound only to pay
 thest casualty estimated at the date of raising the action, with an

No. 84.

Feb. 21, 1877.
 Morris v.
 Brisbane.

addition of 50 per cent. There was also a conclusion to the effect that, upon Morris paying the amount calculated on the basis of the fourth conclusion, he was entitled to a discharge of the casualties.

The original feu-disposition of November 1833 contained the following clause prohibiting subinfeudation:—"That it shall not be lawful for the said John Paterson or his foresaids to sub-feu the said piece of ground or any part thereof, or to dispoise the same, to be holden of themselves but allenarly of and under the dispoonees, as their immediate lawful superiors thereof; and that on contravention in this point, not only such subaltern feu-rights, but also these presents, and all following hereon, shall be null and void."

John Paterson, after being infeft in the subjects, dispoined them to a purchaser, who in turn dispoined them to another purchaser. The subjects, after passing through various hands, in all cases on disposition containing a double manner of holding, eventually came into the possession of John Aitchison and his wife, who were the immediate authors of Morris, the pursuer.

The disposition by the Aitchisons to Morris contained no express manner of holding. None of the intermediate possessors of the subjects were entered with the superior, and John Paterson, the original proprietor, was alive at the date of the action.

Morris, in his condescendence, narrated the provisions of the 15th section of the "Conveyancing and Land Transfer Act, 1874."*

It was contended by Morris that, under the provisions of the 15th section of the Act of 1874 above quoted, he was, in the circumstances of the feu, only liable in the highest casualty, with the addition of 50 per cent.

It was agreed on by the parties that the full free rental of the subjects was £70, and that on the basis contended for by Morris £105 would be the amount payable by him.

The superior, however, maintained that the clause in the original disposition prohibiting subinfeudation was inserted in order to insure that the superior should get a casualty, not merely on the death of a vassal, but at each transmission of the feu, and he therefore contended he was entitled to the full casualty and two-and-a-half times its amount.

It was pleaded for the defender;—(1) That, in a question with the pursuer had no title to sue; (2) that the pursuer was not entitled to redeem; and (3) that the redemption-money offered was too small.

On 6th November 1876 the Lord Ordinary pronounced this interlocutor:—"Finds that the pursuer is entitled to redeem the casualty incident to the feu libelled by payment of the highest casualty estimated as at the date of redemption, with an addition of 50 per cent: Finds that the parties have agreed that the casualty is to be estimated at £70: Finds

* 37 and 38 Vict. cap. 94, sec. 15.—"The casualties incident to any feu created prior to the commencement of this Act shall be redeemable on such terms as may be agreed on between the superior and the proprietor of the feu in respect of which they are payable; and failing agreement, all such casualties except those which consist of a fixed amount stipulated and agreed to be payable in money or in fungibles at fixed periods or intervals, may be redeemed by the proprietor of the feu, in respect of which the same are payable, on the following terms, viz, in cases where casualties are exigible only on the death of the proprietor such casualties may be redeemed on payment to the superior of the amount of the highest casualty, estimated as at the date of the redemption, with an addition of 50 per cent; and in cases where casualties are exigible on occasion of each sale or transfer of the property, as well as on the death of the proprietor such casualties may be redeemed on payment of two-and-a-half times the amount of the casualty, estimated as aforesaid, payable on such occasions."

efore, that the pursuer is entitled to redeem the said casualties by No. 84.
 ing to the defender the sum of £105: Finds the pursuer entitled to
 expenses hitherto incurred; allows an account thereof to be lodged, Feb. 21, 1877.
 remits, &c., . . . : Further, appoints the case to be put to the roll Morris v.
 further procedure." * Brisbane.

he defender reclaimed, and argued;—The pursuer was not entered
 his superior, and therefore was not entitled to sue for redemption of
 casualties. The clause of prohibition of subinfeudation being fenced
 an irritancy took this case into a different class from Colquhoun v.
 ker.¹ Even if the application were competent the pursuer could only
 em upon payment as provided for in the second part of section 15 of
 Act of 1874, the clause prohibiting subinfeudation having been in-
 d in order to preserve the superior's right to a casualty upon each
 mission of the feu.²

ie pursuer was not called upon.

NOTE.—The purpose of this action is to have it declared that the pursuer,
 proprietor of a feu created prior to the Act of 1874, is entitled to redeem
 casualties incident to the feu on payment of the highest casualty, with an
 ion of 50 per cent. It is founded on the 15th section of the Act.

The feu was created by a feu-disposition granted in November 1833 by the
 rs of the defender to John Paterson, who is still alive. Paterson was duly
 , and under the former law the fee would be full by the infeftment in his
 a. Since the feu-disposition was granted no other person has entered with
 periors except by the implied entry introduced by the Act of 1874.

The feu-disposition contains an express prohibition against subinfeudation,
 a declaration that on contravention 'not only all such subaltern rights, but
 these presents, and all following hereon, shall be null and void.'

ince its creation the feu has been transmitted to several persons by con-
 ces containing a double manner of holding. The last transmission is in
 r of the pursuer. It is dated 3d and recorded in the Register of Sasines
 May 1876. The disposition does not express any manner of holding, and
 title contains a prohibition against subinfeudation it must be read as a
 tion of lands to be held *a me* only.—See 31 and 32 Vict. cap. 101, sec.
 one prior dispositions may be in the same position, but it does not seem
 ial to inquire into them.

he defender pleaded that the pursuer had no title to sue, in respect that a
 ty had become due, and must be paid before the pursuer could take the
 of the 15th section. The Lord Ordinary is of opinion that this plea is not
 ounded. The only casualty alleged to be due is the casualty of non-entry.
 nder the old law, none could be due so long as the fee remained full in
 rson of Paterson, and it is declared by the Act of 1874 (sub-section 3 of
 14) that an implied entry shall not entitle the superior to demand any
 ty sooner than he could demand it under the former law.

ut the defender further contended that the pursuer is bound to pay a com-
 n before he can take benefit by his implied entry. The Lord Ordinary
 that he is not. The right to redeem the casualties is introduced by the
 nd it is given to the proprietor of the feu, subject only to the condition
 efore exercising it, he shall pay any casualty which has become due. The
 r is the proprietor of the feu, and he is entitled to enforce his statutory
 under the statutory conditions. These conditions, it is thought, do not
 him to pay any casualty which has not become due under the old law.

is true that the defender urged a plea of a broader kind. He maintained
 ie pursuer had no implied entry, because the precept on which he is infeft
 ained in a disposition having an *a me* holding only, and could not be a
 it for an infeftment. He contended, therefore, that the pursuer could not

¹ May 17, 1867, 5 Macph. 773, 39 Scot. Jur. 392.

² Bell's Princ. sec. 866.

No. 84.

Feb. 21, 1877.
 Morris v.
 Brisbane.

LORD JUSTICE-CLERK.—This question depends upon the construction to be put on the 15th section of the statute 37 and 38 Vict. cap. 94. That section commences—"The casualties incident to any feu created prior to the commencement of this Act shall be redeemable on such terms as may be agreed upon between the superior and the proprietor of the feu in respect of which they are payable; and failing agreement, all such casualties . . . may be redeemed by the proprietor of the feu in respect of which the same are payable on the following terms," The feu in the present case was created prior to the commencement of the Act, the pursuer being in right of the feu, is desirous of redeeming the casualty payable in respect of it under this provision of the statute. The first question of course is, whether the pursuer is the proprietor of the feu in the sense of the Act. I cannot doubt that he is. It is said that he is not to be so regarded because he holds under an original right in which subinfeudation is prohibited and the prohibition fenced with an irritancy; that therefore, although he holds in a double manner of holding in his own feu-right, the bare infeftment is null, and the *a me* holding is of no effect until confirmed. But this difficulty is to be entirely removed when we turn back to the 2d sub-section of section 15 of the Act. We find that it provides that "every proprietor who is at the commencement of this Act, or thereafter shall be duly infeft in the lands, shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate register of sasines, duly entered with the nearest superior . . . to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice." Now, this pursuer being duly infeft in a double manner of holding, must be held to be infeft to the same effect as if his right had been confirmed. At all events this clause makes it clear that the word "proprietor" does include one holding under an *a me* infeftment confirmed. If, then, the pursuer be a proprietor in the sense of this clause, there seem no grounds on which he can be excluded from the benefit of it when he enters with the superior as a singular successor. The superior has no claim or demand against him. The fee is full, and the pursuer cannot be required to take an entry while the former vassal is alive. It may be true, and is, in fact, not true, that the object of prohibiting subinfeudation was to secure that the disponee should enter with the superior. But this will not neutralise the

have the benefit of the statutory entry, inasmuch as he is not 'duly infeft in the lands.' But the statute, it will be observed, declares that proprietors duly infefted shall be held to be duly entered to the same effect as if the superior had granted a charter of confirmation. It seems to follow, therefore, that the infeftment which the statute refers includes an infeftment capable of confirmation. It is all the more clear, seeing that the statute not only declares that it shall be necessary for the vassal to obtain any charter or writ of confirmation, but that it shall not be competent to the superior to grant any such deed.

"The next question is, whether the pursuer is entitled to redeem on payment of one casualty and a half, or of two casualties and a half. The Lord Ordinary is in favour of the former alternative. The disposition contains no declaration that any casualty is exigible on occasion of each sale or transfer of the property. It is true that the prohibition against subinfeudation might have the effect of inducing purchasers to enter in order to the security of their title, but the entry is voluntary on their part. The superior could not compel it, nor act any casualty if they declined to enter. The Lord Ordinary is therefore of opinion that this is not a case where casualties are 'exigible on occasion of sale or transfer of the property.'"

ilege conferred by this statute, or give the superior a right to exact a No. 84.
alty which is not due.

Feb. 21, 1877.

Morris v.

Brisbane.

ORD ORMDALE.—I can see no room for doubting that the Lord Ordinary decided rightly.

seemed to be all but conceded by the reclaimer in the course of the discussion, having regard to the interpretation clause in regard to the meaning of "infestment," the pursuer here must be held to be the proprietor of the feu in the sense of the Act, and entitled therefore to have the benefit of the statute. It was said he had no right to take benefit from the statute until he paid a casualty which was already become due. I am unable, however, to find that is a casualty due. The pursuer did not himself ask to enter with the superior—he was content to know that the fee was full, the original vassal being alive. True, it seems that under the terms of the feu-right there might have been room for a declarator of irritancy of the feu, but no such action has been brought. It was impossible, therefore, to say that any casualty was due when the pursuer applied to have the benefit of the statute.

ORD GIFFORD.—I am entirely of the same opinion. The case is an important one affecting or fixing the working of the new statute, in so far as it relates to redemption of uncertain casualties of superiority. The first point raised is as to this pursuer's title to demand redemption of his casualties of relief composition for an entry, and to require the superior to receive the redemption money and to discharge these casualties. It is said by the superior that no person except a fully entered vassal can demand redemption of these casualties. I do not think so; an unentered proprietor can make such a demand as well as an entered one. Every proprietor infeft, or with a recorded conveyance, which is sufficient to constitute an infeftment, is entitled to redeem the casualties now in question. As enacted by the very words of the statute. It will not do for the superior to say,—You are the proprietor infeft, I admit, but you are not entered with me, and will not recognise your right to come to me and get your casualties redeemed. I think that this contention is negatived by the express provision of the statute, which gives the right to every proprietor infeft, and it cannot be said that the pursuer is in this position.

The second question is, does the mere fact of this proprietor, who, in the language of the statute, is a proprietor infeft, coming to the superior under this provision of the statute to demand redemption of his casualties—does the mere fact of application for redemption make a casualty due to the superior which was not due before, and so does it become necessary that the pursuer, as a condition precedent to his being allowed to redeem, shall pay one casualty, that is, one year's rent?

I have no difficulty in answering this question in the negative. No casualty was due or exigible before the date of this summons, and none is now payable. It cannot be said that an action could have lain at the superior's instance for the casualty now claimed. No action of declarator of non-entry could have been competent to the superior under the old law, and in no shape could the superior have enforced payment of any casualty when the claim was made.

There was an entered vassal, and there is still an entered vassal who is bound to pay the casualties, and no casualty could become due to the superior until the death of the last vassal, an event which has not yet happened.

The only remaining question, being the third, in controversy between the

No. 84. parties is, at what rate is the redemption to be made? What is the amount of redemption-money which the pursuer is bound to tender, and what the defender is bound to accept? There are two classes of casualties referred in the section of the statute, and each class is made redeemable at a different rate.

Feb. 21, 1877.
Morris v.
Brisbane.

The first of these is where the casualties are exigible "only on the death of the vassal." Now, I think this is the part of the clause which applies to the casualties sought to be redeemed in the present case. I can see nothing in the feu-right giving the superior more than what becomes due on the death of the vassal.

I think this pursuer has a good title to come to the superior and demand these casualties shall be redeemed, and that the pursuer is entitled to receive them accordingly at the rate which he has offered to pay.

LORD JUSTICE-CLERK.—I wish to guard my opinion in regard to the effect of the irritancy in the original feu-right, because it declares "that on contravention of this point not only all such subaltern feu-rights but also these presently all following hereon, shall be null and void." What the effect of that declaration is, or how far the superior could enforce it, is another matter, as it strikes at the whole right.

THE COURT adhered, and remitted to the Lord Ordinary for further procedure.

J. & A. HASTIE, S.S.C.—JOHN CARMENT, S.S.C.—Agents.

No. 85. A. B. MACKINTOSH AND ANOTHER (D. McCallum's Trustees), Pursuer
vs.
PETER McNAB AND HIS MARRIAGE-CONTRACT TRUSTEES, Defendants.
McLaren—Balfour—Taylor Innes.
Hall—Geo. Watson.

Feb. 21, 1877.
McCallum's
Trustees v.
McNab, &c.

Personal or Transmissible—Obligation to Reconvey—Assignment.—In the course of a series of transactions in connection with a feu for building purposes, conveyed to C, who was his cautioner in the feu-contract, and had advanced to him funds with which to carry on his building, the whole subjects were built upon or unbuilt upon. C a few days afterwards granted N a letter in which he undertook to reconvey to N upon demand and repayment of past feu any of the lots which remained unbuilt upon. N assigned his interest in the letter to the trustees under his antenuptial marriage-contract. *Held* that the letter did not constitute a right of reversion but a distinct personal obligation upon C to reconvey any of the unbuilt upon lots whenever called upon that the right to demand a reconveyance was validly assigned to N's marriage-contract trustees.

2D DIVISION.
Lord Young.
R.

THE testamentary trustees of the late Donald McCallum of Perth brought this action against Peter McNab, formerly builder in Oban, and his marriage-contract trustees, in which they concluded for declarator (1) that the right competent to Peter McNab under a letter dated 14th April 1871 granted to him by Donald McCallum, was satisfied and discharged, and otherwise extinguished, and that neither Peter McNab nor his marriage-contract trustees had any claim against them in virtue of that letter (alternatively) that, under the said letter, McNab or his trustees were entitled to a conveyance of the subjects therein referred to upon payment of a proportionate part of all charges incurred in respect of these subjects by Donald McCallum.

The action arose out of the following transactions, and writings which No. 85.
passed between the parties.

By feu-contract, dated 28th November 1859, Peter M'Nab had feued ^{Feb. 21, 1877.}
Admiral M'Dougall of Dunolly about 5 acres of the lands of Corran, ^{M'Callum's}
Oban, for building purposes. In that feu-contract M'Nab was taken ^{Trustees v.}
and, among other obligations, to expend £5000 within three years in ^{M'Nab, &c.}
erection of buildings, &c., and to that effect, *inter alia*, he got Donald
Callum to become a party to the feu-contract as cautioner for him. Of

date with this feu-contract M'Nab and M'Callum entered into a
note of agreement, by which it was provided that M'Callum should
advance the £5000 to M'Nab to be expended in building as thereby
agreed. It was therein agreed that M'Callum was to have it in his
power to purchase all or any of the buildings at cost price or by valuation;
in the event of the purchase being made at cost price, a reasonable
sum was to be added for M'Nab's erecting the buildings.

M'Nab entered into possession of the ground. M'Callum advanced the
necessary funds, and a certain number of buildings were erected.

On 22d January 1862 M'Nab conveyed to M'Callum, heritably but
separately, eight dwelling-houses which he had erected on four of the
lots disposed to him in the feu-contract. The disposition conveying these
houses bore that they had been erected for M'Callum, and that M'Nab
had no interest in them.

By disposition, dated 9th April 1862, M'Nab conveyed to M'Callum
the whole subjects contained in the feu-contract between him and Ad-
miral M'Dougall, upon the narrative that M'Callum had undertaken to
release him of the whole feu-duty and obligations contained in the feu-
contract. Thereafter, on 14th April 1862, M'Callum granted to M'Nab
a letter by which, on the narrative of M'Nab's disposition of 9th April,
M'Nab was "desirous of having it in his power to obtain . . .
possession of any of the lots or building stances which may remain un-
occupied at the time of his electing to build on such lot or lots," and as he
was willing to grant him such lot or lots on his paying the past and be-
coming liable for the future feu-duty therefor, M'Callum agreed and bound
himself, and his heirs, &c., to grant to M'Nab, at any time that he might
demand it, a disposition to any one or more of these lots, subject to the
conditions in the feu-contract. This letter, as well as the previous dis-
positions and feu-contract, was duly recorded.

On 2d May 1862 Admiral M'Dougall, with consent of M'Nab, entered
into a feu-contract of the feus on the lands of Corran, formerly granted to
him, with M'Callum, in similar terms to M'Nab's feu-contract. M'Cal-
lum proceeded to erect buildings and make roads, &c., on the ground so
conveyed.

On 27th March 1865 M'Nab entered into an antenuptial contract of
marriage, by which, *inter alia*, he undertook to execute in favour of his
marriage-contract trustees an assignation to the letter by M'Callum to
him of 14th April 1862; and on 21st October he executed an assignation
in terms of that obligation.

On 1864 M'Nab had asked M'Callum to convey to him, in terms of the
letter of 14th April 1862, lot No. 1, of said feus, and M'Callum conveyed
him accordingly by disposition, dated 7th October 1864. This con-
veyance M'Callum's trustees maintained exhausted the obligation in the
letter of 14th April.

In 1867 cross actions of count and reckoning were raised between
M'Callum's trustees and M'Nab with regard to the intrusions of both
parties with the Corran feus, and funds expended in building thereon,
and the actions were still in dependence at the date of this action.

No. 85.

Feb. 21, 1877.
M'Callum's
Trustees v.
M'Nab, &c.

M'Callum's trustees pleaded, *inter alia*;—1. The pursuers are entitled to decree in terms of the first conclusion of the summons, in respect—
The claim competent to the defender Peter M'Nab, under the letter of 14th April 1862, was personal to him, and not transferable; (2) A claim competent to the defenders under the said letter has been satisfied and extinguished by the conveyance granted to the said Peter M'Nab on 7th October 1864; and (3) No valid claim to a further conveyance of building ground has been made by the defenders in terms of said letter, and any claim which they might have been entitled to make has been lost by *mora*.

In the course of a proof that was led M'Nab deponed that the various conveyances had been made principally to avoid the diligence of his creditors, he having got mixed up with a man Henderson in building speculations in Glasgow. The creditors had now been settled with.

On 27th October 1876 the Lord Ordinary pronounced this interlocutor—“Assoilzie the defenders from the first conclusion of the summons, and *quoad ultra* dismisses the action, but without prejudice to the claims of the pursuers to withhold implement of the obligation incumbent on them under the back-letter of 14th April 1862, referred to on record, any debt due to them by the defender Peter M'Nab, including past duties, and also any proper expenditure by them, or their deceased constituent, the late Donald M'Callum, on or for the benefit of the ground therein referred to, has been paid, and decerns: Finds the pursuers entitled to expenses,” &c.*

* “NOTE.— . . . The questions for decision here are—1st, Whether the back-letter was assignable, and was validly assigned to the trustees; and if it shall be held to have been validly assigned, then, 2d, what terms the assignees may demand implement from the pursuers, so that this can be determined under the conclusions of the summons.

“I. On the first question two points are made by the pursuers, viz. That the obligation in the back-letter was exhausted by the disposition in 1864; and 2d, That the obligation was personal to M'Nab, and intransmissible. On both points my opinion is against the pursuers. 1st, I think the only limit to the obligation to convey is that the ground of which a reconveyance might be demanded should be unbuilt on when the demand was made. The exhaustion of it by conveyance with one demand, applicable to a small portion of the ground, is so unlikely to have been contemplated, that I cannot impute that intention to the pursuers. The absence of any expression which clearly indicates it. I think parties would have expressed an intention so unlikely to suggest itself to others would have expressed in the correspondence such a view is not hinted at. 2d, The right under the back-letter was, or might be, and in the result (as I assume from the facts about it) proved to be valuable. It was a right to obtain from the pursuers building ground without price, other than the feu-duty on it, so long as it remained vacant. There is nothing that I can see in the nature of the right except it from the ordinary rule of alienability, nor do I think that the circumstances which here attended its creation are such as to warrant its being specially regarded in this respect.

“II. As to the conditions on which the marriage trustees may demand implement, I should think it clear on general principles that the pursuers are bound to convey under the back-letter, except on payment of M'Nab's debts as far as may be ascertained in the proper process; and, second, of any past or otherwise proper expenditure on the ground subsequent to the disposition of 14th April 1862, and a proportional part of any expenditure on adjacent ground which it benefits, and for which, on the customary division and allocation, such expenditure for building purposes, the ground demanded is liable.”

he pursuers reclaimed, and argued;—(1) The letter founded on by the No. 85.
nders contained merely a personal favour to M'Nab, which he could assign. There was no mention of heirs or assignees of M'Nab in the Feb. 21, 1877.
r; so it was not transmissible. (2) If, instead of being called a gra- M'Callum's
ous personal privilege to M'Nab, it was called a right of reversion, Trustees v.
e was authority to the effect that reversions were not transmissible M'Nab, &c.
as heirs or assignees were expressly mentioned.¹
rgued for the defenders;—The pursuers' authorities as to the non-
nmissibility of reversions referred to cases of proper wadset. But,
t from that, Erskine² repudiated the doctrine laid down by the earlier
ers, and his authority had been followed since.³

ORD JUSTICE-CLERK.—My Lords, this case is one of novelty; but I agree
the Lord Ordinary. There are three questions here:—First, Whether the
ation to reconvey, contained in this so-called back-letter, was assignable;
d, Whether, if it was so, it was exhausted by the reconveyance of one lot
e creditor in it; and third, Whether the creditor in the obligation is en-
to demand as many lots as he pleases? These three questions depend en-
on the construction to be put on the documents now before us. The whole
is transaction began by a memorandum of agreement between M'Callum
M'Nab as far back as 28th November 1859. The position which M'Nab
ied at this time was that of a feuar of a certain portion of building ground
Admiral M'Dougall, and he undertook to erect buildings thereon to the
of £5000, M'Callum becoming his cautioner to that extent, and agreeing
ranchise the £5000 to enable M'Nab to fulfil his contract. Up to that point

s express my opinion, I do not at present see how I can pronounce any
tent on this head under the conclusions of the summons.

o far as I can see, the attempted compromise of the actions of count and
ning has failed for want of the consent of the marriage trustees—assuming
union, which favours their right. If, therefore, these cases shall not be
wise arranged, they must proceed to judgment at last, and it is time, for they
been in Court for nearly ten years. When this end has been reached, the
of the marriage trustees under this judgment will not be hard to explicate
ljust. They will have the full benefit of any rise in the value of the
d, and nothing more, while M'Callum's trustees will have such indemnity
property can afford for the debt due to them, and the obligations prestable
ir favour.

he opinion which I have expressed leads to the absolvitor of the defenders
he primary conclusion of the summons. With respect to the alternative
sion, I think I must dismiss the action, for that conclusion is based on
osition that the Court may, in its discretion, limit the extent of ground
reconveyed on demand within the limit specified in the back-letter (viz.,
as unbuilt on), which I am unable to sustain. But it will be understood
what I have said that I should not order a reconveyance except on the
which I have specified, and that the judgment which I now pronounce
ot import a right on the part of the defenders to a reconveyance without
ing M'Nab's debt to the pursuers, as that may be established in the count
ckoning, and also of any proper expenditure on or for the benefit of the
ty by them or their deceased constituent which may not be included in
ebt."

air, ii. 10, 7, and iii. 1, 16; Neill v. Andrews, June 28, 1748, M. 10,406;
ane v. Gourlay, July 20, 1611, M. 10,365; Murray v. Grant, Jan. 9, 1662,
,322; Ersk. Pr., Guthrie's ed., p. 205.

Ersk. ii. 8, 5, 8; Bell's Com. i. (5th ed.) 757.

as v. M'Finlay, May 23, 1807, Hume, 832; Elgin's Trustees v. Wall,
14, 1833, 11 S. 584, 5 Scot. Jur. 372.

No. 85.
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M'Nab, &c.

M'Nab was in the position of proprietor of the stances, and M'Callum was his cautioner and creditor for any money which he might advance. There is this provision—"The said Donald M'Callum shall have it in his power to purchase any or all of the dwelling-houses so to be erected, either at cost price or, in the option of the said Donald M'Callum, by valuation of six persons mutually chosen; and, in the event of the said Donald M'Callum purchasing at cost price, there shall be included a reasonable charge for Mr M'Nab erecting the building." Now, that provision really comes to this, that if M'Callum wished to take over the houses, then M'Nab was simply to be manager, to be paid by M'Callum for his trouble.

The feu-contract which was then entered into between Admiral M'Dougal and Mr M'Nab is of no consequence except in so far as it vests the feudal right in the whole subject in M'Nab. There are many provisions in it, but of these I need not speak. Then we have the two dispositions by M'Nab to M'Callum, dated 1st January 1862, and 9th April of the same year respectively, and the deed marked on the back "Back-letter," which is in question in this case. It is not possible to say that these are lucid examples of conveyancing—indeed, they are full of blunders, and ambiguous as well. But I think the key to the matter is that at this time M'Nab had got into difficulties in connection with a man named Henderson, a builder in Glasgow; that the real truth is that the deeds were drawn out in this singular manner for the express purpose of saving, on the one hand, the creditors of M'Nab, and, on the other, of saving as far as might be, some interest in this speculation to him. Now, this position illustrates very strongly what I have said. It is a disposition by M'Nab to M'Callum of the houses that had already been built in terms of the agreement. It proceeds on the narrative that "I, Peter M'Nab, builder, residing in Glasgow, and now in Oban, heritable proprietor of the stances and pieces of ground and others hereinafter disposed, considering that I have erected eight dwelling-houses on lots Nos. 2, 3, 6, and 7 of the piece of ground after disposed, and that Donald M'Callum, Esq., residing in George Street, Perth, has supplied me with the whole funds necessary for that purpose, and which dwelling-houses and others were erected for him and on his account, and that I have really no interest therein." And then he goes on to say, from himself, his heirs and successors, "to and in favour of the said Donald M'Callum, his heirs and assignees whomsoever, heritably but redeemably." Now, it is very manifest that there is a clear contradiction between these statements, because if the narrative were true, he was bound to grant the houses irredeemably. The object plainly was to protect this conveyance against the possible bankruptcy of Mr M'Nab. If it had been made in the shape of a security, it would have been struck at as being a security for prior debt; and I have the least doubt that the narrative was intended to shew that it was only a fulfilment of a prior obligation arising from the fact that he was only M'Callum's agent. What effect the word "redeemably" might have had, if the question had been raised I will not say; but it would have been very strange for M'Nab to have said that that was a security when it begins with a narrative which excludes that idea.

The second disposition speaks for itself, for it is a disposition of the stances and pieces of ground, and while it narrates the former disposition of the eight houses there is no reference at all to the idea that that deed gave a redeemable right. By the two deeds M'Callum acquired right, first, to the eight houses, and, secondly,

unbuilt on lots ; and then he grants this back-letter, dated 14th April 1862, No. 85. h relates solely and entirely to the unbuilt on lots. Now, I do not say what ion might or might not have been raised if the matter had remained there. M'Callum's impression is that the narrative of that first deed of January 1862 excludes Trustees v. M'Nab, &c. as that the houses were only given over to M'Callum as security. I think it means that they were to belong to him as they were. But, independently at, if it were true that he advanced the money to erect these houses, then ving taken over the houses, the effect necessarily was that he was pro- or of the houses already.

respect to the back-letter relative to the unbuilt on stances, my impression it it was a consideration in respect of which the disposition was granted ese unbuilt on stances. The substance of the arrangement was that llum said,—“I will take over these stances. They will be forfeited if I do I will pay the feu-duty.” And that is the consideration for which the dis- n is granted. But he says,—“I do not want to make money out of this pro-

If you choose to pay up the feu-duty and take it back, you are perfectly ne, as long as I am free.” But that was followed by another proceeding n M'Callum and M'Nab and the superior. Manifestly the state of matters M'Nab granted the last deed was not altogether satisfactory. They were raid of the creditors attaching these lots, and accordingly they resorted to urse of taking a direct conveyance or feu-contract from the superior in of M'Callum, with the consent of Peter M'Nab, the effect of which was ity to extinguish or sopite any right which M'Nab had, and left M'Cal- solute proprietor. The only doubt that I have had in the case is whether, his feu-contract was entered into with the superior, any right remained in nder the previous document of 14th April 1862 ; but it is needless to nder that, for the parties have argued the question as if the back-letter were isting. That being the real state of matters, the result is that I do not this back-letter renders the absolute title a security in any sense at all. : it is a personal obligation, and a personal obligation of a very simple tion. It is a right to re-purchase certain lands on certain conditions. It ntarily granted by an absolute proprietor, and I am of opinion that this as assignable as any other personal right.

n the question of reversion, according to the dicta of Stair, and Erskine Principles, that rights of reversions are not assignable, I take it that that refers to ordinary rights of reversion under proper wadsets. Where a tion of lands which had been wadset to creditors is in question, wadset operly a sale under reversion. But this is not of that nature. I think t a limitation upon a right in security, but a distinct personal obligation. comes to that—an obligation of trust under certain qualifications—that holder chooses to build or sell, he shall be entitled to build or sell ; but eithier builds nor sells, when the demand is made he shall be bound to ck the lots as they are required, on payment of the feu-duty. If that be nder not see the necessity of holding that the right is not assignable. It is al right in regard to certain lots. It is said that he has already made ice ; but if I am at all right in the real conception of this obligation, it that it was not intended that M'Nab should once for all make his choice he wanted. This was rather a burden undertaken by M'Callum, and he ling to be relieved of that burden at any time.

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No. 85.

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The third question is, whether there is any limitation in the number of lots and it appears to me that there is not.

The only matter in which I differ from the Lord Ordinary is, that I think this is not exactly in the position of a right in security. I think the conclusions of the summons are not well founded in regard to this matter, and ought not to be given effect to.

There are other important questions, but the Lord Ordinary has reserved full effect of these.

LORD ORMDALE.—I have come to be of the same opinion, although perhaps may entertain a greater difficulty than is felt by your Lordship upon one of the points. The nature of this action must be kept in view. It is an instance of M'Callum's trustees, and the summons contains two conclusions, more properly one conclusion with an alternative. The Lord Ordinary assailed the defenders from the first conclusion entirely, and he has dismissed the action under the second or alternative conclusion. Now, keeping in view the judgment that has been pronounced, and that the action is at the instance of M'Callum's trustees, I inquire, in the first place, what is the nature of the first conclusion. It is—"That the right or claim originally competent to the defender, Peter M'Nab, under a letter or agreement granted by the said deceased Donald M'Callum to the said defender, of date 14th April 1862, set forth in the condescendence annexed hereto, is satisfied and discharged, or otherwise extinguished, and that neither of the defenders has any right or title or claim against the pursuers under the obligation therein contained." The first branch of that conclusion "that neither of the defenders has any right or title or claim against the pursuers under the obligation therein contained" seems to be assumed to mean that M'Nab's marriage-contract trustees had no right, but the obligation, whatever it was, was not assignable, and the whole argument was addressed to that. Supposing that the pursuers were successful in their claim, how would it benefit them? Supposing that this obligation was not assignable, and therefore that M'Nab's marriage-contract trustees have no good title in virtue of the assignation of this obligation, M'Nab himself had a good title to it. I am not dealing with the difficulties that may arise which were suggested as to whether this obligation is exhausted by one lot having been already sold to M'Nab; but supposing that the marriage-contract trustees, in respect of this obligation not being assignable, have no good title under it, M'Nab himself has a perfectly good title, and therefore what would be the result? M'Nab could demand one or more lots. I shall come to that presently; but even if that he is entitled to take over the remaining lots of feuing ground upon which he would just get these from M'Callum's trustees, and in that way he would just accomplish all that his marriage-contract trustees wanted to accomplish. Therefore I do not see what interest or what object can be served by the pursuers in maintaining that this right, in existing circumstances, at least, is not assignable.

I am rather disposed to concur with your Lordship in thinking that it is not properly a reversionary right at all. It is an independent right, which M'Callum himself gave before his death when he obtained the disposition which it refers, in express terms. But whether he was bound to give it, or whether the obligation is another matter. I do not think he was; I do not see the necessity of that. He might or might not be liable to account to M'Nab.

missions with the property, but it is very difficult to see how he was to grant such an obligation, especially when we keep in view this disposition to the unbuilt on lots, which is absolute. I am not going to give positive opinion one way or another upon the question of whether M'Callum's trustees are not liable to account to M'Nab or his representative whoever they may be, for M'Callum's intromissions with this feuing d. At the beginning it rather appeared to me, looking at the agreement that M'Callum was to interpose and to make advances, and he did make advances; but in reality M'Nab was to be the feuar, he was the builder, it was a speculation of his. But then some peculiar proceedings took subsequently between the parties. The first disposition bore the inehensible expression "redeemably," while on the face of it M'Nab says he has no interest in the subjects. But we have the second disposition, is referred to in the back-letter, which gives absolute and irredeemable. Then that is followed by what appears *prima facie* almost to close the point the idea of there being a right to redeem left in M'Nab—viz. the feu-contract, which was entered into between the superior and M'Callum, at the consent of M'Nab. Now, it may be impossible for M'Nab, or any party naming him, to call M'Callum's trustees to account. That may be so, but we have documents that we have not before us in this process. I think, however, that must be found, not in this process, but in a count and reckoning. I do not want to prejudice that case. The parties, after seven years' delay in the Court, seem ultimately to have come to a compromise; but ultimately there was one condition of that compromise which it appears could not be carried out, and probably there is an end to that compromise; but the fact still exists of a judicial termination; and therefore as long as that is pending I would rather refrain from giving any opinion on it. But on this back-letter to be an independent right altogether, and not a proper primary right, we get rid in a great measure of the weight of the authorities which have been referred to, and which go this length, that proper reversionary interests where there is a wadset or security, are not assignable, unless made express, and that would in one way prevent M'Nab's marriage-contract trustees from having a title to the ground; but, as I have already said, I cannot see how it can avail M'Callum's trustees. M'Nab had right to the ground, and having that he could make it over to the marriage-contract trustees or to any party named. But, independently of that altogether, I am disposed to concur with our Lordship in holding that there is no legal principle or law sufficient to lead us in this case to hold that this is not an assignable right. On the other hand, I am disposed to think that it is assignable, and that therefore this conclusion of the summons cannot be maintained.

When there is this other point in the case—though the first question is the matter before us—secondly, that whether this back-letter is assignable or now extinguished and exhausted, because, in 1864, M'Nab did make a disposition of one of those lots under this back-letter to be given over to him, and it was given over to him. Now, in the first place, looking at the terms of the disposition, I do not think that that is a fair and reasonable construction of the document. I find words in that document which lead me, without much difficulty, to hold that M'Nab was entitled to have the whole of those unbuilt on lots given back to him, and there was no great hardship in that to M'Callum, supposing that that was really the meaning of the parties. These two people seem

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to have been upon very intimate terms, M'Callum assisting M'Nab with money. M'Nab was a builder, and this was a speculation of his from the beginning. M'Callum was not a builder. It was not unreasonable to suppose that M'Callum when he got the absolute disposition which is referred to in this back-bill might say—Well, what is really useful and valuable to me are the built on lots. The unbuilt on lots are of little or no value to me. I require to pay the feu duties. I am not a builder, and I cannot very well myself make these unbuilt on lots valuable. I do not want to go into a building speculation at all. I am a resident at Perth; this building speculation is at Oban, and I do not wish to engage in it at all. I shall be glad to give you back these unbuilt on lots. I will possibly get them built on, and they may become valuable property, and in that case I am not going to give them over; but so long as they are unbuilt on you must have them. Probably they are not worth more than the feu-duty, if so I will relieve me of the feu-duty, past and future, and all the other obligations I am under to the superior in respect of them, and I shall give them back to you whenever you want them. Now, it appears to me that that is the fair interpretation of the obligation, and that it was not exhausted by that one call in 1864. I have no doubt that the obligation still subsists, and will subsist as long as there are unbuilt on stances, and there is no great hardship, I think, upon M'Callum's trustees in coming to that conclusion; for, according to the terms of the back-bill, all the past feu-duty must be extinguished, and they must be relieved of every obligation in regard to the future, and of every obligation to the superior. On all the points that are raised under the first conclusion I have no doubt that the Lord Ordinary has decided rightly.

LORD GIFFORD concurred.

THE COURT adhered.

W. & J. BURNES, W.S.—MORTON, NEILSON, & SMART, W.S.—Agents.

No. 86.

COMMISSIONERS OF POLICE FOR KINNING PARK, Petitioners.—*Balfour Brand.*

Feb. 22, 1877.
Kinning Park
Police Commissioners v.
Thomson & Co.

WILLIAM THOMSON AND COMPANY AND OTHERS, Respondents.—*Asher—Moncreiff.*

Road—General Police and Improvement (Scotland) Act, 1862 (25 & 26 Vict. cap. 101—Private Street.—A street constructed and maintained by feuars on either side, to whom the *solum* belonged, and which was from 1870 to 1875 open to public traffic, but had not been sufficiently pavestoned, was, in 1875, after the district in which it was situated had been taken into a burgh under the Police Act, 1862, ordered by the commissioners of the burgh to be properly levelled and causewayed at the expense of the feuars. *Held* that after this was done the street still remained a private street within the sense of the "General Police and Improvement (Scotland) Act, 1862," and that the feuars were entitled to exclude general public traffic by means of pole chains.

2D DIVISION.
Sheriff of Ren-
frew and Bute.
I.

IN 1866 Messrs A. and W. Smith feued a piece of ground lying between Paisley Road, the highroad from Glasgow to Paisley, on the north, and a street called Park Street on the south. Sites for buildings were feued off on this piece of ground by Messrs Smith, and in 1870 a new causewayed road or track passing through the centre of the ground was formed and called Smith Street. This road was used for building purposes by the feuars on either side of Smith Street, and also for car-

er traffic between Park Street and Paisley Road. There was a foot-
h made of ashes with a kerbstone along the side of the causeway.
n 1871 the district in which Smith Street was situated was erected
er the "General Police and Improvement (Scotland) Act, 1862,"¹
a burgh, and named Kinning Park, and commissioners were duly
ointed in terms of the statute.

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Smith Street continued to be used by the public for general traffic
1875. The street was cleaned and lighted at the expense of the
missioners, but any repairs and watching were paid for by the feuars.
y in 1875 the roadway fell into a bad state of repair, and on 15th
ember the commissioners and sanitary authorities of Kinning Park
statutory notice to the feuars in the street to cause the street to be
d from obstructions, and to be properly levelled, causewayed,
ed, and channelled." This was accordingly done at the expense of
euars, and to the satisfaction of the commissioners, and in October
the street was again open for free traffic to the public. A short
after the repairs on the street had been completed, a barricade, con-
g of posts and chains, was put up at the cost of the feuars across
Park Street end of the street so as to stop the cart traffic. After re-
ing for about four months this barricade was removed by the orders
commissioners. On 23d March 1876 a fresh barricade of stronger
ials was again erected by the feuars, but on 25th March this barri-
also was removed by the commissioners, and of the same date a
on was presented in the Sheriff Court at Paisley at the instance of
ommissioners for interdict against the feuars again obstructing the

the body of the petition the commissioners set forth the various
as of the General Police Act of 1862 conferring on them jurisdic-
over streets and roads in burgh. The respondents maintained
Smith Street was a private street formed for the convenience of the
in the street.

2d August 1876 the Sheriff-substitute (Cowan) granted interdict as
! The respondents appealed to the Sheriff (Fraser), who, on 11th
er 1876, recalled the Sheriff-substitute's interlocutor, and found that
Street was a private street in the sense of the Police Act of 1862.

7th September the feuars had applied to the commissioners to have
Street declared to be a "street" in the sense of the Police Act of
and as such for ever afterwards to be repaired, with the exception
footway, by the commissioners. The commissioners on 15th Sep-
refused to comply with this request. It appeared that none of
reets in the burgh of Kinning Park had been declared to be
ts" as defined by the Act, and accordingly none were maintained
commissioners.

commissioners appealed from the Sheriff's judgment to the Court
ion.²

JUSTICE-CLERK.—The question here is certainly one of very general

and 26 Vict. cap. 101.

authorities cited at the debate.—"General Police and Improvement (Scot-
ct, 1862," 25 and 26 Vict. cap. 101, secs. 64, 163, 182, 234-5, 248, 408 ;
v. Portobello Town Council, Dec. 11, 1863, 2 Macph. 244, 36 Scot.
6 ; Campbell v. Leith Police Commissioners, June 21, 1866, 4 Macph.
Scot. Jur. 445 ; Millar's Trustees v. Leith Police Commissioners, July
3, 11 Macph. 932, 45 Scot. Jur. 578 ; Wallace v. Dundee Police Com-
ers, March 9, 1875, ante, vol. ii. 565.

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importance, namely, whether a street which was private property and was not sufficiently paved and flagged by the owners before the adoption of the General Police Act, 1862, in the district, becomes a public street in the sense of the Act by the mere adoption of the Act. The appellants have put their case as high as this, that public traffic cannot be excluded from a private street in a burgh in which the Act has been adopted. The Act refers to two classes of streets, public and private, and I am of opinion that under the Act there is no such thing as a public street which is not also a public thoroughfare, and, on the other hand, that no private street is a public thoroughfare. By the interpretation clause it is declared "the word 'street' shall mean a public street, and shall extend to and include any road, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage or other place within the burgh used either by carts or passengers, not being a private street, and not being or forming part of a harbour, railway, or canal station, depot, wharf, towing-path, or bank."

The clause then further declares that "the expression 'private street' shall mean any road, street, or place within the burgh (not being or forming part of any harbour, railway, or canal station, depot, wharf, towing-path, or bank) which is used by carts, and either accessible to the public from a public street, or forming a common access to lands and premises separately occupied, and which has not been, before the adoption of the Act, well and sufficiently paved and flagged, and the owners of premises fronting or abutting on said street, and which has not been maintained as a public street." The result of that is that a "private street" is simply a public thoroughfare, while in the case of private streets, as above, there are two conditions necessary,—(1) that they have not been well and sufficiently paved and flagged" by the owners prior to the adoption of the Act; and (2) that they have not been maintained as public streets.

Sections 146, 147, 148, and 149 of the Act relate to the improvement of streets, to the placing of fences and posts on the side of footways, to the restoration of pavement, flags, or materials displaced or altered by persons, and to the construction and paving of footways. All these sections, I think, plainly refer to the case of public streets. They stand in contrast with the 150th section, which deals with private streets, and which ought to have been founded on in this application. That section has a separate preamble: "Whereas it would conduce to the convenience of the inhabitants and to the public advantage if provision were made for the levelling, paving, causewaying and flagging of streets which have been laid out and formed by persons who have neglected to have the same properly levelled, paved, causewayed and flagged, and for preventing such inconveniences in future." It then proceeds to empower the commissioners to cause such streets to be free from obstructions, and to be properly levelled, &c., and provided with kerbs, gutters, to the satisfaction of the commissioners. Now, in this limited exercise of the power of the commissioners there is nothing whatever to destroy the right of a proprietor to exclude the public from his property over which he has pretended that they have acquired any right of way. The interference with private property is limited to cases involving the safety of the public which cannot be tolerated by the proprietor in a use of the ground, or who may require to use it in respect of some duty or business in the neighbourhood. I am therefore clearly of opinion that the Sheriff's view of this matter is right.

Another question remains behind, whether, when the street is properly paved and the fees apply to the commissioners to declare what was formerly

vate street, to be a "street" within the meaning of the general Act, the No. 86.
 ommissioners are or are not bound to do so. I observe that on the suggestion Feb. 22, 1877.
 the learned Sheriff the feuars did make such an application on 7th September Kinning Park
 '66, and that it was refused by the commissioners without stating any reason Police Com-
 misioners v.
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 refused.

LORD ORMDALE concurred.

LORD GIFFORD.—I am of the same opinion. I entirely concur in the judgment of the Sheriff-principal, and do not think it necessary to go into the details contained in his note.

The question raised by the appellant is a very general and a very important one. It is this, whether police commissioners in burghs where the general Police Act of 1862 has been adopted have a right to compel the proprietors, who are the absolute owners of "private streets" in the burgh, to open and maintain these "private streets" at their own expense, as public cart and stage thoroughfares. The proposition must go that length. If it be answered in the affirmative, then an end is put to all private squares and streets, such as are accustomed to see in Edinburgh and in most burghs in Scotland where the feuing is going on. In such "private streets" horses are not allowed to be exercised, and carts and carriages are prevented from using the street as a public thoroughfare, or from traversing it, excepting to the residences of the inhabitants. I am, however, very clearly of opinion that the police commissioners under this statute are not entitled to do this. They cannot compel the proprietors of a private street to convert it into a public one. The only way in which a private street can be made a public thoroughfare is by the commissioners giving it over as a "public street" under the statute, and thereafter maintaining it at the public expense as a public street. A public street belongs to and is to be kept up by the public, and a private street belongs to and has to be kept up by the private owners. No doubt the police commissioners have under the Act very full powers in connection with even private streets, but among these powers there certainly is not any power or right to make a private street a public one, while it is still kept up by the private owners. Certain provisions in the Act were founded upon in support of the appellants' contention, and I am of opinion that these clauses apply to public streets only.

I think it is quite clear that this is a private street in the sense of the statute meaning nothing more, and the result is it must be dealt with as such, so that except as far as the statute gives the commissioners right to interfere with private streets it is private property. I give my full assent to the respondents' proposition that the feuars on either side of such a street, being also proprietors of the houses of the street, agree to shut up both ends of it, they may do so, and do so if they please with the *solum* of the street so retained for themselves. I suppose if they have made it a street to which the public has obtained right of access by dedication or by grant or by prescription as an access or otherwise this would be a different case, but there is really no ground here for maintaining the plea of this kind.

In the whole matter, as, in order to give effect to the appellants' contention, it would be necessary to affirm the proposition that the police commissioners of a burgh which has adopted this Act are entitled to make any private street

No. 86: a public street, and still compel the proprietors to keep it up, I am for adhering to the judgment of the Sheriff appealed against.

Feb. 22, 1877.
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THE COURT pronounced this interlocutor:—"Find that the street in question was laid out in 1870, and was occupied for some time by temporary erections, but was not built upon until 1874: Find that in 1875 the petitioners, in terms of the police statute founded on, required the respondents to put the roadway of the said street in proper repair as required by the 150th section of the statute, which has been done: Find that the said street is a private street in terms of the statute, and is not a public thoroughfare or passage: Find that the public have no right of passage along the same, excepting at the will of the proprietors thereof: Therefore dismiss the appeal; affirm the judgment of the Sheriff complained of: Find the appellants liable in expenses, and remit," &c.

ADAM SHIELL, S.S.C.—ROBERT A. BROWN, I.A.—Agents.

No. 87.

Feb. 23, 1877.
Ferguson v.
Ferguson's
Trustees.

MRS ELLEN SIMPSON OR FERGUSON, Pursuer.—*Asher—Pearson*.
JAMES HUNTER AND OTHERS (Ferguson's Trustees), Defenders.—
Lord-Adv. Watson—Balfour—R. V. Campbell.

Trust—Liferent—Residue—Capital and Income—Mineral Lease.—A testator directed his trustees to pay to his widow the free annual income of the residue of his estate, and after her death to invest the residue in the purchase of land in Scotland, to be entailed on a series of heirs. At his death the testator's property worth about £220,000. He also held two mineral leases which then five years to run. The trustees carried on the mines, and in three years realised £30,000 of profit. The widow having claimed this sum, held that it was not free annual income, but part of the residue.

1ST DIVISION.
Lord Rutherford
Clark.
B.

JAMES FERGUSON of Wiston, in the county of Lanark, coalmaster, in 1872, leaving a trust-disposition and settlement, by which he made a general conveyance of all his property, heritable and moveable, to trustees. After other provisions, the deed directed the trustees "to pay the balance of the free annual income of the free residue of my estate to my said wife, in case she shall survive me, half-yearly, during all the years and days of her life." *

Failing his wife, a sister of the truster was to have the liferent of the residue, and upon her death the trustees were directed to invest it in the purchase of lands in Scotland, to be entailed on a niece and a series of heirs.

The trust-deed contained an express power of sale.

At the time of his death the truster held two mineral leases of Auchinheath and Blackwood collieries, in Lanarkshire, by the terms of which assignees and sub-tenants were excluded, unless by consent of the landlord. These had then five years to run, and the trustees carried them on till their expiry in 1877.

The truster also left heritable and moveable property worth about £220,000, chiefly realised from the profits of the same leases, which had held since 1855.

The widow received from this source an income of about £5000.

* If the balance of income falling to the widow should in any year be less than £2750, she was taken bound to pay it in certain proportions to the two sisters and brother, but only to the extent of £100, £150, and £200 respectively.

he profits realised by the trustees from the mineral leases for the 20 years following the truster's death amounted to about £30,000, and the widow brought this action of count and reckoning against them, claiming these profits as part of the free annual income of the residue of the trust-estate. No. 87.
Feb. 23, 1877.
Ferguson v.
Ferguson's
Trustees.

The defenders maintained that the sum in question must be treated as capital.

The Lord Ordinary pronounced this interlocutor:—"Finds that, on a strict construction of the trust-deed libelled, the pursuer is entitled to the profits derived from the leases mentioned in the record since the death of the truster, . . . and . . . appoints the cause to be enrolled for further procedure." *

The defenders reclaimed, and argued;—The question was one of intention.

The pursuer had been receiving a much larger income than the £2750, which her husband contemplated as the maximum. Then naturally the trustees could have sold the leases with the consent of the truster, and the proceeds would have been capital. The truster could not have contemplated that it was to depend on the decision of the trustees in a matter of prudent administration, whether this large sum was to be treated as capital or income. The pursuer had greatly benefited by the

NOTE.—The first question in this case is, whether the pursuer is entitled to the profits which, since the death of the truster, have been made from certain of the leases. The defenders plead that she has right to no more than the interest on the profits, as these were from time to time realised. But in the course of the discussion they appeared to surrender that position, and to contend that the leases should be valued as at the truster's death, and interest allowed on the value of the valuation. They say that this is the rule which obtains in England in a right of liferent and of fee is given in a terminable estate, and when no contrary intention appears, it should not appear by clear indications that the truster intended that the life-renter should enjoy the estate *in specie*.

The Lord Ordinary has come to be of opinion that the widow is entitled to the profits of the leases. The trustees are directed to pay the annual income of the residue of the estate to the pursuer, and although there is a general power to sell, there is no direction to do so. It appears to the Lord Ordinary that the leases form part of the residue, and that so long as they are retained, the income thence arising forms part of the income of the estate.

It was maintained by the defenders that the profits could not be considered as part of the residue of the estate, because they would necessarily cease at the expiration of the leases, and because the pursuer, by receiving the profits, if she lived long enough, absorb a portion of the estate itself. But the leases are not less parts of the estate because they are terminable, and they do not less yield income though they do not yield it in perpetuity. When leases are let, liferenters have been found entitled to the rents due from the leases, which necessarily *pro tanto* exhaust the subject, and might altogether so.

The question must be determined by reference to the will of the truster, and the Lord Ordinary thinks that it is the soundest interpretation of the trust-deed to hold that he intended that the pursuer should receive the income arising from the estate, whatever the condition of the estate might be which produced the income. The leases, so long as they are retained, are parts of the estate which produce the income.

The Lord Ordinary has not thought himself justified in applying the doctrine of the English law which were brought under his notice—1st, because the leases are to be confined entirely to personal estate; and 2d, because they have not been recognised in Scotland.

The authorities cited in the course of the discussion were—Wardlaw, 2 Macq. 368; 1 Jarman, 577-78; Lewin on Trusts, 263-67; Howe, 7 Vesey, 137; 19 L. R. Equity, 395; Brown, L. R. 2 Chancery App. 751." . . .

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JAMES FERGUSON of Wiston, in the county of Lanark, coalmaster, died in 1872, leaving a trust-disposition and settlement, by which he made general conveyance of all his property, heritable and moveable, to trustees. After other provisions, the deed directed the trustees "to pay the balance of the free annual income of the free residue of my estate to my said wife in case she shall survive me, half-yearly, during all the years and days of her life." *

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The profits realised by the trustees from the mineral leases for the 20 years following the truster's death amounted to about £30,000, and the widow brought this action of count and reckoning against them, claiming these profits as part of the free annual income of the residue of the trust-estate.

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The defenders maintained that the sum in question must be treated as capital.

The Lord Ordinary pronounced this interlocutor:—"Finds that, on a liberal construction of the trust-deed libelled, the pursuer is entitled to the profits derived from the leases mentioned in the record since the death of the truster, and appoints the cause to be enrolled for her procedure."*

The defenders reclaimed, and argued;—The question was one of intention.

The pursuer had been receiving a much larger income than the £2750, which her husband contemplated as the maximum. Then it might be said that the trustees could have sold the leases with the consent of the lord, and the proceeds would have been capital. The truster could have contemplated that it was to depend on the decision of the trustees in a matter of prudent administration, whether this large sum was to be treated as capital or income. The pursuer had greatly benefited by the

"NOTE.—The first question in this case is, whether the pursuer is entitled to the profits which, since the death of the truster, have been made from certain mineral leases. The defenders plead that she has right to no more than the income of the profits, as these were from time to time realised. But in the course of the discussion they appeared to surrender that position, and to contend that the leases should be valued as at the truster's death, and interest allowed on the amount of the valuation. They say that this is the rule which obtains in England when a right of life-rent and of fee is given in a terminable estate, and when it is not apparent by clear indications that the truster intended that the life-renter should enjoy the estate *in specie*.

The Lord Ordinary has come to be of opinion that the widow is entitled to the profits of the leases. The trustees are directed to pay the annual income of the residue of the estate to the pursuer, and although there is a general power of disposition there is no direction to do so. It appears to the Lord Ordinary that the leases form part of the residue, and that so long as they are retained, the income thence arising forms part of the income of the estate.

It was maintained by the defenders that the profits could not be considered as part of the residue of the estate, because they would necessarily cease at the expiration of the leases, and because the pursuer, by receiving the profits, if she lived long enough, would absorb a portion of the estate itself. But the Lord Ordinary is of opinion that the leases are not less parts of the estate because they are terminable, and they do not less yield income though they do not yield it in perpetuity. When leases are let, life-renters have been found entitled to the rents due from the leases, which necessarily *pro tanto* exhaust the subject, and might altogether do so.

The question must be determined by reference to the will of the truster, and the Lord Ordinary thinks that it is the soundest interpretation of the trust-deed to hold that he intended that the pursuer should receive the income arising from his estate, whatever the condition of the estate might be which produced the income. The leases, so long as they are retained, are parts of the estate which produce income.

The Lord Ordinary has not thought himself justified in applying the doctrine of the English law which were brought under his notice—1st, because they seem to be confined entirely to personal estate; and 2d, because they have not been recognised in Scotland.

The authorities cited in the course of the discussion were—Wardlaw, 2 Macq. 368; 1 Jarman, 577-78; Lewin on Trusts, 263-67; Howe, 7 Vesey, 137; and 19 L. R. Equity, 395; Brown, L. R. 2 Chancery App. 751."

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a testator directs that his widow shall receive the free balance of the income of his estate, or, as it is expressed here, the balance of the free income of the net due of his estate, the idea which is in the mind of the testator is that the net produce of the capital of his estate shall be paid over to the widow. In short it comes just to the same thing as if the estate had consisted of a sum of money and that the widow was to receive the interest, at a fair rate, accruing upon that capital sum. In a case of this kind, where the *universitas* of the estate is conveyed to trustees for the purpose of ultimate realisation and conversion, and where the income is given to the widow, that is, I think, the natural, and appears to me also to be the fixed, principle of construction. It is the principle which is at the foundation of a very recent case with which your Lordships are familiar, namely, the case of *Wood v. Menzies*, May 26, 1871, 9 Macph. 1. In that case the testator directed his trustees to convert his whole estate, heritable and moveable, into money, and after paying debts, &c., to invest the residue in parliamentary stock, public funds, or heritable securities, and to pay over to his wife the free annual proceeds "of my said whole means and estate during all the days and years of her life." That is just such a settlement as we have to deal with here. At the testator's death, on 3d January 1861, part of his estate consisted of consols, the dividend on which became payable on 5th January. The widow survived for some years, and died on 19th April 1867. It was held, on a sound construction of the terms of the deed, that it was the testator's intention that his widow's annuity should be computed on the footing of its being a liferent of a sum of money of which the interest accrued to her *die in diem*, and therefore (1) that she was only entitled to the proportion of dividends effecting to the period of time between 3d and 5th January 1861; (2) that she was entitled to the proportion of dividends due after the half-year current at her husband's death corresponding to the period from 5th January to the date of her death; and it was observed that the question being one of construction, as gathered from the trust-deed, the rule applicable to the ordinary case of settlement of consolidated annuities in liferent and fee did not apply. In this case I observe that Lord Deas in giving judgment said—"It is a mistake to suppose that this question depends on anything else than the will of the testator, although there may be certain presumptions which aid us in construing that will. This is not a case of heir and executor falling within the rules of testate succession. Neither is it like a case of liferent which existed independently of the will of the testator, or the case of one heir of entail succeeding to another under a deed by a third party. The deceased was the unqualified owner of the whole means and estate dealt with by his deed. He voluntarily bequeathed the liferent of the whole to his widow, and the question simply is, What was his intention in doing so? If, indeed, the deceased had given to his widow the liferent of these consols alone, the fair inference might have been that the provision was given with all the incidents usually attached to the subjects of that particular kind. But that was not what he did. He gave to his widow a universal liferent of his estate, which consisted of heritable and moveable subjects of different kinds, the incidents of which were also different. The question is, When did he intend that liferent to commence? So far as I know, the practice is to hold that such a provision vests *de die in diem*, unless some reason appears for thinking that a different period of vesting was meant. Nothing anything special in the deed goes the other way." And I may also observe that in my own observations in that case there occurs a passage which

sides for the payment of debts and legacies, and also for certain annuities
 des that which the widow was to enjoy from the income of the residue,
 then, after all those provisions are satisfied, he disposes of the residue by
 sting that it shall be invested in land and that land settled in strict entail
 a certain series of heirs who are named in the settlement. The provision
 avour of the widow is expressed in the following terms:—"To pay the
 nee of the free annual income of the free residue of my estate to my
 wife, in case she shall survive me, half-yearly during all the days and
 of her life." The trustees entered into possession of this estate imme-
 ly upon the trustor's death, and one of the first matters that necessarily
 ied their attention was that very important part of the estate which con-
 l of going collieries. The leases excluded assignees and sub-tenants without
 andlord's consent, and therefore the trustees were in this position that,
 s they could make some arrangement with the landlord it would have been
 ter of some considerable difficulty for them to do anything else than to
 into possession of the collieries and carry on the business to the termina-
 of the leases. They had a power of sale given them by the deed, and they
 have made an arrangement for selling those leases and realising the value
 m; but it was also quite within their option, I apprehend, from the very
 of the estate which had been committed to their charge, that this portion
 estate should be realised in a somewhat different way—that is to say, that
 should carry on the leases to their termination and make the most that
 be made of them during that period—working out as much as could be
 ht out availably and profitably of the mineral during the remaining years
 leases. Now, this latter was the course which they elected to take, and
 ntly they seem to have been very well justified in taking that course. It
 uggested in the course of the argument that it was doubtful whether they
 entitled under this settlement to carry on those leases to their termination.
 ot say that I see any room for doubting that. They were entrusted with
 alisation of the testator's estate. They were to realise the estate in such a
 ultimately to convert it into money, and with that money to buy land
 ttle that land in strict entail, and of course the testator's object was that
 idue so to be invested should be as large as possible. The trustees, there-
 ight naturally be expected by the testator, and it was at all events their clear
 to make the most of the leases as part of the estate. Without the landlord's
 t they could not sell the leases, and therefore if he had refused his consent
 ad no alternative but to carry them on to their termination, which of itself,
 k, is quite sufficient to shew that in following that course they were not by
 eans exceeding their powers. Now, it appears that very large profits were
 equence made by the trustees from the collieries under lease, and the
 's income under the provision in her favour in the trust-deed will certainly
 t to a very large sum indeed if those profits are to be dealt with as part
 annual income of the estate. I am of opinion that those profits cannot be
 with as annual income. I think they are part of the capital of the estate,
 r this reason—Those leases were terminable rights, and their duration after
 ath of the testator was very short. But during that short period a large
 t was expected to be realised, and was in effect realised, in the shape of
 of the collieries. But to say that that is part of the annual income
 estate is, I think, altogether to misapprehend the nature and effect of such
 ision as was made for the widow in this settlement. I think that when

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enjoy a particular subject *in specie*. In both of these cases the conclusion will be the very reverse of what I am disposed to arrive at here. For example, the case of a proprietor of land, who gives to his widow a liferent of his land estate, or of a portion, it may very well be that the widow would be entitled to the rents or lordships accruing under leases of minerals, because that depends upon a different consideration altogether from what must regulate our judgment here. It depends upon what are the legal rights of the liferenter and fiar *inter se* in a subject of that kind. If a proper right of liferent and fee be created by the testator, the intention of the testator cannot regulate beyond this, that it is his intention to create a proper right of liferent and fee. The law will determine what are the rights of the liferenter and fiar *inter se*. Again, it is possible to conceive a case where in the settlement of a lessee, like Mr Ferguson here, under mineral leases, the intention of the testator may be fairly decided that his widow, or the liferenter who is to benefit by his settlement, should enjoy those leases *in specie*, even though they may be part of the trust settlement. The direction to the trustees may be so clear and distinct to put the widow or liferenter in possession of the leases so as to enable him or her to carry them on, as to leave no doubt whatever of his intention that the profits accruing from those leases were to belong to the liferenter. But in the absence of specialties of that kind, and where you have to deal with a trust settlement conveying and settling the *universitas* of a mixed estate, I apprehend the rule which I have already suggested is the only safe one for our guidance, and in applying that rule here I confess it does not leave me in any doubt at all that the conclusion is that the profits arising from those leases as they come to be received form part of the capital of the testator's estate, and that the widow is only entitled to interest upon those profits.

The Lord Ordinary has not followed out his view of the case to any practical conclusion in figures, and we are not yet in a position, from the argument that has been addressed to us, to say what precisely the effect of this judgment will be; but upon that we shall be glad to have the assistance of parties in a further determination of the case.

LORD DEAS.—The late Mr James Ferguson, as your Lordship has said, was an extensive and successful coalmaster. He held leases of minerals, under which he made very large profits. At the time of his death he held the lease or leases which have given rise to this action, and that lease or those leases had still many years to run. His settlement was made very recently before his death, and was made under circumstances very much the same as those that existed at the time of his death. The profit which he had been making under those leases had reached the amount of some £20,000 a-year. At the date of his settlement, at his death that profit was not nearly so large. It generally happens with coal leases that the lessee takes a lease for a period in the course of which he expects to work out the coal, or to work out the best and most profitable portions of it; and it is quite intelligible, therefore, how it might happen that during the last five years of the leases the profit was much less than it had been during the earlier stages of the leases. Accordingly it appears that for the last five years which have elapsed since the death of the testator the average amount of profit has been only about £8000 or £9000 a-year in place of the much larger sum which had been formerly realised. Well, he leaves the whole estate, heritable and moveable, to trustees, and after providing for a variety of legacies, annuities

ne to have a very direct bearing upon the present question—"If certain consolidated annuities are settled on one person in liferent and on another in fee, is, if after the lapse of the liferent the consolidated annuities are to belong absolutely to the fiar, I think the rule of law is, that the annuities which become payable during the continuance of the liferent will belong to the liferenter, and only those which fall due after the death of the liferenter will belong to his successor who takes the fee. But that rule applies to cases where there is a proper settlement in liferent and fee, and it arises from the nature of subjects so settled. In the case of consols there is really no capital sum; the whole estate is annuity, and the annuity belongs to him who is in right in the annuity becomes payable. The rule, therefore, which fixes that rest on money vests *de die in diem* has no application. Here we have to do not with a single settlement of consolidated annuities, but the settlement of the liferencies of his whole estate, only a small part of which was in the shape of consolidated annuities; and in dealing with the destination of his estate we regulate our judgment by his intention. Now, when we find that he has made a conversion of his entire estate into money and then provides that that money which is to be so converted is to be liferented as a *universitas* by his wife, I cannot avoid the conclusion that his intention was that she was to have the proceeds of that estate as one consisting of money bearing interest; that being so, the mere accident that part of it was in the form of consolidated annuities cannot affect the ultimate question." Now, I apprehend the rule there adopted, and which is by no means adopted there for the first time, but which is perfectly well known in our practice, is this, that where a widow or other person is entitled to a liferent of the *universitas* of a fee estate left in trust the right of the liferenter is to be considered as being in the same position as if she was entitled to the interest accruing upon a capital sum.

Now, applying that case here, I think there is nothing in the deed in the least degree adverse to the application of such a principle. On the contrary, it appears to me to be quite consonant with the whole frame and scheme of the settlement, and with the view that was obviously in the mind of the testator, especially in framing the clause applicable to his widow's provision, that she should have the free balance of the income, in the proper and reasonable sense of the term, of his entire estate.

I agree with the Lord Ordinary in thinking that it is not very safe in a case of this kind to resort to the rules of equity established in the Court of Chancery in England, because we are very well aware that in cases of this kind the Courts of Equity in England have adopted many artificial rules, which are somewhat remote from the principles upon which we administer our equitable jurisdiction. In a case of this kind, for example, I do not think we have any settled principle to which to ascribe our judgments, except the intention of the testator. The result of the thing depends upon that; and the case of *Wood v. Menzies*, while it establishes a principle that is applicable to cases of this kind generally, is yet based entirely upon what is supposed to be the intention of the testator in making his trust-settlement. Now, it must be observed that this class of cases is quite different and very easily distinguishable from another class in which there is either a settlement in liferent and fee of a particular subject, or where, instead of this, there are various subjects conveyed, there is an intention, expressed or implied, upon the part of the maker of the settlement that the liferenter shall

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desired to do so. But I am very clearly of opinion that, under the circumstances, they were not only entitled to carry on those leases in the way they did, but that it was their duty to the trust and to the beneficiaries to do so, by which I do not mean that they would have incurred any legal liability if they had not done it, but that there are duties which trustees owe to the trust and beneficiaries beyond their mere legal duties. There are duties somewhat akin to those which a parent owes to his children and a child owes to his parent which the trust naturally expects that his trustees shall perform even though they incur no legal liability by leaving them unperformed. That the trust expected they would carry on the leases to a termination I have no doubt whatever. There is no indication of that we have in the appointment of a gentleman whom we know to be one of the best men who could have been selected for the purpose (Mr Hunter), as one of those trustees. The anticipated profit might be more, but there was no probability of loss, during the short period the trust had to run. If there had been so, Mr Hunter was thoroughly well qualified to have told them so, and that might have made all the difference. But, as it was, I cannot doubt that if they had thrown up those leases they would have been doing that which the trust never expected them to do, and which they were fairly entitled to expect them not to do. In carrying them to a conclusion I think they only did that which the trust intended them to do, and which they were legally entitled and morally bound to do.

That being so, it follows that when the trustees have drawn all those portions of the estate they have simply realised that portion of the estate. It is the duty of executors and trustees generally to realise the estate, but the time taken to realise it and the mode in which it is to be realised depend entirely upon the nature of the estate and upon circumstances. And when parties are appointed, not only executors, but likewise trustees, to hold the whole heritable and personal estate of a deceased person, I know no law and no reason whatever why they should be bound to realise forthwith in the same way as they would sell some valuable article or perishable subjects. They may take the time that is necessary, whatever that may be, in order to realise without a sacrifice. I think the proper and legal way of realising this portion of this estate was to carry on the leases to their termination, and that being done, I think the trustees made the most fair and liberal proposal when they stated that they were quite ready to account to this lady for the whole proceeds which they had actually received, on the footing of these being capital, and allow her the annual interest on those proceeds. I think that is the most favourable mode of dealing with the estate which she could well expect, and when that is understood and fixed, the only thing that remains to be arranged will be how the accounting is to be done, in respect of what we may call back-hand money which has been got in for a time, by the trustees before being paid over to her. If she had had a regular income, and had been in want of the money from time to time for her expenses, a different kind of arrangement might have been required. That was not the least necessary here. She did not contend for that; but, of course, in the circumstances that it was the half-yearly income intended for her is to be taken into account when you come to the question of accounting as to the amount of money that shall be paid to her. I agree with your Lordships that this is a matter in which the Court are fairly entitled to expect the views of the parties, and I have no doubt, from the liberal spirit which has already shewn by the trustees, that it will be readily arranged.

ings and expenses of the trust, he provides that his widow, so long as she not enter into a second marriage, shall have the liferent of the whole of his estate—that is to say, the whole residue of his estate, heritable and movable, including of course those leases which formed an heritable subject. I agree with your Lordship, and also with the Lord Ordinary, that the question is, What was the intention of this testator? Did he intend the trustee to get the whole income that was to be derived from those leases so long as they lasted, or did he look upon the profits of the leases as a part and portion of the residue of his estate which was only to be liferented? The Lord Ordinary says the question must be determined by reference to the will of the trustor. I think that is quite sound. The Lord Ordinary goes upon a right principle; when he says he does not think himself justified in applying some doctrines of English law which have been quoted to him, I think he is right there also, for this is a question as to the construction of a Scotch deed, prepared by a conveyancer, and it is the deed of a domiciled Scotchman, and deals with heritable property—for the leases are all heritable—and therefore there is certainly, to say the least of it, no occasion for resorting to any foreign law for lightening this particular deed. The simple question is, What, on the face of the deed, and taking the terms of it along with the surrounding circumstances, is to be held as the will of the trustor?

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Now, the main surrounding circumstances were what the trustor himself had been doing in the course of his life. What he had been doing was to carry on those leases, and from the large income he derived from them to accumulate capital. He would not have been a man of common sense if he had been spending the whole of that temporary income and realising no capital. But he was accumulating capital to a large amount, and his intention plainly was (as we see from the deed) that when all his other purposes were satisfied with reference to that, it should be invested by his trustees in the purchase of an estate, to be held upon a certain series of heirs. He left a widow but no family, and his object was to provide for her and then to perpetuate his own memory by a great estate being purchased and handed down to a long series of heirs of entail. Now, while the principle upon which the Lord Ordinary proceeded was perfectly right, I think he has come to a wrong conclusion. Construing the deed according to the intention of the testator, in the light of the surrounding circumstances, I think the true conclusion is that he looked upon the value of those leases as a part and portion of the capital of his estate which he meant to be liferented. As suggested in argument for the trustees that in carrying on those leases they were acting altogether without authority and contrary to their duty, so that the trustor cannot claim the profit which they have thus earned for the estate, the risk of personal liability to themselves had there been a loss. I think it is a very odd argument to put into the mouths of the trustees. My opinion, therefore, is in their favour in its result, proceeds upon the very opposite view. I think they were perfectly entitled to carry on those leases. It may be that they could not have incurred any legal liability if they had not done it—that is to say, if they had made some arrangement and got the leases disposed of in some way; but as your Lordship has pointed out, they could not have done so without the consent of the landlord, because assignees and sub-tenants were expressly excluded. In any event, they, as the representatives of the trustor, were bound for the rents and lordships to the landlord, and they had no means of getting quit of their obligations under the leases if they had

No. 87. the person who gave the power of converting the leases into money that thing to be converted should be used up or absorbed by his widow, in the event of the trustees not being able to arrange with the landlord for the disposal of the leases, and being obliged to work the collieries, as they in point of fact have done.

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On these grounds I concur in the result at which your Lordship has arrived.

LORD SHAND.—The cases which have hitherto occurred on which questions have been raised in regard to the returns from mineral fields have, I think, been of one class—I mean where the testator has been the owner of lands, and the minerals leased, and the question has arisen, who was the party entitled to the rents of those minerals? The three leading cases which were referred to in the discussion were those of Waddell, Guild's Trustees, and Wardlaw¹—all of which are cases of the same kind. In those cases, just as here, I think the principle which the decision turned upon was, what was the intention of the testator? Then, in ascertaining that, the Court, with reference to mineral rents, have arrived at the general conclusion that if minerals have been let by the owner of lands, at least, if they have been let for a considerable period of time—the lands are brought into the category (as Lord Neaves puts it in the case of Wardlaw) of subjects bearing fruits; so that those cases really settle nothing more than that mineral rents in that position are to be regarded as fruits of the lands. If a life tenant has a life interest of the lands, she shall receive those mineral rents which are part of the fruits. This case appears to me to raise an entirely different question. The trustor was not the owner of minerals under lease; he was a tenant under leases. He was not drawing a rent or return from the lands; he was drawing profits from a going colliery business. In the case of the lands, you have a direct return from the lands, and nothing else, and the lands themselves form part of the residue. Those returns are part of the proper income of that residue. In the other case, while you have no doubt a lease of minerals is an important element, yet, truly, what is income is not the mere fruit of the lease but the result of trading. You have a business carried on involving the business of raising coals, with all the outlays connected with it, and trading in those coals, after they are raised, depending upon market prices and profits earned. The case of a coal mine is not different from that of a tenant under an agricultural lease, or that of a partner in a manufacturing or mercantile business who is bound by his contract to remain in that business as a partner for a certain number of years to come. In that class of cases it appears to me, concurring with the statement of principle by your Lordship in the chair, that where the testator leaves an estate, heritable and moveable, is given to trustees, so that the general rule shall be held by them for one person in life interest and another in fee, the rule must be that the profits of such a business as I have referred to shall go into the residue—shall form part of the capital of that estate—unless a contrary intention can be inferred from the terms of the deed; and I think it must be so, because I regard the profits which are to be received from the business as a colliery business or an agricultural lease, or a mercantile business, as not proper interest on residue, but as part of the residue itself,—part of the capital of the trust itself which has been left by the trustor to his trustees, and, indeed, in many cases of estates which one has seen in practice, such profits really and practically form the whole of the estate that a person leaves. And

¹ *Supra cit.* p. 534.

MR MURE.—I have come to the same conclusion, and I agree with your ship that the question must be disposed of according to what appears to be the intention of the truster as disclosed in his trust-deed. The words with which we have more particularly to deal are those under the fourth head, where the testator provides that his widow is to get “the free annual income of the residue of my estate;” and the question is, what does that provision mean? It gives to the widow the whole profits arising from these valuable leases, she only to be entitled to get the interest upon those profits capitalised as they accrue! The question is no doubt one of difficulty; but, taking the words themselves, I am disposed to think that, in a trust-deed of this description, where there are no provisions to the contrary in the other parts of the deed, the word “income” lead necessarily to the opposite conclusion, the expression “income of the residue” is generally understood to mean the income of a realised capital.

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The residue of a trust-estate is what is realised after the ordinary expenses of the trust have been complied with. Taking the words of the deed by themselves, therefore, I do not think that they must necessarily be held to import that this testator intended them to carry to his widow the profits of a lease which was held by him in lease only, and was to go on for about five years from the time of his death; and upon that ground alone I should be disposed to hold that the widow was only entitled to the interest accruing upon profits realised.

There are other clauses in the deed which tend to confirm that view; but the main object of the deed was to realise the estate in order to create an annuity estate, and there are anxious provisions made in the deed for the investment of the money and the management of the estate by the trustees in order to effect that object. What the truster directs to be entailed is the residue, the income of which is to go to his widow; and he also directs that on her death some of that same residue shall be paid to his sister during her lifetime, but upon the death of his sister it is to be applied, so far as it does not consist of land, in the purchase of lands in Scotland, to be entailed upon a series of heirs. Now, I do not think it is natural to suppose that in such circumstances the testator intended that either his widow or his sister should get the whole of the very large income derived from these collieries, and that they were to be so absorbed, instead of being realised, in order that the principal interest might go, first to his widow and then to his sister, and then be entailed. I do not think there is anything to shew that that was the intention of the gentleman who made this trust-deed; and when the clause is read in connection with the provision he makes for the event of his income exceeding £2750 per annum, it seems to me to point pretty distinctly to the same conclusion. The clause makes provision as to what is to be done with a portion of the excess beyond that sum. Why that sum was fixed does not appear, and the clause is peculiar, because even at that time the realised estate was calculated to yield a larger income than £2750. But the provision appears to me, notwithstanding, to indicate very clearly that it never was in the mind of this testator that the income of his widow was to be increased to the extent of £10,000 per annum a-year by the profits of these collieries. That appears to me to be out of the question altogether. But further, and supposing that the trustees had made an arrangement with the landlord and had sold the leases, it is certain that the widow would only have got the interest upon the sum realised by the sale, and that would go far to strengthen the view that it was not the intention of

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benefit of the profits of that sale as being truly hers in the character of a life-rentrix, but realised in a different way. I think that goes a long way to shew that those profits were not of the nature of proper income or interest of residue at all, but were part of the residue itself. I think it very difficult to maintain that in the one case she was to be entitled to get the whole profits to herself, and in the other case that others were to get those profits, and that she was merely to obtain the interest upon them.

So much for the general provisions of the deed ; but I concur with the observation of Lord Mure that there are other clauses which strengthen the view I entertain even upon the general provisions. One of these is the clause which seems to refer to this lady's income being possibly about £2750. It was said that in any view that sum would be considerably exceeded. Well, take it that it might be exceeded by £1000 or £2000—but it is a very different thing to say that the testator in putting such a sum in his deed could by possibility have contemplated that the large amount of £20,000 a-year—or £8000 a-year, as it was reduced—should go to his widow from this one subject alone, when he contemplates so shortly before his death that her income might be only about £2750. Again, I think that if there had been an intention to give the profits, we should have had a different expression from what we have in the residue clause. It is the “income of the residue,” which is a very suitable expression for the interest on the capital of the estate. Again, you have the fact that if this lady died his sister was to become the life-rentrix. Is it to be supposed that upon the accident of one or other of those ladies being in life at a particular time she was to get the benefit of this large estate, amounting to £20,000 or £8000 a-year? These are all considerations upon the special facts of the deed which go to support the view I entertain from the general provisions of the deed, that it was not intended to give this lady the profits of the leases.

The Lord Ordinary has observed, and indeed his judgment seems to be based upon this view, that it appears to him that the leases form part of the residue, and so long as they were retained the profits thence arising formed part of the income of the estate. I think, with deference to his Lordship, that this view is somewhat misleading and fallacious. It proceeds upon the view that the leases, as documents giving an heritable right, are part of the residue. Not so; the leases are part of the residue ; but it is the leases as giving right to the profits that are part of the residue, and the profits themselves being the result of those leases seem to me to become necessarily part of that residue. If you take the case of a truster dying after conveying to his trustees his share in a going mercantile business of which he must remain a partner by the deed for four or five years, the share of that business is no doubt conveyed, and you may fairly say the contract of copartnery is conveyed, as part of the residue of the estate in the same way as a lease is ; but I think it would be extraordinary to say that because the contract of copartnery is conveyed it thereby follows that the whole income of the estate is given, that the life-renter is to get the whole profits to come in from the business.

Upon these general views I concur with your Lordship in thinking that the Lord Ordinary's interlocutor should be recalled, and that this lady should be found entitled, not to the profits of the minerals, but to the interest on the residue, including in that residue the profits which have been realised from those leases since her husband's death.

say that I concur with your Lordships that that is the principle upon which *Mc v. Menzies*¹ was decided. It is of course an entirely different case if you not, as here, the *universitas* of the estate given to a body of trustees, but different given directly of specific subjects, such as a conveyance of those themselves to a beneficiary. In that case you have a distinct indication intention that the beneficiary shall have the whole benefit of that specific so conveyed; and I think the contrary intention may be more readily used in favour of the liferenter if the right of producing the profits is not, re, a terminable right ending after a short period, but is to be one of long ion.

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with that as the general principle, the next question is, applying that, what result with reference to the provisions of this deed? We have here those conveyed as part of the *universitas* of the estate to trustees. We have it they have been producing very large sums,—from £18,000 to £20,000;—immediately before the truster died, and that after his death, and after trustees have renounced one of the leases, the profits have still amounted to £8000 a-year. The liferent or income of the residue of this estate is given, first place, to his widow, and upon her death, subject to certain legacies, liferent of that same estate is given to the truster's sister. There is a power and conversion of the property; and, taking those different provisions together, I see nothing to lead to the inference that there was any intention to give to his lady the large profits which were to be realised in carrying on this business. It was suggested in the argument that the trustees might have been violating their duty in carrying on this business as they did. If the deed expressly or by inference provided that they must wind up this business at once, and if in violation of that the trustees had carried on the business, I should think the claim of this widow would obviously have been one that could not be sustained; but I agree with your Lordships in thinking that that is not the true position of the case,—that in the circumstances in which the trustees were placed, and looking to the very special destination in those leases, the trustees were fairly entitled to carry them on to their close. But, then, in doing so, it appears to me, upon the grounds I have stated, that they were really realising the capital of the estate by the realisation of those profits, and that the profits realised were part of the residue that was to be liferented. It was said that the profits that were realised from the business were income to Mr Ferguson during his life, and no doubt that is perfectly true; but I think it becomes a different question whether you can represent the profits that are being realised after his death as income at all in the same sense. You then have a state, and I do not think that the profits which are being ingathered as part of the trust-estate are income at all in the same sense; and I do not know how we can have a better illustration of that than the consideration what would have occurred if the trustees, under that power of sale which they had, had it fit to dispose of those leases, making arrangements with the landlord with a suitable tenant, and had received a large sum for the leases themselves, and a large sum for the goodwill of this going business. It is conceded that part of this lady that in that case what she would have received, and alone she would have received, would have been the interest upon the profits that was received—that she would not have been entitled to take the

¹ May 26, 1871, 9 Macph. 775.

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O, 2 S O₂) in water, of about the specific gravity of 1070. While a solution of gelatine and bisulphite of lime is still warm and liquid we coat the substance to be preserved with it, either by dipping the substance into it or by brushing it over with two or three coats of the solution. the substance has to be transported any distance in wooden vessels the vessels should be saturated with some of the before-mentioned solution of bisulphite of lime in water, and when dry brushed over with the solution of gelatine and bisulphite of lime. When the solution of gelatine and bisulphite of lime has firmly solidified on the surface of the animal substance, the latter may be packed, the vessel being closed as air-tight as possible. For the preservation of hides the interior surface only requires to be coated with the solution of gelatine and bisulphite of lime. The coating on the hides and the hides must be dried before they are packed. Before treating the animal substance other than hides as above the viscera must be removed and the inside washed free from blood; it then to be coated internally and externally as above described, and when it is cooked the coating of gelatine and bisulphite of lime must be removed by soaking it for a sufficient time in water."

In their final specification, which was lodged in the Great Seal Patent Office, as required by the letters-patent, granted in the form of the schedule annexed to the "Patent-Law Amendment Act, 1852," the patentees declared the nature of their said invention, and in what manner the same was to be performed, to be particularly described and ascertained in and to the following statement thereof, that is to say:—

"The nature of our said invention is to preserve animal substances such as meat, poultry, game, fish, and other animal substances for a long time, and so that the same substances when so preserved, and although the animals from which the same are derived have been killed for a considerable time, cannot be distinguished when cooked from the like substances derived from similar animals which have been recently killed, also for the preservation of hides.

"The manner in which our said invention is performed is as follows:—We employ a solution, hereinafter distinguished as solution No. 1, being a solution of bisulphite of lime (usually expressed by the formula CaSO_3) in water of about the specific gravity of 1050, which specific gravity we find preferable to that of 1070. We sometimes form a second solution, hereinafter distinguished as solution No. 2, by dissolving the ordinary commercial gelatine in boiling water, using from one part to two parts of gelatine in ten parts of water, and adding ten parts of solution No. 1. In determining the proportion of gelatine to be used we increase such proportion in inverse ratio to the decrease of the temperature of the place in which the solution is to be applied, using a larger proportion of gelatine when the temperature is low, and a smaller proportion of gelatine when the temperature is high. Solution No. 2 is adapted for coating animal substances intended to be preserved, such as joints of meat, animals which have been skinned, poultry and birds which have been plucked, fish, also the internal surfaces of hides. For this purpose the viscera of animals, birds, and fish, and also the gills of fish, should be removed, and the inside washed so as to be thoroughly cleansed from blood and other matter. We then apply solution No. 2 while still warm and liquid, and coat such animal substances either by dipping such substances into the solution, or by brushing such substances over with two or three coats of such solution. Such solution is then allowed to dry and solidify, and, if required, we pack such animal substances in casks or other suitable vessels rendered as air-tight as may be. As to hides, we first cleanse the same by washing the inside thereof; we then apply solution No. 2 while

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and liquid to coat the interior surface of such hides, but such in-
coating, and also the hides themselves, must be rendered dry before
hides can be packed; the hides can then be packed in casks or other
vessels, but if the hides are to be used within a short period, say
months after the application of this solution, we do not find such
necessary.

For the preservation of animals without removing the skin or external
thereof, and without removing hoofs or horns, we find it advan-
to employ a solution, hereinafter distinguished as solution No. 3,
by mixing one part of salt with ten parts of solution No. 1, and
say to ten parts of water. We vary the proportion of water accord-
the temperature of the place at which the solution No. 3 is to be
using a larger proportion of water where such temperature is low,
smaller proportion of water where such temperature is high. For
pose, at the slaughtering of the animal, as soon as the bleeding
and while the animal is still warm, we (by any ordinary process of
force solution No. 3, heated to a temperature of from 100° to
ahrenheit, into the arteries and veins from and to the heart of the
animal. We then remove the viscera of the animal and wash the inside
animal, so as thoroughly to cleanse the same from blood and
matter, and the inside of the animal may be washed with solu-
No. 3. The animal can then be packed in a canvas wrapper or in
other suitable packing.

For the preservation of fish we find it advantageous to employ a
solution, hereinafter distinguished as solution No. 4, formed by
ten parts of cold water, one part of salt, and one part of solution

For this purpose we first deprive the fish of the viscera and gills,
wash the inside of the fish so as to cleanse the same from offensive
matter; we then pack the fish in casks or other suitable vessels, fill up
casks or vessels with solution No. 4, and then close such casks or
vessels so as to render the same as air-tight as may be. Poultry and game
are similarly treated with solution No. 4, having been first plucked or
skinned and the viscera removed.

And that solution No. 4 is also useful for preventing and arresting
decay in fresh butchers' meat, game, poultry, and fish. For this
purpose the animal substance to be treated may be dipped into the solu-
tion or wrapped in a cloth saturated with such solution.

The proportions of the substances employed to form solution No. 2
and solution No. 3, and solution No. 4, are respectively reckoned by weight,
or by volume.

When animal substances are to be transported dry in wooden casks
or wooden vessels, the interior of such casks or vessels should before
being used be saturated with solution No. 1 and then allowed to dry, but for this
we make no claim.

When any animal substance which has been coated or treated with
solution No. 3 or solution No. 4 is cooked the effect of the coating or
treatment should be removed by soaking the substance for a sufficient
time in water.

And we consider to be novel and improvements, and therefore we
claim the invention secured to us by the said in part recited letters-
patent:—

First, The use of solution No. 1 for preserving animal substances.
Secondly, The preservation of joints of meat, animals from which the
leathers have been removed, fish, and hides by means of solution
in the manner hereinbefore described.

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"Thirdly, The preservation of animals without removing the skin by means of solution No. 3 in manner hereinbefore described.

"Fourthly, The preservation of fish, game, and poultry by means of solution No. 4 in manner hereinbefore described.

"Fifthly, The preventing and arresting decomposition in animal substances by means of solution No. 4 in manner hereinbefore described.

"But we do not claim the employment of gelatine or salt, nor of the processes of cleansing or injection, nor of air-tight vessels, except in connection with and in aid of solution No. 1, and for the purpose of preserving animal substances, nor do we claim the use of solution No. 1 except for the purpose of preserving animal substances."

William Bailey, who in 1870 had purchased from Henry Medlock a share of the patent, presented in the Sheriff Court of Lanarkshire a petition for interdict against J. and D. Robertson, butchers, Glasgow. The petitioner stated that the respondents had been in the constant habit of using the invention without the consent of the patentees.

The prayer of the petition was against infringing their letters-patent, "and particularly to interdict, prohibit, and discharge the respondents aforesaid, by themselves or others, during said period, and without consent, license, or agreement, as aforesaid, of the petitioner, or his assigns, from using or applying the said material known as bisulphite of lime in solution, for preserving animal substances, or preventing or arresting decomposition in animal substances, and from using or applying the bisulphite of lime along or in connection with gelatine or salt for preservation of joints of meat, or of the bodies of animals, whether skin or feathers have been removed therefrom or not, or of fish, or poultry, or other animal substances, or for the purpose of preventing or arresting decomposition in animal substances in any manner described in said specification, and from using and applying the bisulphite of lime either alone or along or in connection with any other substance or substances for all or any of the purposes aforesaid, in such way or manner as shall in any wise counterfeit, imitate, or resemble the said invention."

The respondents stated that they had been in the habit of using bisulphite of lime for preserving meat for three or four years; that they obtained it both from Messrs M'Tear, who were the petitioner's agent, and from other chemists; that they used bisulphite in its pure and original condition, and never mixed it with any materials such as gelatine or salt, but applied it to meat without any admixture. They maintained that the final specification did not claim the use of No. 1 solution alone; that the final specification was materially different from the provisional specification, in so far as it could be held to claim No. 1 solution alone.

* The Patent-Law Amendment Act, 1852, contains the following clause:—
 "6. Every petition for the grant of letters-patent for an invention, and the declaration required to accompany such petition, shall be left at the office of the commissioners, and there shall be left therewith a statement in writing, after called the provisional specification, signed by or on behalf of the applicant for letters-patent, describing the nature of the said invention. . . .
 7. Every application for letters-patent made under this Act shall be referred by the commissioners, according to such regulations as they may think fit to make, to the law officers. 8. The provisional specification shall be referred to the law officer, who shall be at liberty to call to his aid such scientific or other persons as he may think fit, and to cause to be paid to such person by the applicant the remuneration as the law-officer shall appoint; and if such law-officer be of opinion that the provisional specification describes the nature of the invention, he

t the final specification was defective in not describing the manner of No. 88.
 ng No. 1 solution alone; (4) that the use of bisulphite of lime for pre-
 ring animal substances was not a new discovery. On this last objec- Feb. 23, 1877.
 t to the validity of the patent the respondents relied on several prior Bailey v.
 ents. The only one of these which was ultimately found to be an Roberton.
 icipation was a patent obtained by William Rattray of Aberdeen in
 1. The nature of that invention was for "improvements in preserving
 anic substances."* The petitioners lodged a minute, admitting "that

w the same, and give a certificate of his allowance, and such certificate shall
 led in the office of the commissioners, and thereupon the invention therein
 red to may, during the term of six months from the date of the application
 etters-patent for the said invention, be used and published without prejudice
 ay letters-patent to be granted for the same, and such protection from the
 equences of use and publication is hereinafter referred to as provisional pro-
 on: Provided always, that in case the title of the invention or the provi-
 al specification be too large or insufficient, it shall be lawful for the law-
 er to whom the same is referred to allow or require the same to be amended."
 he schedule annexed to the Act the form of letters-patent makes it a condi-
 of granting the patent that if the patentee "shall not particularly describe
 ascertain the nature of his invention and the manner in which the same is
 performed by an instrument in writing under his hand and seal, and cause
 same to be filed in . . . within . . . months," the letters-patent
 be void. By secs. 28 and 29, every specification filed in pursuance of the
 itions of any letters-patent are directed to be filed in the office of the Court
 ancery, and copies are to be kept for public inspection at offices in Edinburgh
 Dublin.

The provisional specification stated—"My said invention consists, first, of
 de of preserving animal and vegetable matters by impregnating them with
 ueous solution of sulphurous acid. For this purpose I plunge the material
 preserved in a quantity of the solution, or otherwise bring the solution
 contact with the surface of the material for such a length of time as may
 requisite to produce the necessary impregnation. When fresh animal and
 able matters have been impregnated with a solution of sulphurous acid in
 manner the effect is to preserve them from decay for a considerable
 d.

My said invention consists, secondly, of the use of the alkaline and earthy
 ites in packing preserved animal and vegetable matters in cases, and I in-
 ce these sulphites, either dry or in solution, into a case with the preserved
 ers, for the purpose of assisting more effectually to prevent them from under-
 decay or injurious change."

e complete specification declared—"The nature of my said invention, and
 at manner the same is to be performed, to be particularly described and
 tained in and by the following statement, that is to say:—

My invention consists, first, of a mode of preserving animal and vegetable
 ers by impregnating them with an aqueous solution of sulphurous acid.
 his purpose I plunge the material to be preserved in a quantity of the solu-
 or otherwise bring the solution into contact with the surface of the mate-
 or such a length of time as may be requisite to produce the necessary im-
 nation. When fresh animal and vegetable matters have been impregnated
 a solution of sulphurous acid in this manner the effect is to preserve them
 decay for a considerable period.

My said invention consists, secondly, of the use of the alkaline and earthy
 ites in packing preserved animal and vegetable matters in vessels or cases,
 introduce these sulphites, either dry or in solution, into a case with the pre-
 d matters, for the purpose of assisting more effectually and to prevent them
 undergoing decay or injurious change.

The aqueous solution of sulphurous acid which I employ in carrying out my
 tion may be prepared by any of the methods known to chemists. This

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between the 21st day of June 1861 and the date of pursuers' specification, 27th June 1866, solutions of bisulphite of lime were publicly used

solution may be produced of various strengths, but I prefer to make it of the strength indicated by six degrees on Twaddell's hydrometer, because I believe that a solution of that strength keeps better without alteration than a stronger solution. A solution of greater or less strength, may, however be used, but the purpose of mixing it with water and preventing mistakes in the strength of the diluted solutions employed in performing my invention, I find it convenient to keep and use a concentrated solution of one uniform strength. I dilute a standard solution which I employ with water so as to make it of the strength most proper or convenient for operating upon any particular material to be preserved.

"I find in practice that it is convenient to employ diluted solutions of four following strengths, videlicet, a diluted solution of a strength equal to that produced by a mixture of one part of concentrated sulphurous acid of a strength of six degrees of Twaddell with fifty parts of water, which may be called solution No. 1; one other diluted solution of a strength equal to that produced by a mixture of one part of such concentrated acid with forty parts of water which may be called solution No. 2; one other diluted solution of a strength equal to that produced by a mixture of one part of such concentrated acid with thirty parts of water, which may be called solution No. 3; and one other diluted solution of a strength equal to that produced by a mixture of one part of such concentrated acid with twenty parts of water, which may be called solution No. 4. By means of these four diluted solutions the operations hereinafter described may be performed.

"I suspend the material to be preserved or operated upon in any suitable water-tight vessel constructed of wood or other suitable material, which I use as curing vessels, observing always that the different pieces of material do not touch each other or rest on the bottom of the vessel while under treatment. I have found that a useful plan for securing these conditions is to suspend each piece in a net. This mode of suspension I have found most useful in the treatment of animal matters, such as meat, fowls, fish, &c. In the case of vegetable matters, potatoes for instance, I have found that there is less need of this precaution being observed, as, from their more firm consistency, they may be placed in the curing vessel at random.

"The material to be preserved having been introduced into the vessel, a quantity of the solution No. 1 is to be run into it until the materials are covered with the liquid. The curing vessel is then to be covered and kept undisturbed from three to five hours, more or less, according to size or sizes of the pieces of material to be operated upon. The liquid is then to be run off, and the materials in the vessel are to be kept undisturbed, and allowed to drain from three to four hours. A second solution (No. 2) is then to be run into the vessel in the same way as before, and left to act upon the material for a period as the first solution, after which the solution is to be run off, and the material allowed to drain as before. A third solution (No. 3) is then to be run into and kept in the preserving vessel in the same way as the previous solution, and it is to be afterwards run off, and the preserved substances drained as before.

"In most instances I have found that the agency of three solutions of the acid are sufficient to secure the preservation of most organic substances, and the general indications of a sufficiency of treatment having been employed, I have observed that after the substances have been submitted to and left to drain from the acid they are found to retain a somewhat pungent smell of the acid, and to be in appearance somewhat plump and swelled. If these characteristics are found not to be sufficiently developed, then a fourth solution (No. 4) of the acid must be applied in the same manner as the preceding ones, but for a shorter period. Instead of the solution No. 4, one of the other diluted solutions may be employed if it shall be deemed sufficient to produce the desired effect upon the materials to be preserved. At the end of the process, in every case, the preserved materials are to be well drained.

the preservation of animal substances by William Rattray, chemist, No. 88. Erdeen, but that only in the manner described in the specification."

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'Sulphurous acid, whether of greater or less strength than the solutions I have named may be employed for preserving organic substances, but I have found in many cases that stronger acid acts injuriously upon the substances so preserved, while the use of weaker solutions of acid than those which I have mentioned above prolongs the period of treatment, and is productive of results otherwise unsatisfactory.

The above concludes the description of the mode of carrying out the first part of my invention, and the preserved substances are now ready to be submitted to treatment by the second part of my invention, which I shall now proceed to describe.

The second part of my invention, which relates to the preservation of animal and vegetable matters in vessels or cases is more particularly applicable to the preservation of materials operated upon according to the first part of my invention.

There are two modes in which I carry out this second part of my invention, which I shall respectively call the dry and the liquid modes.

First, the dry mode.—The substances having been submitted to the treatment described in the first part of my invention, I dip them into a solution of either of the alkaline sulphites or of the earthy sulphites, or concentrated sulphurous acid, which I prefer to be somewhat concentrated, I then allow the substances to drain, and expose them to the air for about two hours in a warm place, so that the water contained in the solution of the salt remaining on the surface may evaporate and leave the dry salt on the surface of the preserved substances. The preserved substances are now ready to be packed in casks, chests, or other cases, and in doing this the different pieces should be so placed that in the package they do not come into actual contact. This may be obviated by rolling the surfaces of the pieces in any of the alkaline or earthy sulphites reduced to the form of dry powder, and any interstices which may be left in the packages are to be filled with the same powder, and the cases closed up in the same manner as possible to prevent the access of air. A variation in the dry mode of packing just described consists in this, that, instead of rolling the preserved pieces in the dry powder, I envelope each piece in a cover of linen or of cotton cloth, such cloth having been previously steeped in a concentrated solution of sulphite of lime, or of sulphite of alumina in sulphurous acid, and dried. Then, enveloped, the pieces are to be placed in the packages, and the interstices filled with the dry powder in manner as above described.

Second, or liquid mode.—I shall now describe this mode of preserving substances when packed in cases. The substances having been submitted to the treatment above described as the first part of my invention, and also dipped into a solution of the sulphite in manner as I have described in the dry mode of packing, are, without being dried, to be at once packed in the intended cases in the same manner as to prevent their rolling about, yet not so much so as to obstruct the liquid to be put along with them from getting into contact with their surfaces.

Upon the cases being filled the interstices or vacant parts in them are to be filled with a solution in sulphurous acid of any of the sulphites already mentioned, of strength measuring about 2° on Twaddell's hydrometer. As described in the dry mode, in this mode also I have found it advantageous for each of the substances to be enveloped in covers of linen or cotton cloth previous to being packed, and the solutions added as above described. I prefer the dry mode of preserving substances in packing cases above described, and I may remark, that whether the dry or the liquid mode of packing be selected, it will be necessary to have the cases selected for packing of substantial make, and as securely air and water tight as possible.

In treating raw hides by my invention, I plunge them or suspend them in either of the stronger acid solutions above mentioned, that is to say, No. 4, and I submit them to only one or two applications of such dilute acid. After draining I treat them with either of the dry sulphites, but I prefer sulphite of lime, alone or mixed with a portion of dry sulphite of alumina. The hides are

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The respondents pleaded;—(1) The respondents having made use of bisulphite of lime alone for the preservation of meat, and that article having been well known and generally used by the public prior to June 1866 (the date of the alleged letters-patent), the respondents have not infringed the alleged letters-patent. (2) The alleged letters-patent and relative specification do not apply to the use of bisulphite of lime alone in the preservation of animal substances, and the use of that article alone is not an infringement of the alleged letters-patent. (3) Assuming that the said letters-patent and relative specification apply to the use of bisulphite of lime alone for preserving animal substances, the same are null and void in respect that bisulphite of lime was well known and generally used by the public for the preservation of animal substances prior to the date of the said letters-patent. (4) The application of bisulphite of lime alone to the preservation of animal substances is not any manner of new manufacture, and is not an invention which could be the subject of a patent. (5) Assuming that the alleged letters-patent and relative specification apply to the use of bisulphite of lime alone for the preservation of animal substances, the same, *quoad* that application, are null and void, in respect that the so-called invention was known and published within the United Kingdom prior to the date of the said letters-patent. (6) Assuming that the alleged letters-patent and relative specification apply to the use of bisulphite of lime alone in the preservation of animal substances, the same, *quoad* that application, are null and void, in respect that the said Henry Medlock and William Bailey, the alleged patentees, were not the first and true inventors of the said application. (7) The alleged invention as described in the final specification, varies materially from the invention as described in the provisional specification, and the said letters-patent are therefore null and void. (8) The letters-patent are null and void, in respect that the final specification claims the absolute application of bisulphite of lime for the preservation of animal substances without limiting its application to the modes of using it described in the specification. (9) The alleged letters-patent founded on by the petitioners are null and void, in respect that the alleged invention was publicly known prior to the date of the letters-patent.

A proof was led. The material facts fully appear in the interlocutor and the opinions of the Judges.

The Sheriff-substitute (Guthrie) pronounced this interlocutor:—“That the pursuer is assignee of the letters-patent, No. 6/1 of process, which were granted to Henry Medlock and the pursuer, dated 27th June 1866, and sealed 27th December 1866, in pursuance of which the said Henry Medlock and the pursuer filed the specification of which No. 6/12 of process is a certified printed copy: Finds that the defenders have failed to establish any of the objections to the validity of the said patent stated in the petition: Finds that, during the years 1873 and 1874, or during part of the said years, and during the currency of the said letters-patent, the defenders

then to be compactly folded in bundles, so that the flesh sides may be placed towards the interior.

“Having now particularly described and ascertained the nature of the said invention, and the manner in which the same is to be performed, I declare that I claim as of my said invention,—

“First, the preserving of animal and vegetable matters by means of the solution of sulphurous acid, as above described.

“Secondly, the preserving of animal and vegetable substances by means of alkaline and earthy sulphites when packed in vessels or cases, as above described.”

their shops or premises in Gallowgate Street and Duke Street, Glasgow, No. 88.
 lawfully and in contravention of the said letters-patent, use the inven-
 described in the said letters-patent and specification: Therefore re- Feb. 23, 1877.
 all the defences, and interdicts, prohibits, and discharges in terms of Bailey v.
 prayer of the petition: Finds the defenders liable to the pursuer in Roberton.
 cases; allows an account thereof to be given in, and remits the same,
 lodged, to the Auditor of Court to tax and report, and decerns." *

NOTE.—The pursuer is in right of a patent obtained on 27th June 1866, the object of the invention to which it applies is 'to preserve animal substances, such as meat, poultry, game, and fish, for a long time in a fresh state, so when eaten they cannot be distinguished from the same when recently killed, and for the preservation of hides.' It may be said, generally, that the process employed for this purpose is the application of a solution of a substance mentioned in the patent bisulphite of lime. The defenders are butchers in Glasgow, who do not dispute that, after purchasing that solution from the pursuer, they proceeded to do so, and have for some time got it from the Glasgow Apothecaries' Company, and have been in the habit of using it for the preservation of meat in the course of their trade. Indeed, it has been used in the same way by many others in Glasgow, and it appears that this action is defended in the interest of the trade, for the purpose of trying the validity of the pursuer's patent.

In the very clear and able argument submitted for the defenders it was not denied that the subject-matter of the invention was not patentable. That, therefore, which appears to be raised by the fourth plea on record, does directly at least, demand consideration.

The grounds on which the defenders challenge the pursuer's patent resolve into three—(1) That the invention set forth in the specification is not in conformity with the provisional specification; (2) that the conditions of the patent have not been complied with, in respect that the patentees have not detailed in the specification the nature of the invention and the manner in which it is to be performed; (3) that the invention for which the letters-patent are issued was not novel.

It will be more convenient to consider these objections to the validity of the patent in a different order, taking, first, the question, which is purely a question of fact, whether the pursuer's invention was anticipated by the specifications of the earlier patents produced and founded on by the defenders? . . .

We have therefore little difficulty in holding that this patent is not void by reason of any prior publication or user of the invention which it discloses, seeing that invention to be the application of the solution called bisulphite of lime for the preservation of meat in a fresh state.

It is said, however, that the specification of Messrs Medlock and Bailey does not satisfy the condition on which alone their letters-patent are granted, that 'they shall particularly describe and ascertain the nature of their invention, and in what manner the same is to be performed.' In this part of the argument, as I understand it, the defenders disregard the 2d, 3d, and 4th claims described on pages 3 and 4 of the specification 6/12, and the 2d, 3d, and 5th claims on page 5, looking only to the use of solution No. 1, which is the article in the use of which the alleged infringement by the defenders is said to consist. They say that the specification only discloses that the patentees have provided a solution for certain purposes, and that, in describing the manner of using the solution, nothing more is detailed than that 'we employ a solution,' &c., without specifying in what way that solution is to be used or applied, except when it forms an essential constituent part of the solutions and processes afterwards described. The defence is that the letters-patent do not include the application of that solution used alone, which, so far as appears in this case, is the use chiefly made of the solution in Medlock and Bailey's patent. It may be remarked that this argument might be equally applicable to the patent, but merely in shewing that the solution No. 1, used by the defenders, was not included in the patent, according to its fair construction and the original intention of the patentees; but for this case, in

No. 88.

The Sheriff (Dickson), on appeal, pronounced this interlocutor:—"And heres to the findings in the judgment appealed against, that the pursuer

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which the application of their other solutions and processes is not in question, does not seem to be material in what way the defenders' argument is taken. Their objection was put, however, as going to destroy the patent, and it was said further that if we take the word 'employ,' along with the first claim, including every conceivable way in which the solution could be employed, the specification would be virtually a description of a mere principle, for which valid patent can exist.

"I think that the defenders have not substantiated this objection. It may be observed that while the construction of a specification is matter of law for the Court, with the aid of scientific evidence as to the meaning of technical language, it is a simple question of fact whether the description of the invention in the specification is sufficient—(1) to enable a workman of ordinary skill to carry it into effect; and (2) to shew persons reading the patent what they must avoid, so that they would not infringe the patent—(*Morton v. Middleton*, March 20, 1860, 1 Macph. 718, 35 Scot. Jur. 542; *Hill v. Thomson*, 1 Webs., P. R., 235; *Neilson v. Betts*, H. L., 40 L. J., Ch., 317, 329; *Agnew on Patents*, 117, 118). I think that there is sufficient evidence to shew that the description in this specification is enough to direct any ordinary workman to the proper manner of using the solution No. 1 for preserving meat. The specification indeed does not say whether it is to be brushed upon the meat, or the meat is to be dipped in it, nor does it direct the solution to be poured upon minced or sausage meat. But the pursuer's witnesses say, as matter of fact, that it is generally used in that manner by butchers now, and that the instructions in the specification are sufficient to enable any butcher to apply it. The pursuer has given at least *prima facie* proof that his description is practically sufficient, and the defenders, on the other hand, the *onus* rests of shewing that it is insufficient—(*Bickford v. Skewes*, 1 W. P. R. 219; *Neilson v. Betts*, L. R., 5 H. L., Ch., 317)—have adduced no evidence on that point at all.

"With regard to the question which falls to be considered here, whether the specification does claim every method of applying the solution No. 1 for the preservation of meat, I think that the sound construction of it is that it does. The first claim is expressly for 'the use of solution No. 1 for preserving substances.' There is no limitation or restriction of the extent of the word 'substances' have already considered whether this claim is too broad because it claims every thing known and disclosed before. But the defenders argue that it is too broad for another reason, viz., that it really is the assertion of a claim to the exclusive use of a principle. There seems to be no weight in this argument; for I am not aware that the property of a chemical body can well be called a principle in the sense in which that word has been used in the law of patents (*Young v. Fernie*, 10 Eng. Jur., N. S., 926; *Higgs v. Goodwin*, 27 L. J., Ch., 421, E. B. and E., 529; *Unwin v. Heath*, 5 H. L. Ca., 505, 25 L. J., Ch., 111; *Hills v. London Gas Light Company*, 5 H. and N., 312, 29 L. J., Ex., 111). and (2) if the defenders' witnesses are correct in asserting that the bisulphide of lime does not exist, the property is not even that of a distinct chemical substance, but of a chemical preparation, which Messrs Medlock and Bailey have shown us how to prepare and apply. Apart from this, however, and as matter of fact, it may perhaps be held that the rule on which this argument of the defenders is founded cannot in any view apply to this patent. It is true that 'you may take out a patent for a principle, but you may take out a patent for a principle coupled with the mode of carrying the principle into effect, provided you have not only discovered the principle, but invented some mode of carrying it into effect. If you have done that then you are entitled to protect your principle from all other modes of carrying the same into effect'—*Per Baron Alderson in Jupe v. Brett*, 1 Webs., P. R., 146. This statement of Baron Alderson was made in the course of argument; but it has received confirmation in other cases (*Cochrane and Galloway*, 1 Webs., Law of Pat., 79. And the same objection was stated in *Neilson's Hot-blast Patent*, where the ruling of the Lord Justice

signee of the letters-patent mentioned in the said judgment, and that, No. 88.
 ursuance thereof, he and the original patentee filed the specification

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1st it was supported by the Inner-House, and was not challenged in the
 se of Lords—Neilson v. Househill Coal Company, April 7, 1842, 4 D., 1187,
 5 D., 86, 117 (14 Scot. Jur. 626). The charge of the Lord Justice-Clerk,
 the opinion of Lord Moncreiff, on the bill of exceptions, shew the law to be
 id down by Baron Alderson; comp. also Winter v. Wells, 1 Webs., P. R.,
 134, 135.

Assuming, then, for a moment, that this is the statement of a principle, it
 be a sufficient answer that it is the statement of a principle combined with
 us modes of carrying it out, viz., the 2d, 3d, 4th, and 5th claims; and
 these modes being given, the patentees are entitled to claim over and above
 , as part of the subject-matter of their patent, every other mode of using
 rinciple for the specified purpose. I prefer, however, to rest my judgment
 this part of the case on the evidence that the specification is sufficiently
 or practical purposes; and I think that if it be admitted that the patentees
 t to have said expressly that the solution No. 1 was to be applied *per se*,
 hat it might be applied by brushing it on the meat, or by mixing a certain
 tity with minced meat, this is proved to be an omission of no materiality to
 petent tradesman, and therefore is within the authority of the cases of
 ley v. Beverley, 9 B. and C. 63, 1 Webs., P. R. 111; Neilson v. Harford,
 bs., 118, and Neilson v. Househill Coal Co., *cit.*, and 1 Webs., P. R. 687.

t. With regard to the alleged disconformity between the provisional and the
 specification, the pursuer's argument goes perhaps rather too far when it is
 on the authority of a dictum of the Lord President, that this is not now
 vant plea in law. The Lord President cannot, I think, be understood to
 that it is no matter, provided the complete specification be within the
 though it should be for an altogether different invention from that set
 in the provisional specification. As explained in his Lordship's opinion
 e case referred to (Dudgeon v. Thomson, July 4, 1873, 11 Macph. 863,
 which compare Penn v. Bibby, 36 L. J., Ch. 455, L. R., 2 Ch. Ap. 127,
 Westbury's judgment), it is only meant that, in ascertaining whether the
 specification exceeds the subject-matter for which the letters-patent were
 el, we must compare it not with the provisional specification alone or the
 done, but with both read together.

o comparing the documents in this case, I do not think that the facts that
 ne is always associated with the bisulphite of lime in the provisional
 ication, and that the composition is to be applied while hot, make a mate-
 ariance from the final specification, in which the primary solution employed
 hout gelatine; for the evidence of the experts satisfies me that the real
 tion in this case is the use of bisulphite of lime for the preservation of
 in a fresh state, and that the gelatine in the provisional specification, and
 subordinate or secondary solutions described in the final specification, is
 y a vehicle or adjunct used for making the true preservation adhere and
 ue its operation for a longer time. The only rule as to this sort of vari-
 which can be laid down is that the provisional and final specifications must
 escribe different inventions,—in other words, that the final specification
 not describe different inventions; that the final specification must not con-
 y addition or alteration by which the nature of the invention becomes, in
 erial respect, different from that described in the provisional specification
 cwell v. Bostock, 4 De G., J. and S. 298; Thomas v. Welch, L. R., 1 C.
 2, 35 L. J., C. P. 200; Newall v. Elliott, 4 C. B., N. S. 269, 27 L. J., C.
 7; Agnew on Patents, 151, *seqq.* It is not, in my opinion, proved that
 anges introduced in the final specification make the invention substantially
 one. On the contrary, they appear in the light of the scientific evidence
 merely improvements in details, probably discovered by the patentees in
 urse of perfecting their invention, and which it was their duty to com-
 ate to the public in their final specification.

pon the whole case, therefore, I am of opinion that the defenders have not
 ed in shewing that this patent is invalid.

No. 88. (hereinafter called the complete specification) mentioned in the judgment.

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For the reasons stated in the note hereto, recalls the said judgment *ultra*: Finds that the said complete specification sets forth that the manner in which the alleged invention to which it implies is performed is employing a solution of bisulphite of lime (mentioned in the specification as solution No. 1) alone, and also in combination with certain other solutions: Finds that the defenders used the said solution No. 1 alone for preserving animal substances, but that it is not proved that they used it in combination with any of the said other solutions: Finds that the letters-patent were issued after the said original patentee had lodged with the Patent Office a provisional specification, describing the nature of the alleged invention: Finds that the said provisional specification does not describe the use of the said solution No. 1, or any other solution of bisulphite of lime, alone as a means of preserving animal substances, but merely describes it as to be used, in combination with a solution of gelatin: Finds that the said complete specification does not sufficiently describe the manner in which the said solution No. 1 is to be employed for preserving animal substances: Finds that a solution of bisulphite of lime for the said purpose was not a new invention at the time the said letters-patent were obtained: Therefore, and under reference to the note hereto, finds that the said letters-patent are not effectual for preventing the defenders from using the said solution No. 1 alone for the said purpose: Sustains, accordingly, the defences to that effect, and refuses the prayer of the petition: Finds the pursuer liable to the defenders in expenses; and an account thereof to be given in, and remits," &c. *

"4. The only remaining question is, whether there has in fact been a fringement of the patent. Upon this point, although something was said in argument, I am unable to see that there is any real dispute as to the fact that the defenders have been using a liquor practically identical with the pursuer's solution, and, indeed, an imitation of it, without their license. The pursuer is therefore entitled to interdict."

* "NOTE.—Questions of considerable difficulty and importance are involved in this case.

"The pursuer avers on record that the defenders have used for the preservation of meat a solution of bisulphite of lime similar to No. 1, both alone and in combination with other substances mentioned in his letters-patent. But he has admittedly failed to prove the use of it except alone.

"On the other hand, the defenders' counsel admitted that they have used a solution similar to No. 1 in such a way as to infer an encroachment on the pursuer's rights, if the patent validly prohibits such use. They contend that the patent does not, on the following grounds:—

"I. It does not apply to No. 1 solution when used alone.

"II. The complete is materially different from the provisional specification.

"III. The former does not describe the mode of using No. 1 solution for preserving meat, and

"IV. The use of such a solution for preserving meat was not a new discovery of the patentee.

"I. The proper construction of the complete specification is thought to be that the use of No. 1, not only along with the other solution which it specifies, but also alone. At the same time, the absence (1st) of any explanation as to the effect of using it alone, and (2d) of any reference in the provisional specification to that use, makes it doubtful whether the patentee intended his complete specification to bear such a meaning.

"II. A comparison of the complete with the provisional specifications shows that the latter states the object of the invention to be to preserve animal substances for a long time in a fresh state, 'so that, when eaten, they are not distinguished from the same when recently killed.' It does not mention

he petitioner appealed. Additional pleas were given in for the parties. No. 88.
respondents' pleas were ;—1. On a sound construction of the letters-

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ervation of such substances salted. But the complete specification includes
use of solution No. 1, with one of salt, which admittedly would not preserve
meat fresh. It may be doubted whether the patent can cover the latter

But without dwelling on this, it will be observed that the provisional speci-
fication thus describes a process for which the patent is claimed :—' We dissolve
ordinary commercial gelatine in boiling water, using about two pounds of
lime to ten pounds of water. We then add, while hot, a volume equal to
volume of the solution of gelatine of a solution of bisulphite of lime (usually
assessed by the formula $\text{Ca O}, 2 \text{ S O}_2$) in water of about the specific gravity of
. While the solution of gelatine and bisulphite of lime is still warm and
we coat the substance to be preserved with it, either by dipping the sub-
stance into it, or by brushing it over with two or three coats of the solution.'
Directions conclude thus :—' Before the meat is cooked the coating of gela-
tine and bisulphite of lime must be removed by soaking it for a sufficient time
later.'

The process is thus the application to the meat of solutions of gelatine and
bisulphite of lime in combination, in defined proportions, warm
externally, so as to produce a coating which must be removed before the
cooked meat can be cooked.

The complete specification repeats this description as to the use of 'solution
' with only an unimportant modification in the specific gravity of the dis-
solved bisulphite. So far it is unobjectionable.

But it also specifies the solution No. 1 uncombined with gelatine, without
whether it is to be applied hot or cold, or whether it is to be used only
externally and by way of coating, or otherwise. It thus includes application by
boiling, by saturation, and by mixing up with the meat when minced, the
being one used by the defenders which the pursuer seeks to prevent. The
specification deals with the combined solution as unfit for the human
stomach, from being either unpalatable or deleterious ; the other deals with one
of compounds as being wholesome, for it says nothing about its removal
from the meat to which it is applied is cooked.

It is not easy to see how preserving meat by means of two solutions, the
one of which 'must be' removed before consumption of the meat, can be
so identical with preserving meat by one of the two solutions which may
be eaten on or mixed up and eaten with the meat. It can hardly be imagined
that the patentee had the simple and wholesome agent in view when he got a
patent for the compound, and apparently unwholesome, one.

It was urged for the pursuer (and is clearly proved) that the only preserving
agent in the double solution is the bisulphite, the gelatine being only used as
a vehicle, and for fixing it on to the meat. But in the provisional specifica-
tion two substances stand together as equally important, or, if one could be
said to be the more so, it would be the gelatine, which is mentioned first, and to
the bisulphite is to be 'added.'

It will not do for a patentee to say,—as the pursuer now does,—that of two
agents apparently equally essential to his invention one is non-essential,
merely intended for conveying and fixing the other. The provisional
specification contains no data for thus discriminating between the two. It claims
preserving virtue for them in combination ;—for neither of them alone.

The object of every provisional specification is to disclose the nature of the
invention. It is published in order that all persons interested may have
an opportunity of opposing the application for the patent, and that the law
may know what is claimed as an invention (15 and 16 Vict. cap. 83, secs.
1 and 2).

It may fairly be contended that while persons in the defenders' trade may
have known that a solution of bisulphite of lime was a preserving agent which
could be applied in certain ways they did not know of the special virtues

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patent founded on, the use of bisulphite of lime alone in the preservation of animal substances is not thereby claimed, and the use of that ar

claimed (rightly or not) for a combination of it with dissolved gelatine, applied hot, and by way of a coating over meat. They had therefore no reason to dispute such a claim.

"If, however, the provisional specification had disclosed a claim for a process for preserving meat in any and every way by bisulphite of lime, Mr Clark held at the time a patent for doing so by solutions of bisulphites generally (without specifying that of lime), and Mr Rattray, who held one for a process consisting partly of enveloping the meat in cloth, steeped in a concentrated solution of sulphite (*i.e.*, a solution of bisulphite) of lime, would have had an opportunity of opposing the application. They were deprived of that opportunity by the provisional specification not making such a claim. The law officers must have been unaware and been misled as to the true nature of that alleged invention as stated in the complete specification.

"The object of the statute in requiring a provisional specification to be made and published would be defeated if the patent in this case were held to cover the use of the bisulphite alone.

"The importance of any material difference between the provisional and complete specification is evident from the terms of the Patent-Law Amendment Act (15 and 16 Vict. cap. 83). The former is there defined (sec. 16) as the provisional specification describing the nature of the said invention.' The definition in the schedule is—'I do hereby declare the nature of the said invention to be as follows,' &c., and it is for the invention as there described that the letters-patent are issued. The complete specification is filed after by the patentee, and is not examined or passed by any public officer.

"The invention patented is that described in the provisional specification, which the complete specification may and ought to amplify and supplement with matters of detail, but from which it may not vary materially.

"This is clearly laid down by Lord Chief Baron Pollock in *Newall v. Higgins* (1864, Higgins' Patent Cases, 163, and in 10 Eng. Jur., N. S., 955); the object of the statute, which requires a provisional specification, is nothing more than a legislative recognition of the custom which called upon every patentee when he applies for the patent, to give some notion of what his invention is. That has been followed by an Act of Parliament requiring it to be done. The object in both cases is to ascertain the identity of the invention, and to make it certain that the patentee shall ultimately obtain his patent for that invention which he presented to the Attorney-General in the first instance. . . . There can have no doubt that the object of the Act of Parliament was not to ascertain the entirety of the invention, but the identity of the invention, so as to enable the Attorney-General, and, in fact, to enable a jury, ultimately to determine whether the invention fully specified was the same invention as that which was presented to the notice of the Attorney-General by the provisional specification.' Lord Channell said in the same case,—'I entirely adopt the test which my Lord Chief Baron suggested, that the question is as to the identity of the invention, and whether it is disclosed by the full specification, with that of which a short note or abstract was made in the provisional specification.'

"The law is laid down to the same effect by Lord Chancellor Westbury in *Foxwell v. Bostock* (1864, Higgins' Patent Cases, 164, 10 Law Times, 144); and by Lord Chancellor Chelmsford in *Penn v. Bibby*, 1866 (Higgins' Patent Cases, 165, Law Rep., 2 Chan. App., 134).

"The same rule was laid down by Lord Chief Justice Erle in *The Welsh* (1 Law Rep., C. P., 192), in which the patentee succeeded on the ground that the 'difference between the provisional and complete specification was a slight one which injured nobody.'

"The pursuer's agent contended that a Sheriff Court must disregard the authorities, on account of the observations of the Lord President in *Dugald Thomson* (1873, 11 Macph. 863), that 'the plea' (of disconformity between provisional and final specifications) 'as stated, is altogether futile; nor

e is not an infringement of the said letters-patent. 2. *Separatim*, No. 88. said letters-patent are null and void, or invalid, in respect (1) the

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it a relevant plea in law; because, if the letters-patent and complete specification are in accordance with one another, and the two make a valid and complete patent, then an imperfection in the provisional specification, I apprehend, would be altogether immaterial.' It is evident both from this observation, and from the rest of the opinion, that his Lordship did not mean to lay it that disconformity between the provisional and complete specifications did not in any case be fatal, and that he only criticised the plea 'as stated,' mere disconformity in itself is fatal, and observed that a mere imperfection (incompleteness) in the former is unimportant; for the learned Judge goes on to say,—'It appears to me that in these circumstances the true question under consideration of this kind is, whether the complete specification goes beyond the title of the provisional specification, for these two must be taken together. . . . Is something more claimed in the complete specification than was claimed and specified in the title and provisional specification?'

Applying the principles thus explained to the present case, the Sheriff concludes that the pursuer's complete specification both materially differs from and goes beyond the provisional specification, the latter having been limited to the use of a solution of bisulphite of lime in combination with one of gelatine, and at a particular temperature and externally, while the former extends to the use of the solution of the bisulphite in every way, at every temperature, and alone and in that combination.

It is unnecessary to say whether the effect of this difference is to render the patent null to all intents. It is enough that it is fatal to the patent for a solution of the bisulphite as a preserving agent in the unqualified terms claimed in the complete specification. The defence to that effect, therefore, falls to be rejected.

II. The defenders contended that the complete specification does not define the mode of applying solution No. 1 when used alone, to which the pursuer answered that any such description is unnecessary, because the solution can be, and has been, successfully applied by persons skilled in such matters, and is all that the law requires.

This question involves two points—(1st), Whether, in point of law, a patent for a process is sufficient which does not define at all the way in which the materials employed in the process are to be employed? and (2d), Whether, as a matter of fact, the solution No. 1 can be employed properly without special directions?

1) It must be kept in view that the patent is not for a preserving agent, but for the mode of using which had been previously known, but for preserving meat in a manner not previously known. It is for producing a certain result by (alleged) discovered means, viz., the use of a certain solution,—in other words, it is a process.

The law is laid down in all the authorities that the complete specification must state fully and clearly the manner in which a process patented is to be carried out. 'The patentee must give the public every information which is necessary to enable them completely to perform every part of the patent which is claimed, although it may be sufficient to refer in general terms to such things as are well known'—(Hindmarsh on Patents, p. 170; see to the same effect *Wheeler*, 1819, *Higgins' Patent Cases*, 169; *Brunton v. Hawkes*, *ibid.* *Morgan v. Seward*, *ibid.* 172). The questions which have arisen under this rule have been, whether the description of the process in certain cases was sufficient, being only intelligible to persons of skill or persons in certain trades. The law was cited, or has been found by the Sheriff, indicating that a specification could be sustained which is quite silent as to the mode of performing the process patented.

The complete specification as to No. 1, when used alone, is in that position, and only says 'we employ' it. That is thought to be insufficient.

2) Upon the question of fact, the pursuer contends that butchers and

No. 88. alleged invention described in the complete specification is materially different from the invention described in the title and provisional specification.

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housekeepers are able to apply properly a chemical agent not previously used by them for that (or, indeed, any other) purpose, without any explanation or instructions whatever from the inventor. But neither butcher nor housekeeper would know, without some instructions or investigation, whether it was to be applied hot or cold, whether only externally or mixed up with the meat (as in collops) or how long it was to be applied in the one case, or in what proportions in the other. If, as the pursuer's witness, Dr Macadam, observes, the tendency of the dissolved bisulphite alone, as well as combined with gelatine, is 'to form an encrusting crust outside the meat,' novices would be surprised at finding such a result, and would probably think it not a wholesome or satisfactory sign. They would likely stop a process which produced effects so different from that resulting from any other processes for the purpose of which they had experience. But if, notwithstanding of this, they continued to have confidence in the process, how could they know how long to leave the meat exposed to it? or what would be the proper thickness of the crust? or at what point the maximum of preserving effect was reached with the minimum of expenditure of the preserving agent, would be attained? What could they know as to the proper way of dealing with the meat with the crust on? Was the joint to be put to the fire, or into the stewpan, with or without its new cover? If without, how was the 'crust' to be removed? If they found out, or guessed, or were told something on these points, how could they have known the best way to apply the agent, or to remove it, or that they were doing either in the way the patentee intended? They might have discovered a different process from that which was patented.

"The mixing up of the chemical solution in collops would probably have occurred to either a butcher or a housekeeper, however ingenious. The quantity to mix must have been unknown; and it would have been the result of rashness and recklessness to have proceeded on mere guess in a matter which (for all they knew) health, and even life, might have been imperilled by mistake.

"Lastly, how long and how often could the solution be used? Would the properties be impaired by the dipping of one piece of meat in it, or could the same solution be used twice, or how many more times?

"The Sheriff cannot hold that a specification, which gives no light on matters of such essential importance comes within the principle that a patent is granted on condition of the patentee giving to the public sufficiently specific information as to the process patented that persons of skill in such matters could get the full benefit of it.

"The pursuer's argument that the process is so simple that no instruction required is farther negatived by the fact that he issued cards for instructing the butcher trade as to the way to use the solution. It has repeatedly been held that a specification is incomplete which can only be applied by skilled persons after they have learnt how to do so by experiment (cases in *Higgins*, p. 11, *seq.*) In this case, such persons could only have learned about it in this way, or from information which the specification does not afford.

"The pursuer's law agent tried to escape from this difficulty by contending that the patent is not for a process, but for an agent, like chloroform, chlorodyne, or some patent medicine. This is erroneous. The title clearly indicates a process, not an agent; for it is for 'improvements in preserving animal substances' and the minute directions as to all the solutions, except No. 1, when used, clearly shew the same thing.

"The Sheriff accordingly is of opinion that the pursuer's patent for the process of that solution by itself is ineffectual from want of sufficient description of the process.

"IV. He concurs with the Sheriff-substitute that prior use with regard to No. 1 is not to be inferred from the pursuer's patent of 1861, or Clark's patent of 1864.

"Rattray's patent is thought to be different. Its title is 'for improvement

ion, and the complete specification claims more than was claimed and closed in the said title and provisional specification; (2) the said complete specification does not particularly describe and ascertain in what manner the alleged invention is to be performed; (3) the said Henry Dlock and William Bailey were not the true and first inventors of the alleged invention claimed in the letters-patent; and (4) the said alleged invention was publicly known and used at and prior to the date of the letters-patent. 3. The respondents not having infringed the said patent, the appeal ought to be dismissed.

Argued for the petitioner;—The three objections sustained by the court against the validity of the patent for the use of solution No. 1 were not well founded,—(1) As to the alleged disconformity between the provisional and the final specification: The object of the provisional specification was to disclose the nature of the invention, and if that was the case the inventor had six months to experiment and perfect his invention. The object of allowing him six months was to enable him to find out the means of applying the invention, and it would be unreasonable to require him strictly to the details of the provisional specification. All that was required to give was some notice of the invention. The onus of shewing disconformity lay on the respondents, and in order to succeed they would require to shew that the final specification disclosed a different invention. The essence of the invention was the antiseptic properties of sulphite of lime as applied to animal substances, and this was sufficiently disclosed in the provisional specification. It did not matter that gelatine was also mentioned. This might have been disclaimed in the final specification, and the fact that it was not claimed under the first head was equivalent to a disclaimer. The only use of the provisional specification was to satisfy the law officers of the Crown, and the public had no concern with it.¹ (2) This objection was that the final specification did not shew the manner of use of No. 1 solution alone. It was not open to the respondents, as they had not stated it upon record, and originally they made no plea upon it. The word "employ" was sufficient to disclose the manner of use, and this was made clear by the fact that butchers and others had no difficulty in finding out the manner of use. The patent

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preserving organic substances; and the provisional specification for it, after describing the first part of the process as impregnating the animal and vegetable substances with an aqueous solution of sulphurous acid, proceeds,—'My invention consists, secondly, of the use of the alkaline and earthy sulphites in packing preserved animal and vegetable matter in cases.' The complete specification describes part of the process as being the use of a concentrated solution of sulphite of lime in sulphurous acid, which admittedly is the same as a solution of sulphite.

For this limited purpose, therefore, Rattray clearly has right to use a solution similar to the pursuer's No. 1; and his patent has anticipated to some extent the use of this substance as a preserving agent. Nay, more, for all that is in the pursuer's complete specification, his solution could only be applied in the same way as Rattray's.

The Sheriff inclines to think that this infers a prior patent and use by Rattray. If the pursuer's claim as to No. 1 were sustained, Rattray and those holding a license could no longer profit by his patent."

Food v. Zemmer, &c., July 1, 1815, *Holt's Nisi Prius Cases*, p. 58; *Newall v. Elliott*, Jan. 29, 1863, 32 L. J., Exch. 120; *Thomas v. Welch*, Jan 18, 1866, 11 C. P. 192; *Penn v. Bibby*, Nov. and Dec. 1866, L. R., 2 Chan. App., *Wright v. Hitchcock*, Jan. 11, 1870, L. R., 5 Exchequer, 37; *Dudgeon v. Brown*, July 4, 1873, 11 Macph. 863, 45 Scot. Jur. 528; *Cosley v. Bevan*, 27. 1829, 9 Barnewell and Cresswell, 63.

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was for a principle which might be used in a variety of ways.¹ (3) The had been no anticipation of the use of bisulphite of lime for preserving animal substances in a fresh condition. In Rattray's patent the meat was preserved pickled, and not in a fresh state. The strength of the solution was different, and the selection of a particular strength would be enough. Besides, in Rattray's patent the use of bisulphite of lime was only part of a complicated process. Here it was used alone.²

Argued for the respondents;—(1) The final specification was different from the provisional specification. The provisional specification did not describe the use of solution No. 1 alone. The Patent-Law Amendment Act did not require the manner of use to be set forth in the provisional specification, but if the inventor set it forth he was bound to do so. The invention described in the provisional specification was a combination of gelatine and bisulphite of lime, and could not be held to include the use of bisulphite of lime alone. (2) The final specification set out a particular manner of use as to solution No. 1. The word "employ" was not enough to enable people to use the solution. If the claim was for a principle, the principle was disclosed.³ The subject-matter of the patent was previously known for preserving beer, and its application to meat was not a sufficient difference to justify the granting of a patent. Besides, it had been previously applied to the preservation of meat in Rattray's patent.

At advising,—

LORD PRESIDENT.—In this case the petitioner in the inferior Court obtained in 1866 a patent for "improvements in preserving animal substances," and the prayer of the petition to the Sheriff is to interdict the respondents from "using or applying the material known as bisulphite of lime in solution for preserving animal substances, or preventing and arresting decomposition in animal substances, and from using or applying the bisulphite of lime alone or in connection with gelatine or salt for the preservation of joints of meat, or of the bodies of animals, whether the skin or feathers have been removed therefrom or not, fish, game, poultry, or other animal substances, or for the purpose of preventing and arresting decomposition in animal substances in any manner described in said specification, and from using and applying the bisulphite of lime alone or along or in connection with any other substance or substances for any of the purposes foresaid."

Now, among those alternatives there is this general distinction, that interdict is sought against the use of bisulphite of lime in solution for preserving animal substances absolutely, and without any admixture with other substances. On the other hand, interdict is sought against the respondents using bisulphite of lime in solution along with other substances for the same purpose. The

¹ Hills v. London Gas Light Co., Feb. 25, 1860, 29 L. J. (Exch.), 409; v. Evans, Jan. 29, 1862, 31 L. J. (Chancery), 457.

² Young v. Fernie, May 26, 1864, 4 Gifford, 577; Young v. White, Dec. 1854, 23 L. J. (Chancery), 192, 1 H. L. p. 63; Minter v. Mower, 1 Webster's Patent Cases, 138; Betts v. Menzies, Feb. and June 1862, 10 Clark's High Court Cases, 117; Rex v. Wheeler, 1819, 2 Barnwell and Alderson, 117; Regina v. Mill, Nov. 18, 1850, 10 Scott's C. B. Reports, 379, Rex v. Mill, 1817, 2 Starkie, 249.

³ Booth v. Kennard, May 2, 1857, 26 L. J., Exch. 305; Jordan v. Minter, April 27, 1866, L. R., 1 C. P. 624; Arnold v. Bradbury, July 20, 1871, 16 Chan. App. 706; cases quoted in Agnew on Patents, p. 147; Canning v. Nuttall, June 12, 1871, L. R. 5 E. and I. App. 205.

⁴ Rushton v. Crawley, June 16, 1870, L. R., 10 Equity, 522.

the evidence is that the respondents, who are butchers in Glasgow, have been some time in the habit of using bisulphite of lime alone for preserving joints of meat, and the petitioner alleges that that use is a violation of the rights secured to him under his letters-patent. In other words, his contention is that he has secured during the currency of the patent a monopoly of the use of bisulphite of lime for preserving animal substances; nor does he claim the use of solution No. 1 except for the purpose of preserving animal substances. Now, the defences which have been proponed upon the part of the respondents resolve themselves into objections to the validity of the patent as securing that right—namely, to say, securing to the patentee a monopoly of the use of bisulphite of lime for preserving animal substances without reference to the manner in which it is used, or the combination in which it is used, or whether it is used simply in combination with other things.

The first objection which is maintained by the respondents is that the specification does not describe the manner in which bisulphite of lime, pure, is to be used for the preservation of animal substances. This objection assumes that the specification sufficiently discloses the nature of the invention, because the objection is that it fails in the second part of the office of a specification only, viz., in describing the manner in which the invention is to be performed.

But, in judging of the soundness of this objection, it is necessary to examine the specification as a whole; but the question will ultimately be, whether the claim made by the patentee is a good claim, in respect that he has, with reference to that first claim, both described the nature of the invention and the manner in which it is to be performed? The claim is stated under five heads, namely, the use of solution No. 1 for preserving animal substances. Secondly, the preservation of joints of meat, animals from which the skin or hide have been removed, fish, and hides, by means of solution No. 2 in manner hereinbefore described. Thirdly, the preservation of animals without the skin by means of solution No. 3 in manner hereinbefore described. Fourthly, the preservation of fish, game, and poultry by means of solution No. 4 in manner hereinbefore described. Fifthly, the preventing and arresting decay in animal substances by means of solution No. 4 in manner hereinbefore described. Then follows this sentence of disclamation,—“But we do not claim the employment of gelatine or salt, nor of the processes of cleansing or drying, nor of air-tight vessels, except in connection with and in aid of solution No. 1, and for the purpose of preserving animal substances, nor do we claim the use of solution No. 1 except for the purpose of preserving animal sub-

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it is impossible to read those different heads of the claim without much rack with a distinction between the first and all the other heads of the claim. In all the other heads of the claim the solution, whether No. 2 or No. 4, is claimed for the purpose of preserving animal substances “in the manner hereinbefore described;” but in the first head of the claim the solution is claimed for preserving animal substances without reference to any manner hereinbefore described. I do not say that that in itself constitutes any objection to the claim, but it is certainly a circumstance to be taken into account when we come to consider whether in regard to solution No. 1 there is in truth a monopoly in the patent of the manner in which the invention is to be performed.

Coming now to the specification, at the beginning we have this statement

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—“The nature of our said invention is to preserve animal substances, such as meat, poultry, game, fish, and other animal substances, for a long time, and so that the same substances when so preserved, and although the animals from which the same are derived have been killed for a considerable time, cannot be distinguished when cooked from the like substances derived from similar animals which have been recently killed, and also for the preservation of hides.” This is a certain impropriety in the use of the language here, because this paragraph which I have just read professes to state the nature of the invention, and that it certainly in my opinion does not do. It states the object or end of the invention—the preservation of animal substances,—but it does not state the nature of the invention by means of which that object is attained. That, however, is but a verbal criticism, and would be no objection to the validity of the specification if within the specification itself you find, notwithstanding that proper use of language, that the nature of the invention is described; and accordingly I think that, with regard to the first head of the claim, which, it must be borne in mind, is only for the use of solution No. 1 for the preservation of animal substances, the nature of the invention embraced in that head of the claim is set out in the body of the specification; and it is in the words which immediately follow the paragraph I have just read. The specification goes thus—“The manner in which our said invention is performed is as follows. We employ a solution, hereinafter distinguished as solution No. 1, being a solution of bisulphite of lime (usually expressed by the formula $\text{Ca O}, 2 \text{ S O}_2$), in water of about the specific gravity of 1050, which specific gravity we find preferable to that of 1070.” Now, here again there is an impropriety of language in what I have read this paragraph, because what I have read appears to me to be a sufficient description of the nature of the invention, viz., the employment of bisulphite of lime as an antiseptic, or, in other words, to attain the object of preserving meat as that object is described in the preceding paragraph. It is introduced by the inappropriate words—“The manner in which our invention is performed is as follows.” It is certainly not a description, in so far as solution No. 1 is concerned, of the manner of performing the invention, but a description, and the only description within the specification, of the nature of the invention. There is no more about solution No. 1 or about the first head of the claim in this specification at all. I have read every word of the specification that applies to the first head of the claim, or, in other words, to solution No. 1, and the question comes to be, whether within what I have read there is a description whatever of the manner in which the invention “is to be performed.”

It was contended that what is here stated is quite enough to suggest to the mind of any intelligent person that the application of bisulphite of lime to meat will act as an antiseptic. Very true so far, and that is the nature of the invention. But it is contended further that that being once understood you may apply it in any way, and that it is not necessary to tell you how to apply it. But I am afraid that that is not a good argument in patent-law. You must comply with the proviso in the letters-patent, to state the manner in which the invention is to be performed, as well as the nature of the invention. You may combine the two in one set of words—that I do not dispute. But you must tell the world not only what the nature of your invention is, but also in what manner it “is to be performed,” and it will not absolve the patentee from that duty to say that any one can conjecture how it is to be performed, and that there is no mystery about it. That is not a good argument.

ent-law. But neither do I think it is a good answer here in point of fact, No. 88.
 applicable to the circumstances of this case. Observe, again, the words
 which are used with regard to this solution No. 1—"We employ solution No. 1—"
 which is a synonym for bisulphite of lime, "in water of about the specific
 gravity of 1050,"—that is to say, "We employ bisulphite of lime of the specific
 gravity of 1050;" and that is all that is said. He has already stated the object
 which it is to be employed, viz, the preservation of animal substances, but,
 what he tells as to how it is to be employed (he does not even say applied) is
 bisulphite of lime of the specific gravity of 1050 is to be employed.

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The natural question occurs to any one reading that, how am I to employ this
 solution? There are a great many ways in which a substance of this kind may be
 employed with reference to animal substances. It is not said that it is particu-
 larly applicable to animal substances in any particular state. It is not said that
 it is to be used for preserving joints of meat in particular, or whether it is to be
 employed in preserving entire carcases of animals, with or without the skin, or
 with or without the feathers. It is not said whether it is to be rubbed
 on the animal substance to be preserved, or whether the animal substance is
 dipped in it, or whether it is to be used hot or cold, or whether it is to be
 used by evaporating the bisulphite of lime and creating a vapour which shall
 preserve the meat. Any one of those methods may occur to the mind of a man
 reading this part of the specification, and he obtains no light whatever on the
 subject from the patentee.

Now, contrast this with what this same patentee has done in regard to
 the other heads of his claim, all which, observe, are claimed quite distinctly
 separately from this No. 1. He gives next a description of solution No.
 2. He tells how that solution is to be made, and what its ingredients are,
 and so he describes the nature of that part of his invention. But then he
 follows that up with a very distinct specification of the manner in which
 that part of the invention is to be performed. He begins the description
 of the manner in which it is to be performed with these very important words,
 "for this purpose." Again, as regards the third head of his claim, he tells you
 of compound solution No. 3, and to apply that solution to the preservation
 of animal substances in a particular condition, and then, when he has disclosed
 what solution No. 3 is, he goes on introducing the manner of performing
 that part of the invention with the same very significant words, "for this purpose." Again,
 in regard to solution No. 4, he describes, in the first place, what the ingredients
 and composition of that solution are, and again he introduces the manner in
 which that part of the invention is to be performed with "for this purpose."
 Lastly, in regard to the second application of solution No. 4, he says—"We
 use that solution No. 4 is also useful for preventing and arresting decomposition
 of such butchers' meat, game, poultry, and fish,"—and again he goes on to de-
 scribe the manner of performing it, introducing it in the same terms.
 Now, this examination seems to me to give great significance and importance
 to the very peculiar way in which the claim in regard to No. 1 is made at the
 close of the specification. No. 1 solution, being nothing else than what
 we all know as bisulphite of lime, is claimed for preserving animal substances
 without any reference to the manner in which it is to be used for that purpose,
 in all the other heads of the claim reference is expressly made to "the
 manner hereinbefore described" in which these different solutions are to be

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I therefore come to the conclusion that this specification is defective in of the essential particulars required to make a specification good, and that is description of the manner in which the invention is to be performed. Let in conclusion, on this branch of the case, suggest this test of the sufficiency of the specification. When the specification is analysed, so far as applicable the first head of the claim, or solution No. 1, what does it in reality amount to? This, and no more—"Use bisulphite of lime of specific gravity of 1050 for purpose of preserving animal substances." That, and not one idea beyond what the patentee conveys to the world in so far as regards the first head of claim. Now, just let us suppose that the other heads of the claim had not been here at all, and that the only thing in the specification was solution No. 1. It would have been a very short and simple specification certainly, but it would have been such a specification as never was heard of in patent-law before, and such as has been sustained as a sufficient compliance with the proviso contained in letters-patent.

But, then, in the second place, the respondents object that, in so far as the invention is concerned, there is such disconformity between the invention as disclosed in the complete specification and the invention as embraced in the title of the patent and the provisional specification as to constitute a fatal objection to the patent, upon the ground that there is no identity of invention between the two, and that the complete specification claims a much larger and very different invention from what is claimed in the provisional specification. I think this objection is perfectly well founded.

We have already seen quite sufficiently what it is that is claimed in the complete specification under the first head of his claim in the complete specification. Let us see what it is that is alone claimed in the provisional specification. The provisional specification says—"The object of the said invention is to preserve animal substances, such as meat, poultry, game, and fish, for a long time in a fresh state, so that when eaten they cannot be distinguished from the same when recently killed, and for the preservation of hides." Here the language used by the patentee is more accurate than when he states the object of the invention in his complete specification, for he here very properly calls it the object of the invention, while in the other he calls it very improperly the nature of his invention. Then he goes on to comply with what is required by the statute in the provisional specification, which is to state the nature of the invention. One first reads that which follows, and which I am about to read, it certainly sounds more like a description of the manner of performing an invention than a statement of its nature. I cannot but admit that while it partakes of that character it still does sufficiently disclose the nature of the invention,—“The object of the invention is to preserve animal substances, such as meat, poultry, game, and fish, for a long time in a fresh state, so that when eaten they cannot be distinguished from the same when recently killed, and for the preservation of hides. For this purpose we dissolve the ordinary commercial gelatine in boiling water, using about two pounds of gelatine to ten pounds of water. We then, while hot, add a volume equal to the volume of the solution of gelatine of a solution of bisulphite of lime (usually expressed by the formula $\text{CaO}, 2\text{SO}_2$) in water of about the specific gravity of 1070. While the solution of gelatine and bisulphite of lime is still warm and liquid we coat the substance to be preserved with it, either by dipping the substance into it or by brushing it over with a brush, or three coats of the solution. If the substance has to be transported

ance in wooden vessels, the vessels should be saturated with some of the before-mentioned solution of bisulphite of lime in water, and when dry brushed over the said solution of gelatine and bisulphite of lime. When the solution of gelatine and bisulphite of lime has firmly solidified on the surface of the animal substance, the latter may be packed, the vessel being closed as air-tight as possible. For the preservation of hides the interior surface only requires to be coated with the solution of gelatine and bisulphite of lime. The coating on the skins and the hides must be dried before they are packed. Before treating the animal substance other than hides as above, the viscera must be removed and inside washed free from blood; it is then to be coated internally and externally as above described, and before it is cooked the coating of gelatine and bisulphite of lime must be removed by soaking it for a sufficient time in water." Now, it appears to me that that is as nearly as possible a description of the second head of the claim in the complete specification. It is not quite technical—that is of small importance—but it is as nearly as possible the claim made under the second head of the complete specification, for the thing claimed is not the use of bisulphite of lime under all circumstances and conditions, pure or mixed with other substances, for the preservation of animal substances, but it is the use of bisulphite of lime in a particular combination. There is not a word about bisulphite of lime in the commencement of the description. The first thing to be done is to dissolve a certain quantity of the ordinary commercial gelatine in water of a particular temperature, and then to add to it a solution of lime, and with that solution, composed of gelatine and bisulphite of lime, a certain application to the substances to be preserved is to be made, so as to create over and around the substances to be preserved a certain solid coating which is to have the effect of preserving the animal substances, which coating must be removed before the animal substances can be used as human food. Now, that is a very precise and specific and limited claim. It is a claim for one particular solution, composed partly of bisulphite of lime and partly of gelatine, and the object, which is distinctly stated, is so to apply that solution to animal substances as to make a solid coating all over them, which coating you must remove before you can use the meat. Now, is that a claim which can be identified with, or which in any reasonable sense can be said to comprehend, a claim for the use of bisulphite of lime under all circumstances and conditions, pure or mixed, for the preservation of animal substances? I do not answer that question in the negative. I think the claim in the complete specification is a great deal wider, and of a different kind, and therefore there is not that identity between the invention disclosed in the one specification and in the other which is necessary to comply with the provision of the law and to make a good patent in the eye of the law. In that view also I am disposed to say that this patentee cannot prevail.

The third objection which is maintained is an objection of want of novelty, and I confess I am not very willing to enter upon the consideration of that question because it is really excluded by the construction which I have already put upon the complete specification. If there is no good claim for a monopoly of the use of lime under all circumstances and conditions for the purpose of preserving meat, it is in vain to inquire whether other people beforehand have used bisulphite of lime for that purpose. In short, judgment upon the first objection seems to me necessarily to supersede the consideration of the question of novelty or no novelty, and therefore I am not disposed to base my judgment

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upon that ground at all; but I think that the patent is bad—first, because the complete specification does not disclose the manner in which the invention under the first head of the claim is to be performed, and secondly, because that head of the claim is greatly in excess of that which is claimed in the provisional specification.

For these reasons, I am disposed to adhere to the interlocutor of the Sheriff in substance, though perhaps it may be desirable in some respects to modify his findings, if your Lordships should not be prepared, as I confess I am unwilling to deal with the question of the novelty of the supposed invention.

LORD DEAS.—In December 1866 the complainers obtained letters patent for “improvements in preserving animal substances,” subject to the usual conditions that they should particularly describe and ascertain the nature of their invention and in what manner the same was to be performed, and cause the same to be filed in the Great Seal Patent Office within six months after the date of the patent.

Under the terms of their completed specification, lodged within the specified period, the complainers maintain that they have a good patent for the application of what is therein called solution No. 1, to preserve meat, &c., in a fresh state. If this be so, the respondents admit that they have infringed the patent by using that solution for the purpose referred to. On the other hand, the complainer does not allege that the respondents have used any of the other solutions mentioned in the completed specification and said to be protected by the patent; so that the only question before us for decision really is, whether there is a good patent for the use of the solution No. 1 for the specified purpose—that is, for preserving animal substances, such as butcher-meat, poultry, &c., and fish, in a fresh state for a long time, so that the same shall not be distinguishable from butcher-meat, poultry, &c., newly killed.

The two great leading features of a patent or the subject of a patent are utility and novelty.

The utility of the complainer's invention is admitted on all hands. It is because of its utility that the Butcher Trade Association of Glasgow, through the Messrs Robertson, defend the action, in order that they may enjoy the benefit of that utility without paying for a license to use the invention. Mr. Robertson, the principal partner of the respondents' firm, deposes that he began to use the solution No. 1 shortly after its introduction into Glasgow by the complainer's agent, Mr M'Tear, which was in the same year in which the patent was taken out. “We have used it,” he says, “more or less ever since, the quantity used depending on the season of the year. We use it more largely during the hot weather of summer than during winter.” He says they got the solution at first from Mr M'Tear, but afterwards from the Apothecaries' Company, where it came to be sold quite publicly to the trade. He admits it is convenient to his firm in their trade, and on re-examination he says, “I believe the trade use this bisulphite of lime very largely. I suppose it is used in every shop in town.”

The evidence of Mr Robertson is confirmed by that of Mr Laidlaw, the principal assistant to the Glasgow Apothecaries' Company. He deposes that the Messrs Robertson “have been customers of the company for at least twelve months. They got various things from us—among others the bisulphite of lime or solution of sulphite of lime. I believe they began to get it from us.”

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and water. The symbol of it is $\text{Ca O}, 2 \text{ S O}_2$." Mr Laidlaw then
 as to the question whether it is or is not a chemical compound; but as that
 admitted in the argument to be of no moment I need not quote what he or
 say on that point. Mr Laidlaw goes on to say that the solution, in the
 in which it was sold to the Messrs Robertson, has been "among the com-
 articles of sale for a number of years, but I cannot say the exact number.
 principal customers for it are the butchers. The brewers use it also, but
 do not buy it very much from us. I believe the butchers we sell it to use
 the preservation of animal food. We make no secret of selling it, but we
 quite openly. We sell it occasionally under the title of bisulphite of
 but very often under other names. It is asked for as 'Parlez vous,'
 'une Rachel,' 'Jerry,' 'Lime-juice,' 'The Doctor,' and various other names.
 large 2s. 6d. per gallon for it. So far as I am aware we have never
 any of it from Mr M'Tear. His price is 3s. 6d. per gallon."

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Other names besides "bisulphite of lime" are obviously used to avoid the
 challenge by the patentees; and, on the other hand, the higher price
 paid by Mr M'Tear seems to have been intended in lieu of license duty;
 either of these facts are material to the present issue.

Mr Laidlaw afterwards says—"Since the butchers began to use it our sale of
 has been very large. I could not say what the amount of our sale of it has
 During certain seasons it is a very important article of sale. During the
 season we get through a good deal of it. I believe nearly every butcher
 now uses it. We had a great many of them who were constant customers
 and I believe they regard it as an article of great utility to them. We
 sell so much of it now. I believe the falling off of our sales is due to
 say,—many of the butchers having stopped using it in consequence."

We have also evidence of the practical utility of the solution, for the purpose
 of, from other witnesses on both sides, including the men of skill. It is
 necessary, therefore, to say more upon that point. The utility is palpable.
 As to its novelty, I am of opinion that that also is established. Of prior
 use of the solution for the purpose of preserving animal food of any
 in a fresh state we have no trace whatever. Certainly nothing of the kind
 suggested itself to the respondents or to the butcher trade of Glasgow.

Mr Robertson candidly says—"I had never heard before of bisulphite of lime being
 used for the preservation of meat until Mr M'Tear brought it to me with Mr
 Bell's certificate. It was a novelty to me. We had used nothing at
 all for the preservation of fresh meat. For salt beef we had proceeded in the
 ordinary way, of making a pickle by salt, saltpetre, and sometimes sugar.
 These were the only antiseptics that I knew to be applied, and they were only
 used when we intended to have beef cured or salted. The notion of having
 a solution that would preserve meat in a fresh state was something new in the
 knowledge of the trade, so far as I knew; and I am not aware that anything
 had been found better adapted for that purpose than the use of this bisul-
 phite of lime. I am not aware of anything that would produce the same results."

As to the state of practical knowledge on the part either of the sellers or con-
 sumers of animal food in other parts of the kingdom had been different from
 what has thus proved to have been in Glasgow there can be no doubt that
 I should have had evidence to that effect. In the absence of any such evi-
 dence we must conclude that there was no such difference.

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The evidence of Dr Wallace as a skilled witness (as well as that of Mr Ogilby who was held as concurring with him *in omnibus*), goes distinctly in the same direction. He says—"The result produced by the application of bisulphite of lime to meat is a specifically different result from what sulphurous acid produces when applied to meat, or saltpetre, or any other antiseptics. It resembles the effect of sulphurous acid, but there is this difference, that sulphurous acid has nothing to fix it, whereas the bisulphite of lime has the lime to fix the sulphurous acid, so that its action may be continued for a longer time, and is gradually given out as the beef requires it. The effect produced upon the meat is also different from what sulphite of soda or potash produces. I do not know that the effect itself is so very much different, but I regard the sulphites of the alkalies as not being applicable to this purpose, because they would communicate a distinct taste to the meat. They would therefore produce a different result from what the bisulphite of lime produces, and it is also a different result from what the chloride of sodium or nitrate of sodium, or nitrate of potash or saltpetre, or any other antiseptic, that I know of, produces. Therefore this invention is an invention for the purpose of producing an effect specifically different from that of any other known antiseptic. I consider that the result which it obtains is a better result than any obtained before. I think that the fact that this is the only patent that has ever come practically into use is sufficient to shew that it is the only chemical antiseptic that has ever been a practical success; and it was a new contrivance for preserving meat at the time when it was introduced."

But it is upon certain prior patents, or what appears on the face of some of them, that the respondents rest their objection to the want of novelty in the complainer's patent, and it is said that, although none of these patents are valid for the purpose in question, there may be enough disclosed on the face of one or more of them to exclude the complainers from claiming novelty for their invention. Now, without denying the possibility of this being so in some cases, I am unable to see that it is the case here. The Sheriff-substitute gives detailed reasons for his opinion that none of the patents referred to can be held either as making such a disclosure or to be anticipations of the complainer's patent, and these reasons I substantially agree. The Sheriff differs only as to Rattray's patent, and it was upon that patent only that the argument at the bar as to the novelty was seriously rested. I am not, however, convinced by that argument.

Rattray's patent was obtained on 8th July 1861, for "improvements in preserving organic substances."

His completed specification bears that his invention consists of two parts. First, of a mode of preserving animal and vegetable matters by impregnating them with an aqueous solution of sulphurous acid, the effect of which is to preserve them from decay for a considerable period. Secondly, of the use of alkaline and earthy sulphites in packing these preserved animal and vegetable matters in vessels or cases.

He then gives a long description of the mode in which he uses the invention, sometimes four solutions of sulphurous acid of different strengths in succession upon the material to be preserved in a water-tight curing vessel. When the material has been covered by the solution No. 1 the vessel is to be covered and kept undisturbed for from three to five hours, more or less, at the lapse of which time the liquid is to be allowed to drain off for from three to four hours. Then solution No. 2 is then to be run into the curing vessel and left to act undisturbed.

from three to five hours, after which it is to be allowed to drain off as for-
y for from three to four hours more. The solution No. 3 is then to be run
ad left undisturbed for from three to five hours, at the lapse of which time
to be allowed to drain off for three or four hours like the others, making a
s of steeping and draining processes occupying altogether from 18 to 27 hours.
effect of the three solutions thus employed, Mr Rattray says, generally is,
the substances submitted to the treatment are found to retain a somewhat
gent smell of the acid, and to be in appearance somewhat plump and swelled ;
it is this pungent smell and swelled appearance which alone are said to in-
e that the treatment has been sufficient to secure their preservation, so that,
se characteristics are not sufficiently developed, the solution No. 4 must be
ed, but for a shorter period. The above, it is added, concludes the first
of the patentee's invention, and the substances are then ready for the second
of the invention, which he then goes on to describe as consisting of two
s—the dry mode, by which the pieces are packed in casks or cases in dry
er ; and the liquid mode, by which they are packed in cases as securely
ght as possible. It is only when Mr Rattray comes to these two modes of
ing the second part of his invention that he mentions sulphite of lime at
He says that when he gets the length of packing he adopts either what he
the dry mode or the liquid mode of applying sulphite of lime. According
dry mode, he envelopes each piece of the material in a cover of linen or
a cloth, “such cloth having been previously steeped in a concentrated solu-
of sulphite of lime or of sulphite of alumina, in sulphurous acid, and dried,
interstices between the packages being filled up with the alkaline or earthy
ites reduced to dry powder in the manner previously described. According
liquid mode, he says the substances, after being dipped into the same
on as in the dry mode, are packed without being dried, and upon the cases
filled, the interstices are filled up with a solution in sulphurous acid of
the sulphites previously named of strength measuring about 2° on Twaddell's
meter. In either case, he adds, it will be necessary to have the packing
as securely air and water tight as possible.

w, the merit, and the whole merit of the present complainer's patent, so far
have now to deal with it, consists in this,—that his solution No. 1 of
hite of lime may be practically used for preserving meat, &c., in a fresh
for a long time, so that it cannot be distinguished from meat, &c., recently
. That this is a valuable use of the bisulphite of lime there can be no
, and of this use we do not find the slightest idea or trace in Rattray's
cation. He does not propose to use the bisulphite of lime at all till by
ed applications of sulphurous acid, and repeated drainings of that acid from
eat, he has succeeded in causing the meat “to retain a somewhat pungent
of the acid, and to be in appearance somewhat plump and swelled,”—that
ay, he does not suggest the use of bisulphite of lime at all till the meat
come different in smell and appearance from fresh meat, so that it never
ain have either the actual freshness or the appearance of recently killed

It would be very unreasonable, I think, if Rattray's proposal to use
hite of lime to keep the meat in the state into which he had thus brought
uld exclude the complainers from the benefit of their discovery that bisul-
of lime may be practically used for keeping meat *ab initio* in the same
state in which it was when killed. By Mr Rattray's method, as Dr Wal-
beerves, “there are sixteen hours at least of alternate steepings in sulphur-

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ous acid ; these would go to exhaust the natural juices of the meat. Then it would be a great amount of handlings of the beef by steeping it, drying it, steeping it, and so on, and that handling would be injurious. Then there is time occupied and the labour,—all causing expense. In the sulphurous process recommended by Rattray the appearance of the beef is said to be altered it becomes plump and swelled. That indicates a change having taken place in the substance of the beef, which must necessarily be injurious." It is not surprising that in these circumstances Dr Wallace should say—"I should think a man in his senses, no butcher for instance, would ever think of applying the process as a whole to the preservation of meat." Accordingly it does not appear that Mr Rattray's method has ever been a practical success to any extent ever.

Sulphurous acid was, of course, all along known as an antiseptic, and a pound of sulphurous acid with lime in solution, now called the bisulphite of lime, was, I doubt not, also known. But the adaptation of known substances to a new purpose may be quite legitimately made the subject of a patent. The discovery that they may be practically used in combination for a useful purpose may, in like manner, be legitimately made the subject of a patent. The patentees found that a solution of bisulphite of lime, which is a compound of sulphurous acid with lime, might be practically used for preserving meat in a fresh state. That was the merit of their invention, whether it be called a discovery of a use of the compound or an important improvement on the method formerly known. The sulphurous acid would not have succeeded by itself, because, as Dr Wallace observes, "the sulphurous acid has nothing to do with the lime, whereas the bisulphite has the lime to fix the sulphurous acid, so that its action may be continued for a longer time, and it is gradually given out as the meat requires it."

I cannot think, therefore, that the novelty claimed for the complainant's invention is excluded by the curing processes described in Rattray's specification. Both parts of his invention were really curing processes, whether taken separately or together. The meat may have been cured by the sulphurous acid and the first part of the invention with less change upon it than when cured by saltpetre, but it was certainly not thereby preserved or proposed to be preserved in a fresh state. The second part of the invention does not seem to have been intended to be used without the first ; but supposing it to have been so used, it is not suggested that the meat would thereby be effectually preserved without being at once packed in casks or cases "as securely air and water tight as possible."

In short, neither by the first part of Rattray's invention taken by itself, nor by the second part of that invention taken by itself, nor by both parts taken together was it either proposed or suggested that by the application of bisulphite of lime to animal substances such as meat, poultry, game, &c. might be preserved in a fresh state for a long or considerable time, so that they could not be distinguished when cooked from what had been recently killed. Accordingly it never occurred to any of the butcher trade that such a result could be effected or had been contemplated by Rattray's patent, published in July 1861 ; and, on the contrary, the whole trade was taken by surprise by the discovery revealed by the complainant's patent published in December 1866. Bisulphite of lime was not known before the days either of Rattray or the complainant. If Rattray's patent was otherwise good, he may be entitled to monopolise the use of sulphite of lime to produce the result which it was his object to produce. But that will not

complainers' patent from being good for the use of the same sulphite of lime No. 88.
 to produce the practically useful and very different result which it was the patentees' Feb. 23, 1877.
 object to produce. They were the inventors of that application to the purpose Bailey v.
 that effect. To use a known substance to produce a particular effect which is Robertson.
 of great practical utility, and which has not been produced before, is undoubtedly
 a proper subject for a patent. Atmospheric air, for instance, is the same sub-
 stance whether cold or hot, but the discovery that heated air produced upon a
 heating furnace an important and useful effect not known before became the
 subject of one of the most valuable patents known. The heated air was not
 patented, but the application of it for that particular purpose was. So here the
 sulphite of lime is not patented by the complainers, but the application of it
 for the particular purpose of preserving meat for a long time in a perfectly fresh
 state is so. The principle of contract between the patentee and the public, on
 which all patents are held to proceed, is here most justly applicable. Assuming,
 I am doing in the meantime, that there are no fatal objections of a formal or
 technical nature to the working of either of the complainers' specifications, the
 complainers have discovered and communicated to the public a fact of great
 practical utility,—viz., that by the application of a certain known agent—viz.,
 sulphite of lime—to such animal substances of meat, poultry, &c., the meat,
 may be preserved for a long time in the same fresh state as when newly
 killed; and it is only fair and reasonable, therefore, that in the use of his
 invention, the petitioner's protection should correspond to the benefit he has
 conferred on the public.

But two objections, of a different class, are made to the complainers' final or
 completed specification. It is said, 1st, that it does not sufficiently disclose the
 nature of the invention; and 2d, that it does not at all disclose the manner of
 using that invention.

I am not satisfied that either of these objections is well founded.

It must be recollected that, although skilled assistance is frequently taken in
 drawing a specification, the specification is nevertheless to be regarded as the
 work of the patentee himself, and as addressed to persons of ordinary or
 average skill. A fair and reasonable construction is therefore to be given to it.
 It is not required to be artistically divided into heads;—one dealing with the
 nature of the invention, and the other with the manner of using the invention.
 These two may be mixed up together, and yet the meaning may be clear enough.
 The manner of using the invention may sometimes throw light on the nature of
 the invention; and the nature of the invention may sometimes throw so much
 upon the manner of using it as to render very little, if anything, necessary
 to be added on that subject.

Limiting myself to the claim for solution No. 1, as being the only claim now
 in dispute, I find what is said about it in the completed specification to be this:
 "The nature of our invention is to preserve animal substances, such as meat,
 poultry, game, fish, and other animal substances, for a long time, and so that
 the same substances when so preserved, and although the animals from which
 the same are derived have been killed for a considerable time, cannot be dis-
 tinguished when cooked, from the like substances derived from similar animals
 which have been recently killed." (The preservation of hides may at present be
 added). "The manner in which our said invention is performed is as follows:
 We employ a solution, hereinafter distinguished as solution No. 1, being a
 solution of bisulphite of lime, usually expressed by the formula $\text{Ca O}, 2 \text{ S O}_2$,

No. 88. in water of about the specific gravity of 1050, which specific gravity we find preferable to that of 1070. We sometimes form a solution, hereinafter distinguished as solution No. 2, by dissolving the ordinary commercial gelatine in boiling water, using from one to two parts of gelatine in ten parts of solution No. 1." The specification then goes on to mention solutions Nos. 3 and 4, which are used for different purposes; but as we are here dealing only with solution No. 1 these need not be quoted.

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At the end of the specification the patentees say—"What we consider to be novel and improvements, and therefore claim as the invention secured to us by the said in part recited letters-patent are—firstly, the use of the solution No. 1 for preserving animal substances"—(2d, 3d, 4th, and 5th, I need not quote). "But we do not claim the employment of gelatine or salt, nor of the process of cleansing or injection, nor of air-tight vessels, except in connection with the use of the solution No. 1, and for the purposes of preserving animal substances, nor do we claim the use of solution No. 1 except for the purpose of preserving animal substances."

Now, taking all this in connection with the title of the letters-patent "for improvements in preserving animal substances," I confess I do not see any insufficiency in the description of the nature of the invention, or, in other words, of the discovery or improvement, which had been patented. On the contrary, I think it is clear enough to what class of "manufactures," to use the comprehensive word in the old statute, or of "inventions," to use the equally comprehensive word in the modern statute, the invention in question belongs, and to what class of inventions it does not belong; and this, I think, was what was intended by requiring the "nature" of the invention to be stated in the provisional or completed specifications. When it is stated in the title that the patent is "for improvements in preserving animal substances," and in the body of the specification that the patentees' discovery or invention is, by the use of bisulphite of lime, meat, &c., may be preserved, for a long time as fresh as when newly killed, the nature of the discovery or invention is distinguished from other discoveries or inventions, or from other classes of discoveries or inventions, is at once disclosed, and I know no plainer way in which the nature of the discovery or invention could well be described so as to conform to the object of the statute and relative regulations on this particular head.

The objection that the complainers' completed specification does not describe the manner, or any one manner, of using the invention, appears at first sight more formidable. But, on the whole, I think it is an objection more in form than in substance, and too critical to be sustained. The object of requiring the manner of using the invention to be specified, of course, is that persons of ordinary or tolerable skill may be enabled to use it. But how much or how little must be said for that purpose depends on the nature of the invention on the one hand, and the prevailing knowledge of the subject on the other. Accordingly, in the complainers' specification, when they come to deal with their solutions, which were to be used for a variety of curative purposes, they give more ample directions as to the manner of using or employing them, because these somewhat complicated processes, full directions might naturally be required, at least expected, to be given. The use of solution No. 1 is substantially described for the purpose of preserving animal substances for a long time in a fresh state, and for that purpose only. The solution is stated to be a solution of bisulphite of lime, usually expressed by the formula $\text{Ca O}, 2 \text{ S O}_2$, which is proved to

in and recognised formula in the Apothecaries' Hall, Glasgow, so that any man can have the solution by asking for it. The strength of the solution, more is stated. It is to be in water of the specific gravity of 1050, which the complainers say they find preferable to 1070, thus explaining the preparation of the solution independently of the formula. The complainers do not say in so many words that they then put the solution on the meat, but they say that they use it to preserve the meat fresh, which in substance is the same thing. By saying to the butcher trade to employ it for this purpose they really tell them to put it on the meat. To say more than this was quite unnecessary, for the whole butcher trade knew at once how to put it on. To have told them to put it on in any other way would have been misleading, for it requires to be used in a different way, and this the butcher trade, being accustomed to the use of antiseptics (as indeed all housekeepers are) perfectly understood.

Accordingly, the respondent, Mr John Robertson, who represents the complainers after mentioning that in summer time his firm use about a gallon a week of the liquid, says—"For a batch of collops, 10 lbs., we use a wineglassful" (that is, using it to be perfectly wholesome, they simply pour it among the collops). When we apply it to joints we simply brush it over," and, he adds in a passage already quoted, that the trade use it very largely. "I suppose it is used in nearly every shop in town."

It has been objected that there is in the specification, no direction such as is relative to solutions Nos. 3 and 4 for removing the substance used from the meat before the meat is cooked. But the silence on this subject in the one and the direction given in the other, of themselves sufficiently indicate that removal of the substance was required in the one case as it was in the other; and it is obvious Mr Robertson and the trade perfectly understood.

It is important to observe that Mr Robertson, although an adverse party, does not suggest that either he or any one of his numerous constituents, consisting of the associated butcher trade of Glasgow, either required or received any direction to apply the bisulphite of lime in the manner in which he says he and they apply it, beyond what they found in the complainers' specification. The respondent says in his note that the simplicity of the process is negatived by the statement mentioned by Mr M'Tear that he issued cards for instructing the butcher trade as to the way to use the solution. That is not, however, a correct version of the facts.

Mr M'Tear's evidence about the cards, one of which, he says, "I now produce," meaning obviously "one of which I now exhibit," for I find there is no card produced in process, and never was. The words attributed to Mr M'Tear are not very grammatical, but his object, I think, in referring to the cards was to shew that the public were made aware that what the complainers were doing was "the bisulphite of lime alone," and that whoever used it in the manner described in the cards without purchasing it from the respondents or obtaining their authority so to use it, would be liable in the eyes of law. If the respondents had understood Mr M'Tear to mean that the cards were issued the trade did not know how to use the solution. No respondent would of course at once have required the card to be put into the meat, and would have led or attempted to lead evidence to shew the date at which the cards were issued, and that prior to that date the manner of using the solution had not been understood, so that it was to the cards and not to the respondents that the knowledge and the practice were to be attributed. In this the respondents have left us in the position of not being judicially

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No. 88. entitled even to see the card, far less to allow conjectures about it and circumstances connected with it to weigh as evidence in the case.

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It is indeed plain enough to me that the respondents, Messrs Robertson and their constituents, never meant to dispute the fact that the terms of the specification had enabled them to know how to use the solution No. 1. It is impossible otherwise to account for the absence from the record of any averment to the contrary, and of any plea in law raising an objection that in this respect the specification was defective. Their 3d statement of facts goes strongly the other way. It is in these terms:—"The respondents have all along applied and applied the bisulphite of lime to their meat in the pure and simple condition in which they receive it from the sellers. They never mixed it with water or with any materials such as gelatine or salt, but they simply apply to the meat the article known as bisulphite of lime, without any admixture whatever." Their 4th statement, without at the same time saying or suggesting that any difficulty had ever been felt as to how "bisulphite of lime, without any admixture whatever," should be applied to the meat, seems to me to be equivalent to a judicial admission that no such difficulty had been felt, and this is quite in accordance with Mr Robertson's evidence.

The state of the record on this subject is all the more important from the fact that the case having been closed, as the proof itself was, with great deliberation. The action was raised in November 1874, and the record was closed in the end of December of the same year. But in October 1875 the respondents got the record open, and made various additions by way of amendments admitted into it, after which it was again closed and the case allowed to be adjudicated upon without any averment, plea in law, or proof being proposed to raise an objection to the specification as not disclosing the manner in which the "bisulphite of lime, without any admixture whatever," was to be used.

Now, I do not say that this excludes the respondents from now pleading that there is in this respect a technical objection to the specification which invalidates the patent. But I do say that in dealing with that objection we must deal on the footing that in point of fact the terms of the specification enabled the respondents, Messrs Robertson, and the whole butcher trade of Glasgow, to know how to use the solution No. 1, and that they did forthwith use it with effect and accordingly. This result seems to me to demonstrate that there has been no omission to give to the workmen who would naturally be employed the instructions which were necessary to enable them to carry out the discovery or, in other words, "the invention"), and this being so, there is, I apprehend, no omission which can void the patent.

Much, as I have already said, must always depend upon the nature of the invention as well as upon the knowledge of those who are to use it. In *Re Hancock* (6 De G., M. and G. 391) Lord Cranworth laid it down that a discovery that the mixture of two or more simple substances in certain definite proportions would form a compound substance valuable for medical qualities, was a good subject-matter for a patent. Assuming his Lordship to be right in that respect, and the patent to be for a pill for curing a specified disease, I doubt whether, in describing the proportions to be put into the pill it would be necessary to say "then swallow the pill."

There remains, however, the objection of alleged discrepancy between the provisional and completed specifications; or, to put it in its more familiar shape, that the complainers' completed specification goes beyond and claims

n was claimed either in the title or in the body of the provisional specifica- No. 88.

of this means that the completed specification claims the bisulphite of lime for other purposes beside the preservation of animal substances, while the title of the specification is limited to improvements in preserving animal substances, the answer obviously is, that construing the words of the completed specification, it is clear enough that the bisulphite of lime is claimed for improvements in preserving in a fresh state animal substances only.

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rather suppose, however, that the objection taken upon the ground of discrepancy between the provisional and final specifications was meant to be based upon the omission in the completed specification of what is said in the provisional specification of the use to be made of the ordinary commercial gelatine as applicable to solution No. 1.

Now, it is quite true that in the provisional specification it was proposed in general terms to mix the solution to be employed of bisulphite of lime with a solution of the ordinary commercial gelatine dissolved in hot water, and that no solution is there made of a solution of bisulphite of lime without the gelatine. The provisional specification did not fall to be published. It remained a document in the hands of the law officer for his information merely of the nature of the invention, which is all that the statute and relative rules and regulations require to be described in the provisional specification, that is to say, the category to which the invention belonged, and which was thus distinguished from the numerous other categories of inventions for which letters-patent might be granted, and to which other categories it did not belong. The schedule of a provisional specification appended to the Act 15 and 16 Vict. c. 83, is, accordingly, limited to an insertion of the title and a description of the nature of the invention. The complainers' provisional specification thus contained much that was superfluous; but superfluous matter, even in a complete specification, will render that specification bad if it does not mislead the public. Still less superfluous matter void a provisional specification, which is not for the information of the public, but of the law officer only, who, if he think the title of the specification vague or insufficient, may allow or require that title to be amended. The complainers had the usual period of six months to make experiments with a view to perfecting their invention and preparing their full and complete specification to obtain the benefit of these improvements, and the result seems to have satisfied them that where the object simply was to keep meat, &c., in a fresh state, as contradistinguished from certain curing processes, the gelatine, as only for coating, was unnecessary, as the bisulphite of lime was found sufficient of itself, as Dr Wallace explains in his evidence, to fix the sulphuric acid, which was quite well known to be the only antiseptic.

Now the question is—were the complainers entitled in their complete specification to omit the ordinary commercial article called gelatine, as being unnecessary in the course of their six months' experiments, not to be required in the preparation of their solutions, namely, No. 1, while they found it useful to retain the coating qualities in their weaker solutions, Nos. 3, 4, and 5? I am inclined to answer that question in the affirmative.

It is said about gelatine in the provisional specification had been omitted in the completed specification, the complainers might have eliminated it by disclaimer. But there was no room for a disclaimer as applicable to a provisional specification. The only course open to the complainers was to leave the

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gelatine out in the completed specification so far as applicable to solution No. 1 and that was what they did. It was a matter of indifference as to the practical result whether the gelatine was kept in or left out, for the gelatine neither did good nor harm in the use of solution No. 1. But, at the same time, it was proper to omit the superfluity, and I cannot see how its omission can be said to have extended the title of either of the specifications, or to have changed the substance of the patent from what it would otherwise have been. As I construe the patent so far as now in dispute, it does not prevent Rattray, or any other patentee, from using bisulphite of lime except for the purpose of preserving meat, &c., in the same fresh state in which it was when killed. As regards that purpose, the invention, when presented to the public for the first time, was presented in the shape in which it now stands in the completed specification. The public perfectly understood the nature of the solution No. 1, as well as the purpose for which it was to be applied, and the manner of using it, and accordingly they proceeded successfully to use it. I know no case in which such a variance between the terms of the provisional and completed specifications has been held to void an otherwise good patent; and, in the absence of any precedent, I am not for so deciding the point.

If the patent be good, the infringement, as I have said, is undoubted, and as regards the use of the solution No. 1 for preserving meat for a long time in the same fresh state in which it was when killed, and to that extent I am of opinion that the prayer of the inferior Court petition ought to have been granted.

LORD MURE.—It seems to be admitted in this case, and I think it is just, that the only thing done by the respondents which can be said to be in violation of these letters-patent, is that they have used bisulphite of lime, viz., the solution No. 1, for the preservation of meat. I do not think it is just that they have used any of the other solutions. The only question, then, which we have to dispose of is, whether the petitioner is entitled to stop their use in respect of the patent founded on by him? His right to do so can only arise in the event of his shewing that he has a valid patent for the use of bisulphite of lime alone, or in any manner of way. Now, the petitioner maintains that he has such a patent; and his specification no doubt does so, but he professes to claim the use of bisulphite of lime alone for the preservation of meat. This, I think, is clear from the passages in the specification which have been referred to, and more especially from the statement of the claim itself, in which the patentees claim expressly "the use of solution No. 1 for preserving substances."

That being the case, the question is, Has the petitioner validly and effectually established a right to this claim by his patent? I agree with your Lordships, the chair, and with the Sheriff, in holding that he has not. I do not wish to detain your Lordships by going over the details of the provisional and complete specification, which have been fully explained by your Lordships, and with whose exposition of the meaning and import of these documents I entirely concur. Upon this branch of the case, therefore, I shall simply say that while I think that the patentees have distinctly claimed the use of bisulphite of lime itself, they have nowhere described the manner in which that ingredient is to be used or performed; and that I am also of opinion that the patent is bad, in respect that the complete specification, as regards the first claim—the use of bisulphite of lime by itself—is in essential respect defective.

the provisional specification. The provisional specification is for a particular mode of using bisulphite of lime mixed with certain other things; but it makes no claim, as I read it, to the use of bisulphite of lime by itself; and as your ship has so fully gone into the question of the disconformity between the provisional and complete specifications, and into the question whether there is any manner of using the bisulphite described in the complete specification, I think only to add that I adopt your Lordship's views upon both these points, and think that in both respects the patent before us is open to objection.

As to the third point, viz., the question of novelty and prior use, I agree with your Lordship that it may not be necessary, having regard to the judgment proposed to be pronounced on the first two points, to deal with this question. But I think it right to say that, if it were necessary, I am prepared to agree in the result which has been arrived at by the Sheriff. There is not much evidence of the use of bisulphite of lime prior to 1866; but that may be explained and accounted for by the fact that it has been made matter of distinct admission, and minute lodged during the proof, that between the 21st June 1861 and the date of the petitioner's specification, 27th June 1866, solutions of bisulphite of lime were publicly used for the preservation of animal substances by William Rattray, chemist, Aberdeen, in the manner described in Rattray's specification. Now, Rattray's specification consists of two things—(1) of a mode of preserving animal and vegetable matters by impregnating them with an aqueous solution of sulphurous acid, and (2) of the use of alkaline and earthy sulphites for preserving animal and vegetable matters in cases. In speaking of the first mode—the first, I think, does not apply—he says it relates to the preservation of animal and vegetable matters in vessels or cases, and is more particularly applicable to the preservation of materials operated upon according to the first part of his invention. But he does not restrict the application to materials that have been operated upon according to the first part of his invention. He says it is more particularly applicable to them; but he claims the use of bisulphite of lime for the preservation of materials operated upon in other ways, and he has explained in the first part of his specification; and then when he states his claim he says,—“(2) The preserving of animal and vegetable substances by means of alkaline and earthy sulphites when packed in vessels or cases, as above described.” That may be held to be a restriction of the claim to things packed in vessels or cases; but it cannot, I think, be held to be a restriction of it to materials operated upon in terms of the first part of the specification. For he appears to me to claim distinctly the preservation of all animal and vegetable substances by means of alkaline and earthy sulphites. Being so, it rather occurs to me that if the petitioner's patent be, as he claims, one for all or any modes of using bisulphite of lime for preserving animal substances, and if it had been dated in 1860 instead of 1866, Rattray's patent would have been held to be an infringement of the petitioner's patent inasmuch as it claims the use of bisulphite of lime for the preservation of animal substances packed in cases; and if that be so, then the use of bisulphite of lime for the preservation of animal substances was disclosed, and it is admitted that it was used in the way claimed by Rattray. Therefore the broad claim, in which the petitioner puts it, is not a novelty, because a particular mode of using bisulphite was made known to the public, and, according to the law, was used prior to the date of the petitioner's specification.

No. 88.

Feb. 23, 1877.

Bailey v.

Robertson.

No. 88.

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Robertson.

LORD SHAND.—It is not without regret that I concur in holding that judgment must be pronounced against the patentee in this case, for I think proved that the subject of the patent is one of great public utility, and the claim had been somewhat less sweeping, so as not to have covered the invention which is described in Rattray's specification, it would have been a most novel. But unfortunately, as has frequently occurred in similar cases, the patentee has so framed his provisional and final specifications as to leave letters-patent open to objections which are fatal to his case.

The objections which have been urged at the bar are three—(1) That the final specification describes an invention essentially different from that for which the letters-patent were given as that invention was described in the provisional specification; (2) that the patentee has failed to comply with the conditions of the letters-patent, because he has not described in the final specification in the manner in which the invention is to be performed; and (3) that the invention is in the very wide terms of the claim as made in the final specification, is not a novel, but was in prior use. Any one of these objections, if well founded, would be fatal to the letters-patent, and I am of opinion that all of them have been established. I concur generally in the careful and able judgment of the Sheriff, and of the late Mr Dickson. In one point he has fallen into error—I mean where he says that the provisional specification is published in order that all persons interested may have an opportunity of opposing the application for the patent; but, with that exception, it appears to me that the Sheriff's observations on each of the three objections are sound, and that his reasoning is conclusive. While I concur also generally in the observations of your Lordships, I shall consider the different objections, because the case has been treated as one of great importance, and it may be satisfactory to the parties to know the grounds in some detail on which I have come to the opinion I have indicated.

The first objection is that the final specification describes an invention essentially different from that which is described in the provisional specification. The patentee gets his protection for the purpose of experimenting, and his letters-patent only after compliance with that provision of the statute which requires the deposit of a provisional specification which shall describe the nature of the invention; and the letters-patent for the invention as so described and as contained in the subject to the proviso which they contain, that the patentee shall by his final specification describe not only the nature of "the said invention"—that is, the invention for which the letters-patent have been got, as described in the provisional specification—but also in what manner the invention is to be performed. The effect of the statutory provision and the letters-patent is to make the letters-patent valid, only if there be identity of invention as that invention is described in the two specifications. In short, the invention described in the final specification must be that for which the provisional protection was granted, and for which the letters-patent were issued.

Before considering whether that be so in the present case I shall make some observations. In the first place, I think that the question whether the invention as described in these different specifications is identical is to be answered simply by a comparison of the one specification with the other; and I do not think the construction of those instruments as defining the nature of the invention is entirely for the Court, with the aid no doubt of evidence, if necessary, to explain the state of public knowledge, and any technical or peculiar terms which may be found in the specifications. It is of importance to see

er point, because in the argument on behalf of the patentee it seemed to be assumed to some extent that the interpretation of the instruments given by the professional witnesses must guide the Court. With that I do not agree.

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In the question of construction I am of opinion that the invention described in the final specification is different from that which had been described in the provisional specification—and so it is not “the said invention,” in the language of the letters-patent, for which the letters-patent were granted. This involves a comparison of the two specifications and the legal interpretation which they bear. Giving, as I desire to do, the most favourable construction for the patentee, the provisional specification appears to me to describe an invention for the use of a compound agent or combination. It is an invention for the preservation of animal substances, but in preserving animal substances the agent which the patentee says must be used in order to bring about the desired result is one consisting of two different substances, the one gelatine and the other bisulphite of lime. But in the final specification, taking the construction which the patentee himself puts upon it, while the patent is for the same object, the agent is a single agent, for there the agent is not one composed of two distinct substances, but a single agent of bisulphite of lime. I do not think it necessary to go into the provisional specification in detail; but passing from the description of the object of the invention, which is correctly enough given, I find that when the patentee comes to describe the nature of his invention his explanation is that a certain quantity of commercial gelatine in boiling water is the first substance used; with that there is combined a certain quantity of bisulphite of lime of a defined specific gravity; and these two substances being mixed form together the one agent which is described as producing the result. It has been stated that the solution of gelatine is a mere medium in the invention; but the question on the construction of this patent whether the patentee has so intended, and I am of opinion that any one reading this specification according to its ordinary construction must be of opinion that the patentee considered the one substance, gelatine, just as necessary as the other substance, bisulphite of lime, in order to bring about the desired result. Gelatine is not presented as a mere medium (bisulphite of lime is itself a solution, and is a medium so far), but it is stated as having two qualities which, I think, in the mind of the patentee were essential—an adhesive and a solidifying quality; and, as I read the invention there described, I take it to come to this, that with that adhesive and solidifying liquid, combined with the antiseptic liquid, a certain result can be effected; and I see nothing to indicate that the patentee had even an idea that the result could be produced by one of those things alone. Let me suppose that the patentee had been examined as a witness in the course of the proof, and that he had admitted what must, I think, be assumed in this argument, that at the time when he lodged this provisional specification he was in ignorance that bisulphite of lime alone could bring about the desired result,—that he was of opinion that it was absolutely necessary in order to effect the result that bisulphite of lime should be combined with a substance which had an adhesive and solidifying quality, and having found a substance which would have that effect he described the joint agent, which, according to his invention, would produce the desired result, but that after six months he made the discovery that it was unnecessary to combine two agents, and that one would be enough to produce the result,—in that case I am of opinion that that would be not only a discovery of a new invention, for which a third party, if he had discovered it, could have

No. 88. obtained a patent. I do not think that anything so vital could be covered by saying that it was a mere change in the manner of using the invention as the pursuer had originally described it. It is true that provisional protection is given in order to enable a patentee to make experiments and improvements in the manner of using his invention. If the discovery had been made that whereas the patentee formerly thought a solution should be used hot, and now found it could be used cold, or if some slight modification of the original agent had been introduced, such as that the solution might be mixed in somewhat different proportions, I think such variations might be fairly covered by the final specification. But when you have any change so vital as it appears to me you have here, I regard it as a new invention, which would require a new provisional specification and a different patent. I concur in the observation made by your Lordships that the final specification is really a claim for a larger and wider discovery, essentially different from that which formed the subject of the provisional specification.

The next point maintained against the patent is, that the final specification fails to comply with the proviso in the letters-patent requiring that the manner of use shall be described. I am of opinion that that objection also is unfounded. Reading the final specification in the most favourable way for the patentee, and taking it that he has given distinctly the object of his invention and that he has described the nature of it, the next question is, has he described the manner of use? Now, he himself claims under this specification what he thought was not indicated in the previous one—the use of bisulphite of lime alone—but I have found no directions whatever given as to how this agent is to be used. The single word in that part of the specification said to describe the manner of use is the word “employ.” In order to make up for that, which is obviously a want in the patent, it appears from the evidence of Mr M’Tear, A. & W. M’Tear, agents in Glasgow for the patentee, in the course of his examination as a witness for the patentee—“We issued cards describing the manner of using it, one of which I now produce; and it was for the use of bisulphite of lime alone.” Now, it is a very remarkable circumstance, that in order even to enable the trade to know how to use bisulphite of lime alone, the patentee has found it necessary to issue special directions. Lord Deas has made the observation, according to Robertson’s evidence his firm found no difficulty in applying it. His Lordship has failed to notice the evidence I have now referred to, showing that cards of printed instructions were issued to the trade. I am not sure that Robertson should say he had no difficulty, for he had been using bisulphite of lime for a considerable time, having bought it from M’Tear, and therefore he had the benefit of cards issued by M’Tear with special instructions how to use it. The card has not been printed in the proof, but it is stated to be printed by the petitioner’s own witness, and was read by counsel at the bar, and is to the following terms:—“To Preserve Fresh Meat.—Pour out some of the bisulphite of lime into a bowl, and with a clean brush coat all over the meat if very sultry weather, repeat it each day. For Minced Collops or Sausages Put into every 8 pounds or so a wineglassful of the solution, mince all together when they will keep their bright red colour. The saving effected by the use of the above is extraordinary, and it is now used by hundreds of the trade. We can testify to its value. Caution.—Any one found using other than the above will be prosecuted.” What we find thus published is exactly what Robertson admitted, and a knowledge of the manner of use appears to have been thus acquired.

the directions given by the patentee, not where they should be given, in the specification, but in this card. And so I take it that this is a fatal objection. No. 88.
 It is said there may be inventions of such a class that it is not necessary that the patentee should describe the manner of using them. I know of no such inventions. Feb. 23, 1877. Bailey v. Robertson.
 The letters-patent make it a condition of the invention being valid that the manner of use shall be described; and, however simple the manner may be, I think there must be some description. But here I think it was utterly necessary that some description should be given. It was impossible for the trade to know without some assistance whether the agent was to be used by keeping the meat saturated in vessels or casks, or whether it was to be rubbed on, and what quantity was to be rubbed on; whether it was to be kept cold; how often the process was to be repeated, or whether it was to be continued; whether it was to be washed off or left on; and it is a remarkable fact that in the other parts of the specification relating to the other solutions all as in the provisional specification, directions of that kind are given. Therefore, upon this part of the case, I am of opinion that the objection which has been urged is fatal. I may say, with reference to the illustration that has been put in regard to a patent medicine, it would occur to me that a patentee in such a case must not only mention the substances he proposed to use, and the directions of those substances, but must describe some manner of using them.
 I directed that they were to be rolled up into a pill in certain quantities, taken in that way, he has described a manner of use; but even in that case I think that in order to the safety of the public and the validity of the patent an idea must be given of the number of pills to be used and at what intervals the patient is in safety to take them—so in that case it would not be a sufficient instruction to say, “having made up your pill, then swallow it.”
 With regard to the remaining question, whether this patent is objectionable on the ground of prior use, I do not think it necessary to rest the judgment more than your Lordship has done upon that ground, because to my mind the reasons already given are quite sufficient for the disposal of the case. At the same time, as the parties have argued that point, I think it right to say looking to the very wide terms of the claim, the patent appears to me to be objectionable on that ground also. It is admitted in the proof by minute examination of bisulphite of lime was publicly used by William Rattray, chemist, when, in the manner described in his specification. There is no qualification of that admission to the effect that the use of it was not useful; and with that admission I must take it that bisulphite of lime was publicly used with the process which Rattray's patent gives it. I agree with Lord Deas in thinking that Rattray's patent is in many respects essentially different from the present, and I think the patentee here might have had a perfectly good patent if he had framed his specification with a little more caution, because I agree in the view that bisulphite of lime, though publicly used by Rattray in the way there described, was not used as the sole preserving agent, or in the same way that the patentee uses it. In Rattray's patent the use of bisulphite of lime was to preserve animal substances that were already preserved. You must first have the meat treated by various substances till it assumes a special appearance and has a pungent smell, and then the meat in that condition to which bisulphite of lime is to be applied. Having got the meat in that condition, Rattray did use bisulphite of lime, and I use it for the general purpose of preserving animal substances, though they had been subjected to previous treatment. Now, I put the question—the

No. 88. patentee having claimed here the exclusive use of bisulphite of lime for preserving animal substances (he puts his claim in the broadest possible terms) and Rattray thereafter, if this were a good patent, be entitled to go on using bisulphite of lime as he had been doing for preserving animal substances! And it appears to me that if this is a good patent, in the very wide terms in which it is framed, Rattray would be open to the charge of being an infringer. I quite see that if this claim had been a little more guarded—if it had been so guarded as to be a claim limited to the use of bisulphite of lime from the beginning to the end of the process as the sole agent—it would have been a perfectly good patent so far as Rattray's patent is concerned; and even yet a disclaimer might perhaps meet the objection; but having chosen to make the claim so wide as to strike at all and every use of bisulphite of lime, I am of opinion that the claim is too wide, and covers something which is not novel but which was known before.

Upon these grounds I concur in the judgment of the Sheriff, and of the majority of your Lordships.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff-substitute of 31st January 1876, and of the Sheriff of 9th June 1876: Find that the pursuer (appellant) is assignee of the letters-patent, No. 6/1 of process, which were granted to Henry Medlock and the pursuer, dated and sealed 27th June 1861 in pursuance of which the said Henry Medlock and the pursuer filed the specification, of which No. 6/12 of process is a certified printed copy: Find that during the years 1873 and 1874, and during part thereof, and during the currency of the said letters-patent the defenders (respondents) did at their shops or premises, Gallowgate Street and Duke Street, Glasgow, use and employ the preservation of animal substances bisulphite of lime, bearing solution No. 1 claimed by the patentee under the first head of claim in the complete specification: Find that between 21st June 1861 and the date of the pursuer's provisional specification, 2nd June 1866, bisulphite of lime was publicly used for the preservation of animal substances by William Rattray, chemist, Aberdeen in the manner described in the specification of his patent, No. 6/1 of process: Find that the complete specification describes the nature of the invention claimed under the said first head, but does not describe or ascertain the manner in which the said invention is to be performed: Find that, in so far as regards the said first head of the claim, the complete specification is disconformant to the provisional specification, and claims a different invention from which is disclosed in the provisional specification: Therefore find that the patent is not valid and effectual to secure to the pursuer the invention, or supposed invention, used by the defenders aforesaid: To this extent and effect sustain the defence and the prayer of the petition, and decern: Find the defenders entitled to expenses both in the Sheriff Court and in this Court."

MORISON & KEITH, S.S.C.—DUNCAN & BLACK, W.S.—Agents.

SIR WILLIAM EDMONSTONE, Bart., Petitioner.—*Balfour—Murray.*

No. 89.

Improvement of Land Act, 1864, 27 and 28 Vict. c. 114, secs. 78 and 80.—Feb. 24, 1877.
A petition presented by an heir of entail in possession, in terms of section 78 of the Improvement of Land Act, 1864, craving the Court to authorise the Inclosure Commissioners to sanction as a charge upon the estate a sum which he proposed to subscribe towards the stock of a branch railway to be made through the estate, by virtue of sections 78 and 80 of the Act, *held* that it was not indisable that the petitioner should shew that the making of the railway and consequent benefit to the estate were contingent on his proposed subscription. Edmonstone.

HIS was a petition presented to the First Division of the Court under the 21st section of the Improvement of Land Act, 1864, 27 and 28 Vict. c. 114. 1ST DIVISION.
Lord Rutherford
Clark.
B.

The petitioner, Sir William Edmonstone of Duntreath and Kilsyth, Bart., had presented an application to the Inclosure Commissioners of Scotland for land in Wales, in virtue of the above mentioned Act, and particularly section 78 thereof, craving them to sanction as a charge upon the estate of Kilsyth a sum of £5000, which he proposed to subscribe towards the stock in the Kelvin Valley Railway Company, for the extension of the railway between Kilsyth and Falkirk.*

As the petitioner was heir of entail in possession of the estate of Kilsyth, and as he was the father of Archibald Edmonstone, the next heir of entail, who was a minor, it was necessary for him to apply to the Court of Session, under the 21st section of the Act, for an order "authorising the Commissioners to entertain and proceed with the application," notwithstanding the next heir's minority.

The petitioner set forth "that the estimated amount of increased value of the railway would confer upon the estate proposed to be charged as follows, viz.—(1) A rise of about £300 per annum of rent on two farms jointly, which would fall out at Whitsunday 1877; (2) that the value of the other farms would increase as the respective leases fell out; (3) that there would be a large return from feuing, many feus having been applied for in prospect of the railway being made; and (4) that a more lordship would become due on two mineral fields, as per valuation."

Besides these anticipated benefits to the estate, the stock towards which the petitioner proposed to subscribe was guaranteed by the North

The Improvement of Land Act, 1864, enacted, sec. 78:—"In case any owner shall be desirous of subscribing for any shares or stock in the capital, whether original or additional, of a company having power to construct a railway, navigable canal, or any branch or extension railway or navigable canal, or deviation of a line of railway or a navigable canal already sanctioned, the subscription for which such subscription is to be made being unfinished, or in any case in which the capital to be raised for the completion of any such railway, canal, or extension, or deviation, the same being upon or near to, and which will give or benefit, the lands of such landowner, and who shall be desirous that the same amount, or any part thereof, may be charged upon the lands so to be improved, it shall be lawful for him to apply to the commissioners for that purpose within the time limited by the Railway or Canal Companies Act or Acts for the construction of the works in question."

c. 80.—"If the commissioners shall be satisfied that the railway or canal, when constructed and open for traffic, will effect a permanent increase of the value of the lands exceeding the yearly amount proposed to be charged upon them, they shall execute and deliver to the landowner a provisional order under their seal and the hands of two of them, expressing their sanction of the works proposed" in the form therein set forth.

No. 89. British Railway Company $5\frac{1}{2}$ per cent, redeemable at 10 per cent premium. The return on the shares would therefore be £262, 10s. per annum to begin with, diminishing as the shares were gradually released by the periodical payment of the rent charge, and appropriated to the petitioner or his successors paying the same, in terms of the 78th section of the statute.

Feb. 24, 1877.
Edmonstone.

The annual rent charge proposed to be laid upon the estate of Kilsyth, in respect of the above-mentioned subscription to the Kelvin Valley Railway, was £343, 15s. for twenty-five years.

The petition was remitted to the Junior Lord Ordinary to inquire and report.

The Lord Ordinary (Rutherford Clark) remitted to Mr Colin Mackenzie W.S., to inquire into the facts and circumstances set forth in the petition.

On receiving Mr Mackenzie's report, and on a minute being lodged by the petitioner, the Lord Ordinary (Adam), on 29th January 1877, reported the case to the Inner-House, with a note containing, *inter alia*, the following passage:—" . . . The construction of the Kelvin Valley Railway is not contingent on the proposed subscription of £5000 being made to it by the petitioner. It is apparent, therefore, that the increased value of the lands by the making of the railway does not depend on the application being granted. The lands will be equally increased in value whether the application be granted or refused."

From the minute for the petitioner above mentioned, however, it appeared "that the petitioner having been advised that he would be able to present the present application, became bound to the railway company to take £5000 of stock, and they in consequence agreed to divert the line from the edge of the petitioner's property, where it originally was to have gone, to a more central part of his property."

At advising,—

LORD PRESIDENT.—I am quite satisfied that the prayer of this petition should be granted, and an interlocutor pronounced in the terms proposed by the Lord Ordinary.

There is only one difficulty suggested by the Lord Ordinary. His Lordship says that an agreement has been made for the guarantee of the stock required to be raised for the extension of the Kelvin Valley Railway by the North British Railway Company, and that consequently the construction of the line is not contingent on the subscription of £5000 by the petitioner, nor does the prospective benefit to his lands depend on this application being granted.

Now, the Lord Ordinary does not express an opinion that it is indispensable to the success of his application that the petitioner should shew that with his proposed subscription this railway could not be made, but he suggests that this might possibly be the meaning and effect of sections 78 and 80 of the statute under which the application is made. I cannot, however, adopt this view, for I do not think that these clauses are susceptible of such an interpretation. They no doubt contemplate that a landowner who makes such an application as this shall be a person interested in the construction of the railway. But there is abundant evidence that the petitioner is in that position. The small branch line is intended and calculated to be of local benefit mainly, if not entirely, and it was therefore most natural that the promoters should have to carry with them the landowners through and near to whose estates the line was to run, and induce them to take shares. The petitioner has accordingly agreed

ake shares in the company, trusting to the present application being granted. No. 89.
 Indeed it were necessary under the statute that the construction of the line
 should depend upon the proposed subscription of the petitioner, then there is no
 doubt that the application must be refused, for the investment is clearly an
 active investment, and the company can have no difficulty in obtaining the
 money elsewhere. But I have no idea that it is indispensable to prove that the
 success of the undertaking is in any way dependent on the petitioner's sub-
 scription.
 On other respects I am satisfied that the petitioner has made out a good case
 granting the application.

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ORD DEAS, LORD MURE, and LORD SHAND concurred.

THIS interlocutor was pronounced :—"The Lords on the report of
 Lord Adam, Ordinary, authorise and require the Inclosure Com-
 missioners of England and Wales, acting under the statute 27 and
 28 Vict. chapter 114, commonly called 'The Improvement of
 Land Act, 1864,' as regards lands in Great Britain, to proceed on
 the application to them by the petitioner, and to deal with the
 same according to the provisions of the said Act authorising them
 on that behalf, notwithstanding the circumstance that the peti-
 tioner is the father of a person entitled to an estate in the lands
 to be improved under the foresaid application immediately after
 the petitioner, and that such person is a minor, and direct that the
 costs of the application to the Court, and of the procedure follow-
 ing thereon, as the same shall be taxed by the Auditor of Court,
 shall be deemed to be part of the expenses of and incidental to the
 said application to the said commissioners, and decern, and
 remit to the Auditor to tax the account of said costs."

J. STORMONTH DARLING, W.S.—Agent.

CHARLES METCALFE OCHTERLONY of Ochterlony, Baronet, Pursuer.— No. 90.

Balfour—Low.

WID FERGUSON OCHTERLONY AND OTHERS, Defenders.—*Asher—Keir.*

Feb. 24, 1877.
 Ochterlony v.
 Ochterlony
 and Others.

tail—Disentail—11 and 12 Vict. cap. 36 (Rutherford Act, 1848), sec. 43
not—Failure of Trustees to execute Trust—A testator having instructed his
 executors to execute a strict entail of certain lands on a series of heirs, the trustees
 executed an entail, and the institute entered into possession of the lands. Thirty-
 years afterwards he found that the deed of entail was invalid, the word "irre-
 revocably" in the clause prohibiting alienations being written on an erasure. In
 pursuance of (1) of declarator at the institute's instance that under the 43d section of
 the Rutherford Act he was entitled to possess the lands in fee-simple, and (2) of
 declarator at the instance of the next heir that the institute had no right to the
 lands except under a strict entail, and for reduction of the deed of entail, *held*
 the deed, being invalid as an entail, the trustees had not executed the trust
 deed, and that the institute, as a beneficiary under the trust-deed, was not
 bound to avail himself of the mistake to the prejudice of the subsequent heirs.

THE following narrative of the facts in this case, which was an action
 of declarator at the instance of Sir Charles Ochterlony, Bart., against him-
 self and the subsequent heirs of entail in the lands of Ochterlony, is taken
 from the Lord Ordinary's note of 24th October 1876 :—

2D DIVISION.
 Lord Ruther-
 furd Clark.
 R.

By a trust-deed of settlement and commission, dated 10th March 1824,
 David Ochterlony (then residing in India) directed his trustees and

No. 90. commissioners to purchase lands in Scotland, and to settle them on himself and a series of heirs under a deed of strict entail.

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Ochterlony v.
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"Sir David died before the execution of the trust, and the trustees having purchased the lands, disposed them under what was intended to be a settlement of strict entail in favour of the pursuer and the heirs of his body, and the series of heirs therein mentioned. The deed of entail was executed in March and April 1840, and infeftment in favour of the pursuer followed thereon in November 1840.

"The pursuer has discovered that the word 'irredeemably' occurring in the prohibitory clause is written on an erasure or is vitiated. He has accordingly raised this action against his son and the other heirs-substitute of entail, in order to have it found and declared that the entail is defective, and that, by virtue of the 43d section* of the Entail Act of 1848, he is entitled to possess the lands in absolute property.

"The Lord Ordinary is satisfied that the word 'irredeemably' is vitiated and that it cannot be read as part of the deed. He accordingly pronounced an interlocutor to that effect dated 13th June 1876."

This interlocutor was as follows:—"The Lord Ordinary having been counsel for the parties, Finds that the word 'irredeemably' occurring on the 28th page of the deed of entail and in the prohibitory clause, is vitiated and erased, and cannot be read as part of the deed; and in respect that the defender stated that he intends raising certain proceedings against the pursuer, sists *in hoc statu*."

Thereafter, on 21st June 1876, Mr D. F. Ochterlony raised an action of declarator against his father, Sir Charles Ochterlony, for declarator that Sir Charles had no right to the lands contained in the entail except under the conditions of a strict entail and the other conditions contained in Sir David Ochterlony's trust-deed, and that any deed conveying these lands to Sir Charles which might be found invalid as a strict entail was *in vires* of Sir David's trustees, and should be reduced.

A record having been made up in this action, parties were heard in both cases, and on 24th October 1876 the Lord Ordinary assailed[†] it

* 11 and 12 Vict. cap. 36, sec. 43:—"And be it enacted, that where any tailzie shall not be valid and effectual, in terms of the said recited Act of the Scottish Parliament passed in the year 1685, in regard to the prohibitions and alienation and contraction of debt and alteration of the order of succession, consequence of defects either of the original deed of entail or of the intervention following thereon, but shall be invalid and ineffectual as regards any one of the prohibitions, then and in that case such tailzie shall be deemed and taken to be, and after the passing of this Act, to be invalid and ineffectual as regards all the prohibitions, and the estate shall be subject to the deeds and debts of the person then in possession, and of his successors as they shall thereafter in order to be under such tailzie, and no action of forfeiture shall be competent at the instance of any heir-substitute in such tailzie against the heir in possession under the same, by reason of any contravention of all or any of the prohibitions."

† "NOTE.—(After the narrative given above)—The action is deferred against Mr David F. Ochterlony as the next heir-substitute of entail. He has also raised an action of declarator and reduction against the pursuer, to have it found that the pursuer is not entitled to possess the lands except in conformity with the trust-deed, and to set aside the deed of entail which was executed by Sir David Ochterlony's trustees.

"The Lord Ordinary entertains no doubt that if the pursuer is entitled to possess the lands under the deed of entail of 1840, he is, by virtue of the 43d section of the Entail Amendment Act, entitled to hold them in absolute property. For if the entail is defective in so material a part as the prohibitions against irredeemable sales, it is by the Act ineffectual in all respects.

"But the defender maintains that the pursuer is not entitled to possess

fenders from the conclusions in the original action at the instance of No. 90.
Charles Ochterlony.

Of the same date the Lord Ordinary pronounced decree of declarator Feb. 24, 1877.
reduction as concluded for in the action at the instance of Mr D. F. Ochterlony v.
Ochterlony
and Others.

Sir Charles reclaimed against both interlocutors, and argued ;—If Sir David Ochterlony had himself executed the deed of entail which had been found to be vitiated there could be no doubt that Sir Charles would be entitled, under the provisions of the 43d section of the Rutherford Act,¹ to hold the lands in fee-simple. That being so, and the deed having been executed by persons acting as commissioners for Sir David, upon the principle of the maxim *qui facit per alium facit per se*, the deed was in the same position as if Sir David had executed it himself.² The case could not be argued on the question of intention, as no one ever intended to make a bad entail. In any view, the fault here was one of defect, and not of excess, so the deed could scarcely be called *ultra vires* of the trustees. The case here was exactly that contemplated in the 43d section of the Act—an original entail, valid in two of the prohibitions, but invalid in the third. It was the policy of the Rutherford Act to destroy entails; and if the fact of interposing trustees protected a faulty entail, the object

of the Act would be defeated, and that it must be set aside as disconform to the directions of the trust-settlement of Sir D. Ochterlony.

The pursuer does not dispute that by the trust-deed the trustees were directed to dispose of the lands under a settlement of strict entail. But he maintains that the deed of entail was delivered and received in good faith, and as the error was one which might have escaped notice without any imputation of negligence, the trustees have executed their office, and that his rights must be determined with reference to the deed of entail, as the only legitimate title under which the lands can be held. He urged that if Sir David had himself made the entail, the right of the heir in possession must be determined by the deed of entail as made it, and that the same rule must apply to a deed executed by trustees, who are the mere mandataries of the truster.

The Lord Ordinary is unable to sustain this argument. It is not disputed that the trustees had no power to execute any other deed than one of strict entail.

The pursuer, as beneficiary under the deed, is not entitled to avail himself of his mistake to the prejudice of the other beneficiaries, and as the Court could not have executed the trust, they can, it is thought, correct any error which has been committed by the trustees.

The analogy which the pursuer attempts to draw between the present case and that of a deed executed by the proprietor himself is fallacious. If the latter is not properly framed, the Court cannot reform it. The rights of the persons who take benefit by it must be determined by its condition as it left the hands of the maker. But where the trustees have a duty to perform the Court is bound to see that they duly perform it, and to set aside any deed which is inconsistent with the instructions under which they act.

The pursuer further maintains, that by reason of the long period for which he has possessed the lands under the existing title, his right to possess under that title cannot now be questioned. If prescription had run, the argument of the pursuer would have been sound. But the Lord Ordinary is of opinion that the length of time short of the prescriptive period will exclude the right of the beneficiaries to have the estate settled in conformity with the instructions contained in the trust-deed.

The Lord Ordinary has therefore absolved the defenders, and has given judgment in favour of Mr Ochterlony in the action at his instance."

11 and 12 Vict. cap 36, sec. 43.

Union Bank v. Makin, March 7, 1873, 11 Macph. 499, 45 Scot. Jur.

No. 90. of this clause would be defeated. Sir Charles was under no obligation to put himself under a strict entail. He was a gratuitous taker.¹

Feb. 24, 1877. Argued for Mr D. F. Ochterlony;—The trustees had a plain duty laid upon them, and having failed to execute it successfully they were bound now to do so. As the Court could itself have executed this duty, it was bound to correct any error made by the trustees in carrying out the trust.

Ochterlony v. Ochterlony and Others.

At advising,—

LORD ORMDALE.—By the trust-deed of the late Sir David Ochterlony directed and appointed, authorised and empowered, a deed of strict entail to be executed, recorded, and feudalised by his trustees and his commissioners, as to be “effectual in terms of law.” But it having been now found and determined by final interlocutor that the entail which was executed is not a strict one, or effectual in terms of law, the question is whether, notwithstanding, it forms a good right and title in the reclamer to the lands and estates referred to, free from the fetters of a strict entail. He maintains that it does, in respect that the trustees, although the entail which they executed cannot be said to be valid and effectual, as they were directed to make it, having acted in *bona fide* and in ignorance of the erasure in the word “irredeemably,” or of any other flaw in the deed, the deed must be held to form a good and sufficient fee-simple title, in terms of the 43d section of the Entail Amendment Act, 11 and 12 Vict. cap. 36, and independently of that Act.

I have come to be satisfied that this contention on the part of the reclamer cannot be sustained.

The *bona fides* of the late Sir David Ochterlony's trustees can be of no avail, if they exceeded or violated, as they undoubtedly did, the powers and directions under which alone they were entitled to act. I am not aware of any law or authority to the contrary, and assuredly the case of the Union Bank of Scotland v. Makin and Sons, cited at the debate for the pursuer, is not so. In that case the question was, whether the power with which Makin and Sons invested their mandatary, Dempster, was so ample and comprehensive as to entitle the bank, as a *bona fide* third party, to rely on it. Accordingly, the Lord President, in concluding his remarks when giving judgment, observed: “The question was ‘whether Dempster, the mandatary, did not deal with the bank in that department of business in which he was specially authorised to deal.’ I am clearly of opinion he did.” And Lord Ardmillan, the only other Judge who appears to have expressed an opinion, said, “We have no case here of implied authority. We have very clear and ample authority expressly conferred. That authority, given by the defenders to their manager, their general agent and representative in Scotland, the bank were entitled to rely.” But in the present case Sir David Ochterlony gave no general powers to his trustees and commissioners. On the contrary, the powers and directions he gave were plain and explicit as to render it impossible to mistake or misunderstand them.

Independently, however, of the question of *bona fides* on the part either of Sir David Ochterlony's trustees or of Sir Charles Ochterlony, it was argued for the pursuer—and this was the plea chiefly relied on by him—that the 43d section of the Entail Amendment Act applies, and enacts that where an entail

¹ Baillie v. Cochrane, March 9, 1855, 17 D. 659, 27 Scot. Jur. 279, March 1857, 19 D. (H. L.) 14, 29 Scot. Jur. 336, 2 Macq. 552.

valid under the Act of 1685 in any of its essential prohibitions, it is to be held invalid in all respects, and the estate shall be subject to the acts of the person in possession at the time as if it belonged to him in fee-simple. But ^{Feb. 24, 1877.} ^{Ochterlony v. Ochterlony and Others.} argument proceeds, I think, upon an entire fallacy. The Entail Amendment Act, in the section referred to, has no relation to a deed of entail like that in question, which is absolutely, and was from the beginning, null and inept, as if it had never existed; for I take it that such is truly its nature, seeing that it was executed not only without authority, but in violation of the powers and directions under and in terms of which alone it could have or ever ought to have been executed. And it is made all the clearer that such an unauthorised deed cannot be upheld as good to any effect, when it is considered that there is no reason, as remarked by the Lord Ordinary, why another unobjectionable one should not now be executed, and the purposes of the trust be thus carried into effect. It is not suggested that the existing deed has been, by prescription or otherwise, so fortified as to render it impossible now to put matters right. I am, therefore, of opinion that the Lord Ordinary's interlocutors reclaimed must ought to be adhered to. What steps will require to be taken in order to put matters right is a question which has not been brought under our consideration by either of the parties, and therefore I offer no opinion regarding it.

ORD GIFFORD.—I concur. Sir David Ochterlony directed his trustees to execute in favour of the heirs mentioned a deed containing all the clauses recited and usually inserted in the strictest entails. The duty of the trustees was therefore to make a strict entail. They purchased lands as directed by the charter, and executed a disposition of these lands which professed to be a strict entail, and under which the pursuer on his charter has possessed for many years, not for the prescriptive period. It now appears that this disposition was an essential part written on an erasure. This was a failure of duty on the part of the trustees, in whose *hereditas jacens* the estate still is; and I think the pursuer of one of the substitute heirs is now entitled, as he would have been entitled immediately on the execution of the defective deed, to call for the execution of a new deed of strict entail, in terms of the trust-directions. No doubt possession might have fortified the title. It is quite clear that the Entail Amendment Act does not apply to invalid deeds. I had some doubts as to the manner in which the correction of the faulty title should take place, but I agree with the Lord Ordinary that the existing deed must be reduced.

ORD JUSTICE-CLERK.—I concur in thinking that the case is a very clear one. The entail is manifestly defective, and so not what the trustees were directed to execute, and the Rutherford Act, in sec. 43, does not apply to cases of breach or non-execution of trust. There may be ulterior questions as to how far the rights of the heir in possession are to be cut down, but I agree that the faulty title must be reduced.

THE COURT adhered to the interlocutors in both actions.

MACKENZIE, INNES, & LOGAN, W.S.—DALGLEISH & BELL, W.S.—Agents.

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Feb. 24, 1877,
Belch v. Commissioners of
Inland
Revenue.

JOHN BELCH, Appellant.—*R. V. Campbell.*
COMMISSIONERS OF INLAND REVENUE, Respondents.—
Sol.-Gen. Macdonald—Rutherford.

Revenue—Stamp Act, 1870 (33 and 34 Vict. cap. 97), sec. 19—Conveyance—Sale—Discharge of ground-annual.—B entered into a contract of ground-annual with C whereby it was provided that he was to pay the amount of the ground-annual for twenty years, but might after that redeem it on payment of twenty-two years and a half's purchase of the ground-annual. After the expiry of the twenty years he paid the twenty-two and a half years' purchase-money and obtained a discharge. *Held* that the discharge fell to be stamped as a discharge of a security and not as a "conveyance on sale."

2D DIVISION.
R.

A CASE stated by the Commissioners of Inland Revenue, under the Stamp Act, 1870 (33 and 34 Vict. cap. 97), sec. 19, set forth the following facts:—In 1856 John Belch entered into an original contract of ground-annual with Duncan Cameron, manufacturer, Glasgow, with respect to certain subjects in Main Street, Anderston, Glasgow. The ground-annual or ground-rent payable by Belch under the contract was £480 and it was made a real burden on the subjects. This contract contained the following clause:—"And it is further hereby expressly provided and declared that the said John Belch and his foresaids shall at any term of Martinmas or Whitsunday occurring after said term of Whitsunday 1876, be not sooner, be entitled to redeem from the said first party or his foresaids the said ground-annual, or any of the allocated portion thereof (provided the subjects burdened with the remainder shall be of the full yearly value to the extent aforesaid), upon giving six months' previous notice in writing, and making payment of twenty-two years and six months' purchase of the said ground-annual, or of the part thereof to be so redeemed: and on payment being made of such redemption-money in the terms fore-said and all arrears, the said Duncan Cameron binds himself and his foresaids to grant and deliver, at the expense of the party redeeming, all discharges or deeds necessary for disburdening the foresaid lands, or the portion thereof liable for said ground-annual, or the allocated portion thereof."

This deed was stamped with a leading duty of £30, being the *valorem* duty on a ground-annual of £480, under the Stamp Act 17 and 18 Vict. cap. 83, in respect of its being a contract containing "the original constitution" of a ground-annual right, and two progressive duties amounting to £1.

At Whitsunday 1876 Belch, taking advantage of the provision in the clause of the contract above quoted, gave the requisite notice that he was prepared to pay up the stipulated sum of £10,800, being twenty-two and a-half years' purchase of the ground-annual, and the trustees of Cameron who was dead, proceeded to grant him a discharge thereof—the discharge now in question.

The case gave the following abstract of the contents of that deed:—

"The deed narrates that John Belch, in terms of the contract of ground-annual, dated 17th and 19th, and recorded in the books of Councils and Session the 23d April 1856, between Duncan Cameron and John Belch therein-mentioned, has right to redeem on the terms after-mentioned from the said trustees a ground-annual of £480 sterling, upliftable out of subjects in Main Street, Anderston, Glasgow.

"Therefore, and in consideration of the sum of £10,800 paid by the said John Belch, the said trustees discharge the said ground-annual upliftable out of the foresaid subjects, in terms of contract of ground-annual entered into between Duncan Cameron and John Belch.

Further, the trustees redeem and disburden of said ground-annual, No. 91.
 All and Whole the subjects therein described.
 Statement of titles by which said trustees acquired their right to said ground-annual—

Clause of warrandice from fact and deed.

Consent to registration for preservation.

Testing clause."

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Belch having desired to have the opinion of the commissioners as to stamp-duty with which the deed was chargeable, the commissioners were of opinion that the provisions inferred the payment of the duty of £54, viz the *ad valorem* duty for a conveyance on sale in respect of the sum £10,800, being the consideration paid by Belch to Cameron's trustees forth as the cause for granting it. The deed being stamped with the duty of £2, 14s., the commissioners assessed and charged the additional duty of £51, 6s. upon it, to make up in all the duty of £54.

Thereupon Belch paid to the cashier of stamp-duties at Edinburgh the sum of £51, 6s. as for the stamp-duties, and the discharge was thereupon stamped with stamps denoting the duty of £51, 6s. in addition to the duty of £2, 14s. with which it was previously impressed. Belch declared himself dissatisfied with the determination of the commissioners, in so far as it assessed the *ad valorem* duty for a conveyance on sale, on the ground that it was not payable in the circumstances, and that the deed was only liable for the duty of £2, 14s., being the duty under the head of mortgage, bond, and nature, &c., in schedule to the Act 33 and 34 Vict., cap. 97, chargeable in respect of—“(4) Reconveyance, release, discharge, surrender, tender, warrant to vacate, or renunciation of any such security as said, or of the benefit thereof, or of the money thereby secured, for £100, and also for any fractional part of £100 of the total amount due of the money at any time secured, 6d.” Or otherwise, that the deed was only liable to a duty of 10s., either under the head of “release” at schedule, “in any other case than upon a sale, or by way of conveyance,” or under the head of “deed of any kind whatsoever not dealt with in this schedule.”

Therefore required the commissioners to state specially and sign the opinion on which the question with respect to such stamp-duty arose, together with their determination thereon, which the commissioners stated accordingly.

The question for the opinion of the Court is whether the said instrument is liable to be assessed and charged with the said *ad valorem* conveyance on sale stamp-duty, in terms of the Act 33 and 34 Vict. cap. 97, or, if not, that other stamp-duty it is liable to be assessed and charged with? The provisions of the Stamp Acts were quoted in the case.*

These were as follows:—13 and 14 Vict. cap. 59, schedule, title “Conveyance,” 16 and 17 Vict. cap. 59, sec. 11, paragraph 2; 17 and 18 Vict. cap. 83, schedule, title “Conveyance,” 33 and 34 Vict. cap. 97, sec. 70,—“The term conveyance on sale” includes every instrument and every decree or order of court or of any commissioners, whereby any property upon the sale thereof is wholly or equitably transferred to or vested in the purchaser, or any other person on his behalf or by his direction;” also sec. 72, sub-sec. 2,—“Where the consideration or any part of the consideration for a conveyance on sale consists of any sum payable periodically in perpetuity, or for any indefinite period not terminated with life, such conveyance is to be charged, in respect of such consideration, with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the date of such instrument;” and sub-sec. 4,—“Provided that no conveyance on sale chargeable with *ad valorem* duty in respect of any periodical

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Argued for Belch;—The substance and result of this deed was not a sale. No property passed. It was the release of a security. The ground-annual was extinguished, that was all.¹

Argued for the commissioners;—It was settled in such cases that the true nature of the transaction must be looked to.² The trustees had a separate right of property which they could have sold in the market. What really was effected here was a new transaction.

At advising,—

LORD JUSTICE-CLERK.—(After stating the facts, and the clauses of the Statute Acts referred to)—The question raised here depends on whether, first, the transaction represented by the instrument proposed to be stamped is a conveyance on a sale of property, or, second, whether it is a discharge of a security by way of mortgage, or, third, whether it belongs to a class not specially enumerated.

I am of opinion that this instrument does not represent a conveyance on a sale of property. If, indeed, the grantee had possessed a perpetual and unconditional right of ground-annual, which he was entitled to retain or not as he pleased, a new bargain with the purchaser to redeem the burden would be in substance a conveyance on a sale, and the sum stated as the consideration would represent the price paid. But such is not the position or nature of the transaction represented by this instrument. The seller never had an unconditional right of ground-annual. He had only a right to his annual payment secured by an instrument as long as the purchaser elected to retain the stipulated price, being two years' purchase of the annual sum. But when the purchaser used his option and paid the price, the sum paid was the consideration for the original conveyance, and the payment of it and the discharge granted in respect of it were a new transaction, but only the completion of the original contract of sale. The discharge only becomes necessary, not for the purpose of conveying any substantial interest, but solely to clear the record.

But, in the second place, I am of opinion that this infestment on the ground-annual right was simply security for the interest on the contract price, being £480 on a principal sum of £10,800, or something short of £5 per cent. That was its real nature, and it only subsisted at the option of the purchaser until

payments, and containing also provision for securing such periodical payments is to be charged with any duty whatsoever in respect of such provision, and a separate instrument made in any such case for securing such periodical payments is to be charged with any higher duty than ten shillings."

In the schedule to that Act the following entries occur:—

"Reconveyance, release, or renunciation of any security—see Mortgage."

"Release or renunciation of any property, or of any right or interest in any property—Upon a sale—see Conveyance on Sale; by way of security—see Mortgage, &c.; in any other case, 10s."

"Conveyance or transfer on sale of any property (except such stock or venture stock or funded debt as aforesaid) where the amount or value of the consideration for the sale does not exceed £5, 6d. And so on."

¹ Millar v. Small, March 24, 1853, 15 D. (H. L.) 38, 25 Scot. Jur. 3 Macq. 345; Royal Bank v. Gardyne, May 13, 1853, 15 D. (H. L.) 45, 25 Scot. Jur. 399, 1 Macq. 358.

² Christie v. Commissioners of Inland Revenue, Nov. 21, 1866, L. R. 2 D. 45; The Limmer Asphalt Paving Co. v. Commissioners of Inland Revenue, April 17, 1872, L. R. 7 Exch. 211.

It was paid. I am therefore of opinion that the stamp first proposed by the No. 91.
and party is the correct one.

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AND ORMDALE.—The instrument or deed in question may in one sense be to be a receipt or discharge for £10,800, the sum on payment of which Belch was entitled to redeem the ground-annual; but the deed or instrument more than merely acknowledge the receipt of that payment. It also declares Mr Belch's property to be redeemed and disburdened of the ground-annual of the contract by which it was constituted. It also contains a clause of arrandice and the other clauses usual in a release or renunciation of such heritable right. The stamp applicable to a mere receipt or discharge for money received is therefore not that with which the deed or instrument in question is chargeable, and this was not maintained.

It was contended, however, on the part of the Crown, that it was of the nature of a reconveyance, release, or renunciation of a right of property, or right or interest in property "upon a sale," and the question really comes to be, is it so or

not? The ground-annual had not in its constitution contained, as it does, an express stipulation or provision to the effect that it was redeemable on payment of a fixed sum calculated at twenty-two and a half years' purchase, or, in other words, on a payment of £10,800 by Mr Belch, a great deal might have been said in support of the Crown's contention, for on that assumption Cameron's trustees, if they pleased, have refused to consent to any redemption, and, at any rate, they would have had it in their power to negotiate for payment of a larger sum for the consideration or price, so to speak, of their agreeing to the redemption and subsequent release or renunciation of the ground-annual. But, as the matter was, no such negotiation was necessary or indeed admissible. All Mr Belch had to do was to tender payment of the stipulated redemption money, and thereupon he was to receive the necessary discharge, or, to use the words of the Act, release or redemption. But such a transaction cannot well be said to be of the nature of a sale, which necessarily implies a seller on the one hand and a purchaser on the other, each being entitled to make the best bargain he could for himself. No bargain, however, for any such bargaining was left relative to the redemption of the ground-annual in question, for the consideration in respect of which its redemption could be enforced, and every other characteristic of a sale, were excluded, all that having been previously arranged and fixed in 1856 by the contract of ground-annual itself, on which an *ad valorem* stamp was then

paid. It is not, I think, to be said, however, that the Crown, therefore, my inability to see how the deed or instrument here in question can be held to be of the nature of a reconveyance, release, or renunciation of property, or of a right or interest on property "upon a sale." It is at least impossible, I think, to come to any such conclusion without giving a strained and unnatural construction to the language of the statute, contrary to the established rule that penal and revenue Acts are to be construed strictly, and not extended to cases to which they do not clearly and unequivocally apply. In accordance with this rule it was, in *Phillips v. Morrison*, in 1844 (13 L. J. 212), laid down by the Court of Exchequer in England that—"The party who brings an instrument within the Stamp Act must shew clearly that it is within it; he must, so to speak, hit the bird in the eye. We," said the Judges, "can make no intendment in favour of the liability."

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For these reasons, I am of opinion, in answer to the question submitted in the case, that the commissioners have erred, and that the deed or instrument referred to is not liable to be assessed and charged with an *ad valorem* "conveyance on sale duty," in terms of the Act 33 and 34 Vict. cap. 97, and that the stamp-duty it is chargeable with is that which it was stamped with prior to the opinion of the commissioners being taken, viz., £2, 14s., being the *ad valorem* duty payable on the discharge of a security.

LORD GIFFORD.—I am of the same opinion, and agree with the views expressed by your Lordship in the chair. It is now quite fixed on principle as well as by the cases to which we were referred—*Christie v. The Inland Revenue* and the *Ashphalt Paving Co.*, being, I think, the two leading cases—that in questions like the present we are not to criticise the exact words of the deed but rather to look to the substance and effect of it, to see what the real transaction between the parties was, and to assess the stamp-duty accordingly. Now, I do not think there can be any serious doubt what the real transaction between Mr Belch and the party from whom he purchased this feu was. It was this—In 1856 he bought this property for a price, but it was not convenient for him to pay that price down, and so the price was converted into an annual duty or ground-annual, or annualrent, of £480 per annum, redeemable, however, in manner provided for by Mr Belch when he chose to give notice, in terms of the deed, for twenty-two and a half years' purchase, or, in other words, for the sum of £10,800. That was the transaction, and the bargain about redeeming or paying off the ground-annual is, as your Lordship has said, an integral part of the original transaction. There was no new bargain—no new sale between the parties. It was all included in that deed which fixed the rights of parties in 1856. Now, I think when Mr Belch availed himself of the right to pay down the capital price instead of what was substantially just interest upon it he was not buying a new subject. He was paying the price which he agreed to pay in one of the forms in which he was allowed to do it, and there is an end of the question. At the moment you see it so simply stated as that, because there can be no doubt that if, instead of expressing the original bargain as it was actually expressed in what is called a contract of ground-annual, the price had simply been made a real burden on the property, bearing interest at $4\frac{1}{2}$ per cent, there could have been no doubt whatever that on payment of that price no new *ad valorem* duty would be exigible. But in substance and reality that is the true nature of it. This gentleman, in paying off or redeeming the ground-annual, is just paying the price of the subject which he bought in 1856; upon the conveyance in 1856 the stamp for the price was paid, no doubt calculated not at twenty-two and a half years' purchase, but in terms of the statute at twenty years' purchase. That does not make any difference. The statute fixes 5 per cent as the conveyance sum on which stamp-duty should be paid. Here the parties fixed on about 4 per cent so long as the price was not paid. Well, if it had been expressed in that way, that the price of £10,800—for they fixed it to a penny—shall nevertheless be a real burden on the property, and bear interest at $4\frac{1}{2}$ per cent, or bear interest of £480 per annum until paid, could it ever be maintained that when the price was paid that was a new sale, and that the conveyance required to be impressed with a new or *ad valorem* stamp-duty? I think it would be perfectly impossible to say so. Getting, therefore, at the real contention between the parties, I have not the least hesitation in saying that the only stamp exigible here is that of a

releasing a real burden which is now released in consequence of the payment of what was originally stipulated as the price of the subject. Now, that falls under the head of mortgage, bond, or debenture, and I think Mr Belch took the correct view when he stamped the instrument with a duty of £2, 14s., and that no more is exigible.

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Counsel for Belch having moved for an order for repayment of the duty paid in excess, in terms of sub-sec. 4 of sec. 19 of 33 and 34 Vict. cap. 97,

THIS interlocutor was pronounced:—"Find that the instrument referred to in the case is liable to be assessed and charged with a stamp-duty of £2, 14s., being the amount chargeable in respect of the discharge or renunciation of a security, and therefore order the sum of £51, 6s., being the excess of duty paid by the appellant, to be repaid to him by the said commissioners, together with the costs incurred by him in relation to the appeal: Remit," &c.

MAITLAND & LYON, W.S.—THE SOLICITOR OF INLAND REVENUE.—Agents.

JOHN DAWSON AND OTHERS (Trustees of Adam Dawson *secundus*),
First Parties.—*Lord-Adv. Watson—M'Laren.*

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JOHN RAMAGE DAWSON (Trustee of Frances Dawson), Second Party.—
Balfour—Murray.

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JOHN RAMAGE DAWSON (Trustee of William Dawson), Third Party.—
Lorimer.

Succession—Liferent and Fee—Alimentary Provision.—A father in his settlement conveyed an estate to his eldest son under the real burden of £6000, 500 of which was declared should "belong in liferent to each of my daughters, F and M, viz., £3000 betwixt them, and to their children in fee, the interest at four per cent being payable to them respectively as alimentary provisions, . . . the principal sum in each case to be divided among the children of each, if more than one, in such proportions as the said F and M may respectively direct," and failing such direction, equally. The deed, after excluding the rights of any husband F or M might marry from the sums above provided, continued, "nor shall the same be affectable by the debts or deeds of his husband, but the said F and M shall have power to uplift and dispose of the whole subjects and sums of money hereby conveyed to them respectively, for their maintenance, rent, annualrents, and profits of the same, . . . in any manner not inconsistent with the provisions of this deed without the consent of any such husband." *Held* that the deed conferred on the daughters rights of liferent.

IN 1836 Adam Dawson of Bonnytown, Linlithgowshire, died leaving a 1ST DIVISION.
position and settlement dated 23d September 1820. By this deed he conveyed the estate of Bonnytown to his eldest son William, under the following declaration:—"Declaring always, as it is hereby expressly declared, that the said lands and others are hereby disposed with and under express and real burden of the sum of £6000 sterling, which shall be paid and be payable in manner following, viz., . . . *Secundo*, £600 shall, under the conditions and restrictions aftermentioned, belong in liferent to each of my daughters, Frances and Margaret, viz., £3000 betwixt them and to their children in fee, the interest at four per cent being payable to them respectively as alimentary provisions, from the 1st of Whitsunday or Martinmas immediately preceding my death, the

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principal sum in each case to be divided among the children of each, more than one, in such proportions as the said Frances and Margaret Dawson may respectively direct by a writing under their hands; or in the event of their not executing such writing, the sum above provided to each shall be divided among their respective children equally, share and share alike: Providing always, as it is hereby expressly provided and declared that any husband whom the said Frances or Margaret Dawson may respectively marry shall in no event have any right, either of property, life interest, courtesy, or administration, or any other right or interest whatever, in and to the sums of money above provided to them respectively or in and to the lands and sums of money hereinafter provided to them or any part thereof, or the rents, annual rents, or profits of the same, in virtue of the *jus mariti* or otherwise, nor shall the same be affectable by the debts or deeds of such husband, but the said Frances and Margaret Dawson shall have power to uplift and dispose of the whole subjects and sums of money hereby conveyed to them respectively, and rent, annual rents, and profits of the same, in any manner not inconsistent with the provisions of this deed, without the consent of any such husband or husbands; and that every deed to be done by them or either of them, in relation to the premises, though without the consent of any husband or husbands either of them may have, shall be as valid and effectual as if they continued unmarried, or their husbands had consented thereto; as also that in case the said Frances or Margaret Dawson, or either of them, shall have occasion to lend out any sums to which they shall succeed in virtue of these presents, or to purchase therewith any lands, or other subjects whatever, the conveyances or securities to be taken by them, or either of them, shall contain an express exclusion of the *jus mariti* of either: That £250 to each of my sons, Adam and John Dawson: Fourth, £500, be the remainder of the said £6000, shall belong to my said sons, Adam and John, recommending to them to settle the interest thereof upon my son Patrick as an alimentary provision to him, if they can do so without touching the same, or any part thereof, available to his creditors, or if they shall see it possible to pay the principal of said sum to my son Patrick without going into the hands of his creditors, they are hereby authorized to demand payment thereof from my said son William five years after my decease, upon a notice of six months, or at any term of Whitsunday at the expiry of the said five years, upon a similar notice of six months, to pay the same to my son Patrick accordingly."

William Dawson, on the death of his father in 1836, entered upon possession of the estate of Bonnytown, and afterwards sold it to his brother Adam Dawson *secundus*.

Frances Dawson died unmarried in 1867 leaving a trust-disposition containing a general conveyance of all her estate. Her trustees, proceeding on the disposition and settlement of Adam Dawson *primus*, and on their own trust-deed, expedite a notarial instrument in their own favour of the real burden of £1500, and took infeftment.

William Dawson died in 1872 leaving a trust-disposition and settlement containing a conveyance of his whole estate to trustees.

Adam Dawson *secundus* died in 1873 leaving a trust-disposition and settlement, by which he conveyed the estate of Bonnytown to trustees.

This special case was brought to try the questions whether the fund provided to Frances and her children was carried by her settlement upon Adam Dawson *secundus* as proprietor of the estate, or whether it had been disburdened by the lapse of the legacy, or whether it had been carried in William Dawson, the original donee of the estate.

The first parties to the case were John Dawson and others, trustees

am Dawson *secundus*, and the third party was John Ramage Dawson, sole surviving and accepting trustee of William Dawson under his trust-disposition and settlement. The second party was John Ramage Dawson, sole surviving trustee under the trust-disposition of Frances Dawson. No. 92.
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The following were the questions of law :—“ 1. Whether, under the said position and settlement and codicil of the said Adam Dawson *primus*, fee or capital of the £1500 thereby provided for the said Frances Dawson vested in her, and was transmitted to the party hereto of the second part by her trust-disposition and settlement above mentioned? In the event of the preceding question being answered in the negative, whether is the said principal sum of £1500, so provided for the said Frances Dawson, with interest since her death, the property of the parties to of the first part, or of the party hereto of the third part?”

The Court refused to consider the second question, on the ground that residuary legatees of Adam Dawson *primus* were not parties to the trial case.

The first parties and the third party argued ;—Nothing was given by deed of Adam *primus* but a bare liferent to Frances. There were two cases where the liferenter was fiar—(1) Where he had a power spousal ; and (2) where the fiars were not in existence. An alimentary was unknown. The case of Douglas v. Sharp was an authority that an alimentary “ had the same effect as “ allenarly.” There was no trust created, but the intention of the testator was apparent, because (1) there was a declaration of the mode of division among children, indicating two equal interests in the parents and children ; (2) the annual income of the fund was given to the daughters ; (3) there was a power of appointment on the part of the daughters. The power to uplift, and the position of the husband’s interest, had reference only to the fiduciary fee.¹ The second party, the trustee of Frances Dawson, argued ;—The daughter had large powers of investment. When the granter intended only to provide alimentary provisions he knew how to do so, as was shewn by other provisions in the deed. The clause here was in similar terms to the clause in the case of Frog’s Creditors. The word “ alimentary ” was not taxative.² It was only advising,—

THE PRESIDENT.—(After reading the clauses of the settlement)—The question is whether the provision in favour of Margaret and Frances is of the nature of a liferent interest merely or a fee, and it appears to me that the words used under the second head of the settlement are sufficient for the determination of that question.

The liferent of each of the daughters is to be alimentary, and it is carefully provided that the provision is not only to be protected against the *jus mariti* of the husband, but also against the diligence of creditors. It occurs to me that such an alimentary provision would be a very futile

¹ Bell’s Com. (M’Laren’s ed.) 55 ; Seton v. Seton’s Crs., March 6, 1793, M. Ramsay v. Beveridge, March 3, 1854, 16 D. 764, 26 Scot. Jur. 329 ; Mein v. Hume, June 8, 1827, 5 S. 779, N. E. 727, Feb. 23, 1830, 4 W. and S. 22. ² Ogilvie’s Crs., Nov. 25, 1735, M. 4262 ; Cumstie v. Cumstie’s Trs., June 30, 1779, ante, vol. iii. p. 921 ; Porterfield v. Graham, June 23, 1779, M. 4277, 1 Bell’s 5th ed. 57, M. Bell’s Conveyancing, 782 ; Kennedy v. Allan, Feb. 19, 1812, Shaw, 554, N. E. 383 ; Douglas v. Sharp, March 9, 1811, Hume, 173 ; v. M’Kilston, June 14, 1781, M. 4402 ; Mackintosh v. Mackintosh, Feb. 1, 1812, F. C. ; Ferguson’s Trs. v. Hamilton, July 13, 1860, 22 D. 1442, 1 Scot. Jur. 654 ; Hutton’s Trs. v. Hutton, Feb. 11, 1847, 9 D. 639, 19 Scot. Jur. 4 ; Maule, June 14, 1876, ante, vol. iii. p. 831.

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and inexpedient way of settling a fund of this kind if a declaration that it was to be alimentary and not subject to the diligence of creditors were to be followed by a vesting of the fee, which would of course operate so as to open the fund to the diligence of creditors. Yet that is what is contended for here by the representative of Frances Dawson. The result of the fee vesting in Frances Dawson would be that she could have done what she liked with it. What could it be the good of the protection against the *jus mariti* and diligence of creditors? If the fund vested in Frances Dawson it could be attached by the diligence of creditors, and the alimentary provision would perish with the fee which produced it. There is an absolute inconsistency in declaring the life interest to be alimentary and at the same time so framing the deed that the fee of the fund should vest in the beneficiary.

If, however, any other light were necessary it is to be found in the scope of the other clauses of the deed. It is not necessary to go into them all of them which bear on this point leave no doubt in my mind that there was no intention that the fee should vest in the daughters, and there is nothing in the terms of the deed to prevent us arriving at that conclusion. The daughters are certainly to have powers as to the reinvestment of the money, but those powers are all introduced for the purpose of excluding the rights of husband. I am therefore prepared to answer the question in the negative, and to hold that the £1500 was not carried by the trust-disposition of Frances Dawson.

LORD DEAR.—The first question is of a very special kind depending on the words of the deed. And the decision which we are to pronounce, that can never apply to another deed unless the words are similar. One consideration is that the provision is alimentary, and that depends not only on the clause containing the provision but on the construction of the deed taken together. I have no doubt that the opinion given by your Lordship on that is right, and I concur in the views expressed.

LORD MURE.—The question here raised depends upon the meaning of the second clause of the directions in the settlement, by which a right is given to the daughters; and I think that there is sufficient in that clause to limit the right to a life interest. The phraseology used, viz., that the provisions were "alimentary provisions," and that the principal sum in each case was to be divided among the children of each, makes this just as clear, in my opinion, as if the word "allienary" or "only" had been used. It was, I think, substantially so decided in the case of Douglas, 9th March 1811, Hume's Decisions, p. 100, and this was assumed to be settled law by Lord Wood, than whom there can be no better authority on such a question, in the case of Ramsay v. Ramsay, in which his Lordship said,—“There is no decision to support the proposition that it is solely by the taxative words ‘allienary’ or ‘only,’ or for the use of alimentary, or some equivalent words inserted in the dispositive part of the deed, or by the regular appointment of trustees and the formal constitution of a trust, that the case can be taken out of the principle fixed in that of Douglas. The words “for life interest use alimentary” are thus expressly laid down, and apparently with the concurrence of the majority of the Court, as of equal weight with the words “allienary” or “only,” to take a case out of the rule laid down in the case of Frog's Creditors, M. 4262, and the provisions we are here to construe appear to be fully as strong in this respect as the words “for life interest use alimentary.”

The provision in a subsequent part of this clause giving power to the daughter to uplift and invest the funds may be calculated at first sight to raise some difficulty. But then this power is qualified by the words "in any manner not consistent with the provisions of this deed," and cannot therefore, I think, be held to do away with the effect of the leading provision by which the right is restricted to a liferent.

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THE COURT, on 10th November 1876, pronounced this interlocutor : — "Find and declare, in answer to the first question, that the fee or capital of the £1500 provided by the disposition and settlement of Adam Dawson *primus* in favour of his daughter Frances Dawson did not vest in the said Frances Dawson, and was not transmitted by her settlement to the party of the second part, and decern : And in respect the residuary disponees of the said Adam Dawson are not parties to this special case refuse to make any answer to the second question."

WOTHERSPOON & MACK, S.S.C.—TODD, MURRAY, & JAMIESON, W.S.—
DUNCAN & BLACK, W.S.—Agents.

THOMAS WATT, Pursuer.—*Fraser—Rhind*.
M'PHERSON AND ANOTHER (John M'Pherson's Trustees), Defenders,
—*M'Laren—Mitchell*.
AND
M'PHERSON AND ANOTHER (John M'Pherson's Trustees), Pursuers.
—*M'Laren—Mitchell*.
THOMAS WATT AND JOHN WATT JUNIOR, Defenders.—*Fraser—Rhind*.

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Agent and Client—Sale—Purchase by Agent—Reduction.—W, a law-agent, agent for his brother, Dr W, four dwelling-houses from two ladies, the Misses M as trustees of their late father. The missives of sale were signed for the trustees by H M, their brother. In answer to an action for implement brought by W, the trustees brought an action of reduction of the missives, on the ground W, though acting for the purchaser, was also the trustees' agent in and for sale, and that while ostensibly buying for Dr W he was in reality, unknown to them, buying in fact for himself.

The proof established that about four years previous to the sale the agency of the trust had been removed from the original agent for the trust; that a new agent had been regularly appointed; but that W had transacted with the trustees some incidental matters connected with the trust; that H M, who was a manufacturer, managed the ordinary affairs of the trust for the trustees in the way of collecting rents and interests, &c.; that W was the agent of the Misses M as individuals, and of H M and also of some of the beneficiaries under the trust; that, prior to the sale, in the course of a conversation between W and H M in regard to matters not connected with the trust, W told H M that he thought he could find a purchaser for the houses; that shortly after he offered to purchase for his brother Dr W; that thereupon a price was fixed between W and H M, and an offer was written by W, "as authorised by his brother Dr W," which, after being submitted to the Misses M as accepted by H M as "authorised" by them; that before the offer was made, W had arranged with his brother Dr W without the knowledge of either of the Misses M that he was to take over from him two of the houses on payment of one-half of the price; and that W resold his two houses within a few days at an enhanced price.

It is, in the circumstances (*rev. judgment of Lord Curriehill, diss. Lord James*), that the Misses M had failed to prove either (1) that W occupied the position of general law-agent for the trust, or (2) that he was specially consti-

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tuted the agent of the trustees for the sale of the particular property in question, and that, on the contrary, their brother H M must be held to have acted as the sole agent in the sale.

An action was raised at the instance of Dr Thomas Watt of Darlington against Misses Ann and Jessie M'Pherson, as trustees of the late John M'Pherson, manufacturer, Aberdeen, for declarator and implement of a contract of sale of four houses Nos. 3, 4, 5, and 6 Ann Place, Aberdeen, entered into by the pursuer as purchaser through his brother, John Watt junior, advocate, Aberdeen, and the defenders as sellers, through their brother, Hugh James M'Pherson, comb manufacturer, Aberdeen.

The missives constituting the alleged contract of sale were—(1) a letter written and addressed by John Watt junior, upon the 9th November 1875, to Hugh James M'Pherson, in the following terms:—"Aberdeen, 9th November 1875.—Dear Sir,—I am authorised by my brother Dr Watt, Darlington, to offer the trustees of your late father the sum of £1900 for the four half houses at Ann Place belonging to them, on the understanding that he shall bear the whole expense of transfers. The entry to the purchaser to be at Whitsunday next, when the price will be paid to the sellers, who will receive the Whitsunday rents, the rents falling due at Martinmas 1876 being payable to the purchaser. I shall feel obliged by your submitting the offer to the trustees, and letting me hear from you if it be accepted,—Yours truly," &c.; (2) another letter of the same date by John Watt junior to H. J. M'Pherson, in the following terms:—"Aberdeen, 9th November 1875.—Dear Sir,—The offer for the houses at Ann Place is made on the understanding that the feu-duty of the whole is £20 sterling per annum, and that the subjects are liable to duplicate in feu-duty every nineteen years, the first duplicand being payable in 1877,—Yours truly, &c. P.S.—I shall send to Mr Edmond for a look of the charter;" and (3) a letter by the said Hugh J. M'Pherson to John Watt junior, also dated 9th November 1875, in the following terms, viz.:—"Dear Sir,—I am in receipt of your two letters of this date and having duly submitted the offers for the 4 (four half) houses at Ann Place to my sisters, surviving trustees of my late father, they have authorised me to accept of the same on the conditions named—viz, £1900 cash, the purchaser paying all expenses connected with the transfer, yearly duty of £20, with a duplicand every nineteen years, first duplicand 1877. Purchase-money payable and entry given at Whitsunday next, 4th June, for entry, the rents up to then being payable to the sellers," &c.

The trustees refused to implement the contract of sale, and resisted the action, on the ground that "the purchase of the said four houses at Ann Place, Aberdeen, by Mr John Watt junior, although made ostensibly for and on behalf of his brother, the pursuer, was really made for his own account (or, at least, was made to the extent of two of the said houses, Nos. 3 and 4 Ann Place, for his own account), the name of the pursuer being used to conceal from the defenders the fact that they were dealing with the law-agent and adviser. The defenders, if they had known that Mr John Watt junior was purchasing for his own account, would not have sold the property to him, or at least would not have sold to him without the intervention of a neutral solicitor. The price stipulated was not a fair price."

The defenders farther stated;—(Stat. 2) "Until the year 1871 the late James Edmond, advocate in Aberdeen, acted as the agent of the defenders. Since that year they, as trustees foresaid, have been in use to employ Mr John Watt junior, advocate in Aberdeen, as their legal adviser and agent."

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connection with the management of the affairs of the trust-estate. No general meeting of the trustees has been held since 1871, but, acting as agent, Mr John Watt junior has negotiated for them the investment of the funds of the trust, and in all such transactions they have been guided by his advice. Mr Watt has also acted as their agent and adviser in their own private and personal business matters. Mr Watt was also the law-agent of the trustees and also the law-agent of the trustees acting under the deed of settlement of the deceased Mrs Ann Thomson or M'Pherson, widow of the said John M'Pherson, and one of the trustees, and the law-agent of the trustees under the marriage-contract trust of Mrs Jane Black or Black, a daughter of the said John M'Pherson, both of whose trust-estates have an interest in the said property in Ann Place. Communications on all such business matters between the defenders and Mr Watt have frequently passed through the defender's brother, Mr Hugh James M'Pherson, for whom Mr Watt also acted as law-agent and adviser." (Stat. 3) "In the course of the year 1875 Mr John Watt mentioned to Mr Hugh James M'Pherson that he had money bearing to a client on hand for investment in house property, and had difficulty in finding suitable subjects to purchase. In reply, Mr Hugh James M'Pherson mentioned that the Ann Place houses would have to be sold in 1877, and said that he had been thinking of recommending that they should be advertised for sale. Mr Watt asked that advertisement should be delayed till he ascertained whether any of his clients would take them. In consequence of this, and acting upon the advice of Mr John Watt junior, and being guided by his calculations as to the price and other circumstances of the transaction, the defenders were induced to decide to sell the houses, and to do so at the price of £1900. Thereupon the letters bearing date September 9, 1875 (quoted *supra*, p. 602), passed between the said John Watt junior, and the said Mr Hugh James M'Pherson as representing the defenders. In this transaction Mr M'Pherson and the defenders understood that Mr John Watt junior was acting as agent for the sellers as well as the purchaser, as he was in fact acting.

The pursuer denied that his brother was agent for the trustees, but in answer to art. 2 "admitted that the late James Edmond, advocate, acted as agent of the defenders, and that Mr John Watt junior has occasionally acted for them in their individual capacity. Admitted that he was the law-agent of the trustees acting under Mrs M'Pherson's deed of settlement, and was law-agent in her trust. Admitted that she was John M'Pherson's widow.

Admitted that the said John Watt junior is one of the trustees under Mrs Black's marriage-contract, and is law-agent in the marriage-contract trust. Admitted that Mrs Black is a daughter of the said John Watt senior."

It was admitted that on 30th November 1875 John Watt junior received two houses purchased by him at the price of £1125, being a sum of these two of £175.

The defenders pleaded;—(1) The pursuer not being the true purchaser, his name having been used in the letters constituting the alleged contract of sale merely for the purpose of concealing the fact that the defender was the law-agent and adviser, Mr John Watt junior, advocate, Aberdeen, the purchaser, in whole or in part, and at an inadequate price, of the property thereby proposed to be sold, the pursuer is not entitled to require the defenders to implement the said alleged contract of sale, and the defenders are entitled to absolver. (2) The pursuer not being the purchaser, and his name having been used in the letters constituting the alleged contract of sale merely for the purpose of concealing the fact that the defenders' said law-agent and adviser was the purchaser of two

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of the four houses, being houses Nos. 3 and 4 Ann Place, Aberdeen thereby proposed to be sold, and that at an inadequate price, the pursuer is not entitled to require the defenders to implement the said alleged contract of sale, in so far as relates to the said two houses, and in respect thereto the defenders are entitled to absolvitor. (3) The said John Watt junior being the law-agent and adviser of the defenders, and being a trustee under the trust-deed of settlement of the deceased Mrs. Thomson or M'Pherson, and a trustee under the marriage-contract of Mrs Jane M'Pherson or Black, and as such interested in the trust of the said John M'Pherson, was under a personal disqualification, enabling him from purchasing the trust-estate of which the defenders are the trustees, or at least he could not legally purchase from the defenders while the defenders were ignorant that he was interested in the contract, and while the relation of agent and client subsisted between the pursuer and the sellers. (4) In the circumstances, and even assuming that the pursuer was interested as purchaser of two of the four houses, the defenders are entitled to be relieved of the contract in its entirety, in respect of concealment and constructive trust.

A reduction of the missive of sale at the instance of the defenders against Dr Watt and John Watt junior was held as repeated, and a before answer was allowed, the trustees to lead in the proof.

The import of the proof was thus stated by the Lord Ordinary:—

"1. The late John M'Pherson, combmaker in Aberdeen, died in 1841, survived by his widow and a family of seven children by her, as well as by a family of several children by a former marriage. He left a trust-deed, under which the defenders Ann and Jessie M'Pherson, two daughters by the first marriage, are the sole surviving trustees.

"4. During the lifetime of John M'Pherson, his law-agent was Mr James Edmond, advocate, Aberdeen, who, and his subsequent firm Messrs Edmond and A. Edmond, continued to be the law-agents of the trustees until 1871, in which year the trustees closed their accounts with Messrs Edmond, and received up the trust papers. John Watt junior appears at the time, and until the present questions arose, to have been the law-agent and adviser of several members of the family of John M'Pherson, and particularly of his daughter, Mrs Black, and of his son, H. J. M'Pherson, Jessie M'Pherson and Ann M'Pherson, the defenders.

"5. After 1871 comparatively little law-agency was required in connection with the trust. H. J. M'Pherson, who had, along with his father, Ann and Jessie M'Pherson (the trustees), succeeded his father in business as combmaker, seems to have managed the trust-property, letting the houses, levying the rents, and drawing the interest of the trust. When the services of a law-agent, however, were required, John Watt junior was the person employed, and, in particular, about the year 1872, some railway stock to the amount of between £2000 and £3000, having been sold, the said John Watt junior, on the employment of the trustees, invested the proceeds in bonds heritably secured over the property of other two clients of his own, named respectively 'Shearman & M'Gregor.' The instructions to procure the investment were given by H. J. M'Pherson to John Watt junior, who, although acting as agent for the borrowers in the transaction, yet acted equally as agent for the trustees of M'Pherson's trustees.

"6. In the year 1874 John Watt junior became tenant of one of the four houses in Ann Place (No. 4), which he has continued to occupy ever since, at all events until Whitsunday last, 1876.

"7. Under the settlement of John M'Pherson the whole of his

erty was directed to be sold at or prior to Whitsunday 1877. The
 er part was sold in and before 1871, and by a family agreement made
 at year it was arranged that the unsold houses in Ann Place should
 eld by the trustees for behoof of the truster's second family, two of
 n are H. J. M'Pherson and his sister Mrs Black.

In the end of October 1875 H. J. M'Pherson had a meeting with
 Watt junior as his law-agent in reference to the investment of
 belonging to the trustees under his own marriage-contract, in the
 e of which Watt stated that good investments were not easily got as
 property was rising in value, whereupon H. J. M'Pherson said that
 as thinking of advertising the Ann Place trust property for sale.
 r the accounts of the interview given by Watt and by M'Pherson do
 materially differ; but they do materially differ in other respects.

Watt junior says * that not only at this meeting, but long before its
 M'Pherson had urged him (Watt) to buy the houses, as he was now
 t of one of them, and that he declined to do so, whereupon M'Pherson
 sked him if he knew any one likely to buy to tell them about the
 s. This story of Watt is not, in my opinion, a very probable one;
 having seen and heard both of the witnesses, I am inclined to adopt
 sion of the transaction given by M'Pherson,† who says that Watt

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the following is the evidence of John Watt junior :—" I first communicated
 brother, Dr Watt, the pursuer, as to the Ann Street property, after Mr
 rson had urged me to purchase it myself. I think that was about the
 October or beginning of November 1875. Mr M'Pherson had previously
 me to purchase it myself on more than one occasion. On the 9th October
 ed me if I would purchase the property. He told me first of all that he
 ed to raise the rents to £40, and said that I ought to buy the property.
 that I was not inclined to purchase at that time, and he then said that if
 l of any one wanting such a property I might let them know. That con-
 on took place about the end of October or beginning of November. I
 rote to my brother and told him about the property, stating that I thought
 d be a very fair investment. . . . Prior to that my brother in Darlington had
 ed me to buy some property at Yeat's Lane, Aberdeen. He wanted some
 investment, and it occurred to me then to write him on the subject. I
 ny brother accordingly. (Q.) When you first wrote to your brother pro-
 that he should purchase the block had it occurred to yourself to take
 the houses? (A.) I had never thought of that at all; if I had thought
 would have offered for the property myself. (Q.) Was it after your
 had agreed to buy the houses for the £1900 that it occurred to you?
 es; that I might get him to pass two of the houses to me, so that
 it alter my house to suit myself, by putting up an additional bed-

the following is the evidence of Hugh James M'Pherson :—" (Q.) In the
 of 1875 was there a sum of £2000 of your marriage-contract funds to be
 d? (A.) Yes. (Q.) Did you speak to Mr Watt about finding an investment
 (A.) Yes. (Q.) In the course of conversation on that subject was there any-
 id about selling the property in Ann Place? (A.) Nothing whatever. (Q.)
 id you first come to speak to Mr Watt about the sale of that property? (A.)
 id not find an investment for the £2000; he said that investments were
 were indeed, and that he had a lot of money lying in his hands to invest
 ats, but could not get properties over which to lend it, as they were going
 high in the market. He just casually mentioned that. As things were
 o high, and as we had to sell the Ann Street property in 1877, I said I
 think of advertising it for sale. (Q.) Did you do so? (A.) I did not;
 d me not to do so, as he thought he would be able to find a purchaser.
 out what time would this be? (A.) About the end of October, so far
 collect. (Q.) When did you next hear from him on the subject? (A.)

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requested him not to advertise, because he thought he could find a chaser. Both witnesses, however, concur in saying that M'Pherson requested Watt to look out for a purchaser, and M'Pherson expressly said — 'I commissioned him to find a purchaser.' It is thus, as I think, proved that John Watt junior was employed or instructed on behalf of the trustees by H. J. M'Pherson, a beneficiary in the trust, and himself a client of Watt, to sell, or at least to procure a purchaser for the property.

"9. A day or two after this Watt called for M'Pherson and asked what price the houses would be sold. M'Pherson said that he thought each block of two houses should fetch from £1100 to £1200, but that he would take £2000 for the whole four. Watt objected to that price as excessive, but said that £1900 would be a fair price; and Watt then said that he had communicated on the subject with his brother, who had money to invest on heritable property, and would be prepared to give the price. M'Pherson then said to Watt if he would give a written offer on behalf of his brother he would advise the trustees to accept, and the offer and acceptance of 9th November 1875 were accordingly written out and exchanged.

"10. It happened that just as M'Pherson had received the offer the sisters (the defenders) called upon him at his place of business and shewed them the offer, and they, before authorising their brother to do anything of it, asked him whether the offer was truly for Dr Watt (the purchaser) and not for John Watt junior, saying if it was John Watt junior who was buying for himself they must have the advice of a neutral person. M'Pherson, who believed that the offer was truly for Dr Watt, advised the sisters the required assurance, and the offer as made was then by their authority accepted.

"11. Although the correspondence which passed between John Watt junior, in Aberdeen, and his brother, Dr Thomas Watt, in Darlington, in reference to the purchase, has all been destroyed, with the exception of a fragment in one letter, being the second which John Watt junior wrote to his brother on the subject, it is clearly proved by that fragment and by the admission both of Dr Watt and John Watt junior in the evidence, that before the offer of 9th November was written and signed by M'Pherson it had been proposed by John Watt junior, and agreed

Very soon afterwards. (Q.) Where was this? (A.) In my place of business. (Q.) Did he call upon you? (A.) Yes. (Q.) What did he say? (A.) He said that he wanted for the houses, and I said I thought each double tenement would bring £1000 or £1200, but that I did not know the real value of the property. I then said I would take £2000. (Q.) What did he say? (A.) He would not hear of it; he told me that property of that description ought to return 7½ per cent, and he made a calculation shewing me that even if we got 10 per cent we would be a great deal better off. (Q.) Did he give you to understand he had a purchaser in view? (A.) He told me that he had his brother Dr Watt in view. What did he say about his brother? (A.) He said that his brother had money to invest, and wanted an investment in heritable property. He had told that before, and that his brother had told him to look out for an investment, but he did not say to what amount. He said he would buy the property for his brother. (Q.) Was that at £1900? (A.) There was no price mentioned. (Q.) At the time you had this conversation with him when you said you would take £2000, and he said he would not hear of it, but that £1900 might be given, did he say that he had communicated with his brother? (A.) Yes, he seemed to be able to close with the transaction. I said that if he would give me a written offer on behalf of his brother at that sum I would recommend the trustees to accept it."

pursuer, that two of the houses should be passed on by the pursuer to his brother at the price of £950, being half of £1900, the price of the whole four houses. The offer, therefore, for the whole houses which was made by John Watt junior, as in name of his brother, was truly, so far as regards two of the houses, an offer for behoof of himself, John Watt junior. This fact was concealed from, or at least was not communicated to, M'Pherson, or to the defenders, until some time after the acceptance.

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12. The pursuer, Dr Watt, intended to purchase and retain two of the houses as an investment, but within a day or two of receiving the acceptance from M'Pherson, John Watt junior began to negotiate with other parties for a re-sale of the two houses, which were to be passed on to his brother, and the result was that, before the end of November, he had sold the houses to a person of the name of Robson, for the price of £1125, being an advance of £175 upon the price which he himself was to pay. Robson, again, within a day or two, sold one of the houses to Buickshank, the tenant thereof, for £600, being a further advance of £100. The price of £950, therefore, for half of the subjects, or £1900 for the whole, was plainly greatly below the true value of the property.

13. These circumstances were communicated by John Watt junior to M'Pherson, about or shortly after 19th November, and by M'Pherson (or some attempts at compromise) to his sisters, the defenders, and through M'Pherson, who seems to have been in ignorance as to the law of the case, was disposed at first to advise his sisters to submit to what undoubtedly was a bad bargain, these ladies themselves, on becoming aware of the facts, insisted upon the bargain being given up altogether, and at all events, upon the difference in price obtained by John Watt junior being paid to them. Both proposals were declined."

The Lord Ordinary, on 4th July 1876, pronounced this interlocutor:— "the reduction at the instance of the defenders, M'Pherson's trustees, and Thomas Watt, the pursuer of the original action of declarator, impleader, and damages, and against John Watt junior, advocate in Aberdeen, which has been held as repeated in this process, reduces, decerns, and decrees in terms of the conclusions of the summons, and in the said original action assoilzies the defenders, M'Pherson's trustees, from the said conclusions of the summons, and decerns: Finds the said Thomas Watt and John Watt junior liable in expenses in both actions," &c.*

NOTE.—(After stating the result of the evidence as quoted *supra*, p. 604, et seq.—Such being the state of the facts proved, the question is whether the purchase was sustained to any, and, if so, to what extent? Now, although it was made in the name of Thomas Watt, it was truly, to the extent of one-half, made by his brother, John Watt jun., who was not only the law-agent of the trustees and beneficiaries as individuals, but was, on his own suggestion, engaged, as law-agent of the trustees, with the duty of finding a purchaser for the property. But the important fact that Watt was thus buying for himself was, as we have said, not communicated to the sellers. It may be conceded to the pursuer that a purchase by an agent is not illegal in the sense in which a purchase of trust property by a trustee is illegal. But it is a transaction which the law regards, and rightly regards, with jealousy, and, in order to justify such a case when challenged, an agent who has bought the property of his client—events, when he has been employed to sell that property—must come into the case with clean hands, and must shew that his client was acting with full information upon every material matter, and that the price was adequate. The rule was very clearly stated by Lord Eldon in the House of Lords in the leading case of *Cane v. Allen* (2 Dow's App. 289)—"If one not employed before an attorney was employed for the sale of an estate, and advised his employer to buy it to himself (the attorney), the Courts of Equity would say, "The

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nature of your employment was such as rendered it incumbent on you to give the best advice to your employer ;" and unless he withdrew from that connection, or put himself completely at arm's length, he must shew, in case the contract be questioned, that he had given the same disinterested advice that is naturally would have given if the contract had been made with another party. Now, it is clear that John Watt jun., the true purchaser of at least half of the property, has failed to shew that the transaction comes within the rule laid down by Lord Eldon. He did not close the confidential relation between him and his clients, or hold his clients at arm's length, and he did not give them disinterested advice. On the contrary, he dissuaded them from advertising the property for sale by public auction, thereby preventing fair and open competition for the property. He suggested that he himself should look out for a purchaser, at a price considerably lower than that which his clients thought should be asked ; and he moreover, concealed from them the important fact that he was the real, though his brother was the ostensible purchaser. By means of this concealment he threw his clients off their guard, and induced them to believe that he was protecting their interests as their agent ; and it is certain that if they had known the fact which Watt thus concealed they would have called in the services of a neutral agent. And further, the price is greatly less than the true value. In any case, if within a week or two of the contract, Watt, without trouble, and without delay, without much desiring to resell, disposed of the property privately at a profit of upwards of 20 per cent, the presumption is that, at a public sale by trustees, a still larger price would have been realised. It is in vain to say, the pursuer does, that the property was valued in 1871 at £1860 ; that a purchaser could not be found for it in that year at £1900 ; and that a solicitor or conveyancer from Aberdeen is of opinion that £1900 is the fair price now. The *onus* of proving adequacy of price at the date of sale rests with the pursuer, and he has not discharged that *onus*. The valuation of 1871 forms no safe test of the value in 1876, and the profit made by John Watt jun. in this transaction is real evidence that the price at which he purchased was inadequate. I think that the presumption is very strong that, had the defenders known that he was the purchaser, and employed, as they would then have done, a neutral agent to attend to their interest, a very much larger price would have been obtained. The sale therefore—at all events, in so far as John Watt jun. was personally interested therein—cannot be sustained. But apart from these considerations I think that the mere concealment of the fact that J. Watt was himself a purchaser is of itself sufficient to vitiate and annul the sale at all events, in so far as regards the houses purchased for himself. This doctrine is implied, if not expressed, in the opinions of the Judges in *Gourlay's Trustees v. Kerr* (6th June 1857, 19 D. 789), and it has repeatedly been made manifest by decisions in England—see *Woodhouse v. Meredith* (1st March 1820, 1 Jacob & Walker, 204). *Charter v. Trevelyan* (5th September 1844, 11 Cl. & F. 714)—where such concealment was held sufficient to set aside a purchase by an agent after the lapse of thirty-seven years ; and in *Lewis v. Hillman* (2nd March 1852, 3 Clark, 607), when the Lord Chancellor (St Leonards) said—

¹ *Edwards v. Meyrick*, 1842, 2 Hare's Chan. Rep. 60 ; *Woodhouse v. Meredith*, 1820, 1 Jacob and Walker, 204 ; *Charter v. Trevelyan*, 1844, 11 Cl. & F. 714 ; *Cane v. Allen*, May 16, 1814, 2 Dow's App. 289 ; *Cunningham v. Lee*, Nov. 13, 1874, *ante*, vol. ii. p. 83 ; *Grieve v. Cunningham*, Dec. 17, 1878 Macph. 317, 42 Scot. Jur. 140 ; *Harris v. Robertson*, Feb. 16, 1864, 2 Macph. 664, 36 Scot. Jur. 333 ; *Gourlay's Trustees v. Kerr*, Dec. 6, 1856, 19 D. 789, 29 Scot. Jur. 64 ; *Blaikie Brothers v. Aberdeen Rail. Co.*, Nov. 19, 1854, 17 D. 66, 24 Scot. Jur. 49, *rev.* July 20, 1854, 17 D. (H. of L.) 20, 1 Macph. 26 Scot. Jur. 622.

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the trustees of the late John M'Pherson, manufacturer in Aberdeen, for the purpose of enforcing a contract of sale of four houses in Ann Place, Aberdeen, belonging to the trust-estate, alleged to have been concluded by Hugh James Watt junior, the pursuer, on behalf of the trustees, the sellers, and John Watt junior, the pursuer's brother, on behalf of the pursuer, as the buyer. The defence against this action is, that the contract founded on was in reality a contract under which, the pursuer alone, but his brother, John Watt junior, also was the purchaser; that his brother being at the time the agent of the sellers, and the fact of being himself the purchaser to the extent of one-half of the subjects being concealed from his clients, the contract is invalid. To give effect to this defence a motion of reduction of the missives of sale was raised by M'Pherson's trustees, and held as repeated.

As to the law applicable to such a case, there is very little doubt. It is not lawful for a law-agent to purchase from a client. But he must do so openly without disguise, and even then he is under the necessity of shewing that the bargain was fair, the price adequate, and all the conditions of the transaction such as a law-agent would have advised his client to agree to in the ordinary course of business. If he fails in this he is liable to have the transaction set aside. There is another rule equally well established. If a law-agent puts

should lay it down as a rule, my Lords, that ought never to be departed from, if an attorney or agent can shew he is entitled to purchase, yet, if instead of openly purchasing, he purchases in the name of a trustee or agent without disclosing the fact, no such purchase as that can stand for a single moment. In a transaction, to stand, must be open and fair, and free from all objection. If a man purchases, as these appellants purchased, by putting forward a name of his own, not as a clerk, not as an agent, but as an actual *bona fide* purchaser upon an absolute and independent contract, he does that which, the law as it is stated, renders the deed powerless for the purpose for which it was made and executed, and the Court will hold the parties responsible for everything that results from it. If, therefore, a bill had been filed, and this contract had been attempted to be set up, and it had come before your Lordships, I can assure you that you would have rescinded that contract, and thrown the costs of the proceedings upon the parties who had entered into it.

Such being the rule of law applicable to cases like the present, it is clear the decree must be reduced—at all events, so far as regards the houses purchased for John Watt junior, and that, to that extent, the pursuer, Thomas Watt, cannot demand implement of the contract. The question remains whether the pursuer can stand as regards the two houses retained by himself, or can be enforced to that extent. That question is not free from difficulty, but I have felt myself constrained to hold that the contract cannot be enforced to any extent. The offer which was accepted was an offer by, or rather in name of, Dr Thomas Watt for the purchase of four houses at a lump sum. It was accepted by the pursuer on the footing that he, and he alone, was the purchaser. But as the fact turns out to be vitiated in an important respect by the concealment of which the pursuer himself was aware before the offer was written and signed, and which he ought to have inserted, or caused to be inserted, in the deed he must take the consequences of his own want of care. He must be responsible for the improper concealment on the part of his brother, especially as it cannot be doubted that if, on the 9th November 1875, the defenders had ever stated that John Watt junior was personally interested in the purchase the contract would not have been accepted. The result of the whole case, therefore, is that the reduction which the defenders have been allowed to repeat in this case, decree setting aside the missives must be pronounced; and in the obligation of declarator and implement, the defenders, M'Pherson's trustees, are absolved, with expenses."

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forward some person to buy for him then the sale is bad, without proving any inadequacy of the price or other objectionable condition. It is a piece of deception which an agent is not entitled to practise, and which is in the eye of the law a fraud.

If the present case belongs to either, it belongs to the latter category. For the allegation of M'Pherson's trustees is, that the original contract was completed on the assumption that Dr Watt was the sole purchaser, while in truth he was only such to the extent of one-half, while his brother, the defenders' agent, was purchaser on his own account to the extent of the other half. The case, therefore, turns entirely on the question of fact, whether John Watt junior was or was not the agent of the sellers.

Now, the statement that John Watt junior was the sellers' law-agent may have a double meaning. It may mean that he was the general law-agent of M'Pherson's trustees, or that he was their law-agent constituted for this particular transaction. Proof that he occupied either of these positions would be sufficient to let in the legal rule which I have already stated.

Now, was he the ordinary law-agent of the trustees? I apprehend that the question must be answered in the negative. He never was the regularly constituted agent of the trustees. On two occasions in regard to some small incidental matters he does indeed appear to have acted for the trust. In 1871 there was an entry in his books, by which John M'Pherson's trustees are debited with the cost of drawing a discharge by Mr Black's marriage-contract trustees to the trust. In that matter it is clear that he was acting as law-agent of the trust. Again in 1872, there is another small piece of business transacted by him. The trustees were about to lend a sum of money on heritable security, and the borrowers were clients of Mr Watt. The trustees paid the sum to be lent into the hands of John Watt, and he paid it over to the borrowers, and from that time he continued to pay to the trustees the interest accruing on the money so lent. Now, no doubt in this transaction, up to a certain point, he was acting as agent for the trustees—the lending of the money was an act of the trustees performed by the hand of John Watt. But that was the whole amount of what he did as agent for the trustees. In the subsequent payment of interest he was acting as agent for the borrowers. These are the only occasions on which Mr Watt ever acted as agent for the trustees. It was indeed represented that he was the law-agent of many of the beneficiaries, but that did not make him the agent of the trust, or put him at all in an equivalent position. No doubt some of the beneficiaries under the trust were entitled to expect his assistance and rely on his advice in the conduct of their own affairs. But to make him agent for the sellers it must be shown that he was in the position of adviser of the trustees,—that he was the agent to whom they were in the habit of recurring for advice, and on whom they were to rely for guidance in their dealings in the trust affairs and estate.

The next question is, whether Mr Watt was specially constituted the law-agent in this particular transaction;—whether he was employed by the trustees to sell this property, or took upon himself the duty of so doing? The allegation on this subject made by the defenders, M'Pherson's trustees, in the third article of their statement of facts is very important—(Reads third article of defenders' statement of facts). The case of the defenders, therefore, is, that the position of John Watt junior here was that of agent for both parties, and that he acted for both parties in making a personal contract of sale, not in carrying through a piece of conveyancing, or doing anything requiring any special legal knowledge.

ige. I confess I have considerable difficulty in understanding how one No. 93.
 can be agent for two parties in a matter of that kind. When two
 parties are about to enter into a contract of sale, what they have to fix Mar. 2, 1877.
 the price, and, except in particular circumstances, nothing else. There Watt v.
 may be some conditions necessary to be stipulated. But in ordinary cases the M'Pherson's
 personal contract of sale means nothing more than this, that the purchaser agrees Trustees,
 to give, and the seller to take, a certain price for a certain subject. How any et c contra.
 man can act as the agent for both parties in adjusting the price I fail to
 understand. I can conceive a man adjusting the price between an intending
 purchaser and seller in the capacity of arbiter, but not of agent. It is quite a
 different thing if an agent undertakes to do the conveyancing work for both
 lender and purchaser, or to prepare the deeds of security in the case of a loan
 amply secured. I can quite well understand one man acting as agent for
 lender and lender in a loan transaction, for there the personal contract is
 made beforehand, the parties having agreed to borrow and to lend. The com-
 mon agent's duty to the one is to examine the security, and to draw the bond;
 to the other, to revise the bond when drawn. If he acts with due care and
 attention he can quite well do his duty by both. But how a man can be
 brought into the field at an earlier period as common agent for both parties I
 do not see.

But on looking into the circumstances it is plain that not only is the position
 of common agent for both parties in the personal contract of sale a legal impos-
 sibility, but that no such duty was ever intended to be imposed on Mr Watt in
 the present case. Mr M'Pherson was in the active management of the whole
 of the affairs; the trustees having no personal interest in the trust-estate, left the
 management of it very much in Mr M'Pherson's hands. He goes to his friend
 Watt, and in the course of conversation he mentions that the houses are for

sale. What is the rejoinder of Mr Watt? "Don't advertise them, for some
 of mine will very probably purchase them." The matter stands over for
 a few days, and then Mr Watt produces a purchaser in the person of his brother.
 Now, two, M'Pherson and Watt, then set about adjusting the price. Now, when
 men set to work to fix the price of a subject which is being sold it cannot
 be said that one is the agent of the other. M'Pherson asks £2000; Watt thinks
 too much, and proceeds to lay before M'Pherson calculations to shew that
 £1000 is a fair offer. He offers that sum, and it is accepted. Now, that is what
 is making a bargain. There must be two parties to a bargain, and here we
 have two—Mr M'Pherson and Mr Watt—and the one cannot be the agent of
 the other in making the bargain. Missives of sale were afterwards exchanged.
 How do they stand? The offer is made by Watt professedly on behalf of his
 brother, and accepted by M'Pherson on behalf of, and after consultation with the
 trustees. How, in these circumstances, it can be said that Watt was acting as
 agent of the trustees I confess myself quite unable to understand. In truth,
 both parties to the sale were represented by agents, and by them the transaction
 was completed. It turns out that Mr Watt was buying in part for himself, but
 there is nothing wrong in that, unless he was or professed to be agent for the

trustees. It was perfectly indifferent to the seller who was the purchaser, provided
 he paid the price for which he stipulated. Unless they can make out that Watt
 was acting as their agent the defence is at an end, and I confess that I have
 without difficulty to the conclusion that the character of agency is in no
 way established. The result will be, that we recall the Lord Ordinary's inter-

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LORD DEAS.—I confess when I first read the Lord Ordinary's interlocutor a note I was somewhat carried away by his reasoning in favour of the judgment. But after a careful consideration of the argument and proof I have become satisfied that the conclusion at which your Lordship has arrived is the correct one.

A law-agent stands in a peculiar position. He is not disqualified from purchasing the property of his client, but if he does so he is subject to a certain presumption which he must overcome by shewing that the transaction was a bona fide one, and that no advantage was taken by him of his confidential position. In order to raise that presumption it is, in the first instance, necessary to shew that the position of the purchaser was truly that of law-agent for the seller or sellers. Now, I am of opinion that there is no evidence that, up to or at the time of this transaction, Mr Watt was in the position of law-agent for the seller or Mr M'Pherson's trustees.

The trusters died in 1867. The only surviving and acting trustees are the two unmarried daughters of the truster, who now pursue this action. I have a brother, Mr Hugh James M'Pherson, a manufacturer carrying on a large business in Aberdeen, manages for them the affairs of the trust, and attends to their individual interests. The late Mr Edmond, a well-known advocate in Aberdeen, acted as law-agent for the trust as long as a law-agent was required. In October 1871 Mr Edmond's accounts were demanded and settled by Mr Hugh James M'Pherson, to whom Mr Edmond delivered up the trust papers, which were not said ever to have been placed in the hands of any other law-agent. Hugh James M'Pherson was well acquainted with everything connected with the trust from the outset, and quite capable of attending to whatever required to be attended to after the agency was taken from Mr Edmond. It appears to me that, from the time the papers were given up by Mr Edmond, there was no actual law-agent for the trust at all. One or two incidental matters were done for the trustees, as your Lordship has noticed, by John Watt junior, but these certainly did not amount to regular agency on behalf of the trustees, and I am clearly of opinion that unless Mr Watt was employed as agent for the trust in the particular transaction now in dispute there is nothing like the evidence which the law requires to establish agency on the part of Mr Watt at all.

The question therefore comes to be, Whether Mr Watt was employed as agent for the trust in this particular transaction? Now, that depends entirely on the evidence of Mr M'Pherson and Mr Watt. I confess that, in looking carefully at the proof, I am not able to say that I have greater confidence in the statements of Mr M'Pherson than in those of Mr Watt. It is in evidence that, prior to the transaction altogether, Mr M'Pherson had offered to sell the property directly to Mr Watt. This Mr M'Pherson denies, but I think it is satisfactorily proved against him. It may be that he has forgotten the circumstance, but the improbability of that does not increase one's confidence in the rest of his evidence. I entirely agree with your Lordship, that Mr M'Pherson's acquiescence in Mr Watt's suggestion, that he might find a purchaser among his own clients, does not establish the employment of Mr Watt as agent for the trustees to sell the property. Mr M'Pherson was of opinion that a sale was essential, and he was quite competent to judge of the value of the property. On the question of value, indeed, there was really not much difference of opinion between them. M'Pherson

ady to sell at £2000, and Watt to buy at £1900. This difference as to the ice was in noways remarkable, and M'Pherson, with his eyes open, deliberately cepted Watt's offer. No. 93.

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If, then, Mr Watt was neither general agent for the trust, nor special agent employed to sell that property, he was just in the position of an ordinary independent third party. What, then, did the law lay upon him? I do not say it a man in that position may not make himself liable to have such a transaction set aside. But that would require the case to be brought up to a case of fraud. If the Lord Ordinary had thought that was the sort of case, he would no doubt have sent it to a jury. That was obviously not done only because the case was represented to him at the bar as involving an important question of agency.

I am disposed to think there is no such question in the case.

Laying aside that question there remained certainly some things in Mr Watt's conduct not quite satisfactory. He did not explain to Mr M'Pherson that he had himself take two of the houses off his brother's hands. But that seems to be quite inadequate in the circumstances as proof of fraud against a person standing in the position of a mere friend or ordinary third party, even where he had helped to find the desired purchaser.

For what, on the other hand, was the position of Mr M'Pherson in relation to the trustees and the trust property? I think the case is really to be viewed as if M'Pherson had been selling his own property. Everything was entrusted to him by his sisters. Though they were the trustees, they devolved the whole trust management upon him. They allowed him to sell the trust property at his pleasure, without applying to either of them for instructions. He did not know, and never inquired, who was law-agent under the trust, or whether there was a law-agent at all. They signed whatever papers M'Pherson presented before them, without reading them. In short, they made him virtually trustee, and whatever he did for the trust is just, I think, as binding as if it had been done for himself. Now, if Mr M'Pherson had been selling his own property could he have said that Watt had practised on him a successful fraud, only because Watt had not told him that he was purchasing in part for himself? I cannot think so. No doubt Watt afterwards resold his half of the houses at a profit. But there is equally little doubt that when he bought he had no intention of reselling. He was tempted to sell only by an unlooked-for increase of a profit. He made no concealment about that offer nor about his intention to resell in consequence of it. What he did was at once to tell M'Pherson about it. M'Pherson advised him not to take the offer, and why? Not because he thought the original transaction objectionable or invalid, but because he anticipated some reflection from his sisters as to the price he had got for the houses if they should hear of a resale at a higher price. Then there came a proposal by M'Pherson of a loan over the houses of part of his marriage-act funds to be made to the purchaser on the footing that the purchase was to be effected. The negotiation on that subject went on—M'Pherson insisting the loan being carried out, and ultimately exacting a penalty from the purchaser for letting him off. Success in this exaction seems to have suggested to him that he might in like manner exact a penalty from Mr Watt by impeaching the sale as illegal. A considerable period, however, elapsed before this suggestion of illegality was made. M'Pherson now tells us that his sisters complained to him of the unfairness of the transaction, and that hence arose the

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present challenge. But it is quite clear that it was M'Pherson himself who suggested the challenge, and that he did so in precisely the same state of knowledge he had been in all along. It was not because he had been advised that the sale was illegal, for he had taken no advice on the subject. It was because he thought he might get Watt to buy off the objection, which, as Watt's brother observed in one of his letters, could not have been done without a sacrifice of professional character.

Looking to all M'Pherson's means of knowledge, I think that if this case had been tried as a case of fraud at common law the challenge could not have succeeded, and for the reasons I have stated I do not think it involves the element of professional agency.

LORD MURE.—The main if not the only question here raised is one of fact, viz, whether Mr Watt was the law-agent for the defenders, M'Pherson's trustees, at the time this purchase was made; either as being general agent for the trustees, or as being employed to act for the trustees in this particular transaction. If he was, the sale, in so far as made to himself, would not be a valid sale; because he does not appear to have informed the defenders, before the sale was made, that two of the four houses would be acquired by himself. But I think it right to add that even in that event there would, in my opinion, be no grounds sufficient at law, at least there are none set forth in this record, in respect of which Dr Watt could be called upon to give up the two houses bought on his own account.

Now, as regards the agency of Mr Watt, I am of opinion, upon the evidence that he was not at the time of the sale, and never had been, general agent for the trust, although he may have occasionally been employed to do what was trust business, when Mr Edmond was agent for the trustees. But when Mr Edmond ceased to act as agent for the trust Mr Watt was not appointed agent and the trust business, which seems to have consisted chiefly of looking after and drawing the rents of the houses in question, was managed by the brother of the defenders. Neither do I think that there is evidence to shew that Mr Watt was employed to act for the defenders in the sale of these houses. In the third statement of facts, referred to by your Lordship in the chair, that is what is alleged. It is, on the contrary, there stated that the correspondence relative to the sale passed between him and "Mr Hugh M'Pherson as representing the defenders;" while all that is alleged is that the defenders understood Mr Watt as acting as agent for the sellers as well as the purchaser—that is, as agent for both parties. Now, as regards this alleged acting for both parties, I agree with the observations made by your Lordship in the chair. An agent may, and doubt does frequently, act for both parties in the preparation of the deeds relative to a loan of money, or even to a sale. But with reference to the fixing of the price at which a property is to be sold, I confess I do not very well see how the same agent can act for both seller and purchaser, except as referee. Even as acting for the seller it is his duty to get as high a price as he can, while acting for the buyer it is his duty to keep down the price. Now, in this action Mr Watt was admittedly acting as agent for the pursuer, Dr Watt; and was thus in an antagonistic position to Mr M'Pherson, who is not only stated in the record, but appears from his own account of what passed relative to the price at which the properties were to be acquired, to have in that matter represented the defenders. This is made pretty clear, I think, from Mr M'Pherson's account of what took place at the meeting after Dr Watt had authorized

other to purchase the property. At that meeting an agreement was ultimately made as to the price which was to be paid for the houses, which was at £1900, and as to which Mr M'Pherson says,—“ I said that if he would give me a written offer on behalf of his brother at that sum I would recommend the trustees to accept it.” This was accordingly done, and the written offer and acceptance set forth on the record, and which are dated on the day after that meeting, bear expressly, the one to be made by Mr Watt as acting for his brother, while the acceptance is by Mr M'Pherson as acting for the defenders. In these circumstances I have been unable to come to the conclusion that Mr Watt was employed to act for the defenders in the sale of the properties in question.

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LORD SHAND.—I am of opinion, differing from your Lordships, that the Lord Ordinary is right in holding that John Watt junior cannot take benefit by the tract of 9th November 1875, made in name of his brother with M'Pherson's trustees.

I think with the Lord Ordinary that it has been proved that in procuring a purchaser and effecting a sale of the houses in question Watt professed to act, and did act, as agent for the defenders; and that on this ground, apart from his position as a trustee under the deeds, which I shall immediately notice, he is precluded from taking the benefit of a contract which, though entered into in his brother's name, was to a material extent for his own behoof. The proofs show that an intimate business relation subsisted between Watt and the various members of the family who had the beneficial interest in the houses. Watt was law-agent for every member of this family personally, and his relation to them individually is, I think, of importance in ascertaining his relation to the trust under which they were either trustees or beneficiaries, and which materially enters into the question as to the position he assumed when Mr M'Pherson first spoke to him with reference to the sale of these properties. He was law-agent for the two ladies who, as trustees, are the defenders here, in their personal business. In his evidence he explains that he was consulted in connection with Mrs M'Pherson's executry; that he acted for Miss M'Pherson in arranging the transfer in her favour of two small properties, one at Woodside, the other in James Street, Aberdeen, and that he continued to draw the rents of these properties for her. So recently as the spring of 1875,—a few months before the transaction here challenged,—on the employment of the two ladies, given through their brother, he carried through a service in their favour as agents of their brother George, and had them also decerned as executrices to the family estate. He acted for Mrs Black, another sister, in preparing her marriage-contract. He was Mr Hugh James M'Pherson's ordinary and only law-agent, and advised him as to his contract of copartnership and contract of marriage. From the second statement of facts for the defenders, and the answer, it further appears that Mr Watt was (1) a trustee under Mrs M'Pherson's trust-deed, and law-agent for that trust; and (2) was also trustee and law-agent under Mrs Black's marriage-contract. Mrs Black is one of the beneficiaries who has, under her father's deed of settlement, a direct interest in these properties; and from the statement and answer just referred to it appears that M'Pherson's trust has also an interest in the property. Mr M'Pherson's deed of settlement has not been printed, nor has it been made clear what the nature of the interest of these beneficiaries is; but it may well be (as seems to

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be pointed at in the third plea in law for the defenders) that the transaction might be successfully challenged on the ground that it was Mr Watt's duty, trustee for certain of the beneficiaries, to see that the largest possible price was got for the property, while in becoming the purchaser his interest was to take it at the lowest price for which he could obtain it. In the absence of direct information as to the interest which these trust-estates had in the property I cannot say more on this point than that it appears to me it might of itself be really decisive of the case. But at all events, Mr Watt's confidential relation to the various parties interested here is, in my opinion, an important consideration in determining his position, and as throwing light on the relation in which he stood in this particular transaction, having regard to the ground on which the case was decided by the Lord Ordinary.

In regard to this particular trust, it appears that in 1871 Mr Edmond's agency for the trust ceased, and such trust business as required an agent's intervention—which was admittedly little—was transacted through Mr Watt. He prepared the discharge in favour of the trust by Mrs Black, and arranged and completed the securities in favour of the trust for a sum of £2250 in 1871, and I think Mr Watt had substantially superseded Mr Edmond as law-agent of the trust, and would in that character, for example, have carried through the conveyances of the houses in question, if no dispute had arisen about them.

That being the relation of Mr Watt to the parties, what position did M'Pherson occupy or assume in this matter? I confess I am unable to assist you with your Lordships in thinking that he held any position like that of a law-agent, or such as to suggest that he was not, as occasion required, to take the benefit of the advice of a law-agent. His business was that of a comb-maker, and his own account appears to me a natural one, when he says in one part of his evidence, that in attending to business matters for his sisters he was simply acting as one of the family, and not as an agent, and in another, that he acted as their mouthpiece as a rule. I take it that his position was one common enough in everyday life—that of a brother aiding his sisters in business matters, and, amongst others, acting for them in communicating with their agent on their behalf.

How, then, was the transaction in question entered into? Mr M'Pherson having called on Mr Watt with reference to legal business connected with his own marriage-trust, the subject of this house property, which Mr Watt knew belonged to his sisters as trustees, came up in conversation. Mr M'Pherson said that as the houses had to be realised before 1877 he was thinking of advertising them for sale. Mr Watt replied,—“Don't do that, for I think I can find you a purchaser.” The account of the two parties, Mr Watt and M'Pherson, as to what took place between them does not materially differ, that seems to be the gist of it. Now, that is not the case of a friend or independent third party in a casual way saying,—“Don't advertise the property, for I think I can find you a purchaser.” It is not even the case of a law-agent saying “I think I can find you a purchaser among my clients.” In view of the relation in which Mr Watt stood to Mr M'Pherson personally, and to the other members of the family, Mr M'Pherson was, I think, entitled to assume, as I think he did assume, that Watt, as agent of the trust, and in view as undertaking to act for the parties interested, was to endeavour to find a purchaser for the property, and that, in disposing of it, M'Pherson would take the benefit of Mr Watt's experience and of his disinterested advice. If

ht in this, it appears to me to follow that Mr Watt, after what subsequently No. 93.
k place, cannot take benefit by the transaction in question.

As to the law on the subject there is no difficulty. The Lord Ordinary states Mar. 2, 1877.
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quite correctly when he says,—“It may be conceded to the pursuer that a
chase by an agent is not illegal in the sense in which a purchase of trust
perty by a trustee is illegal. But it is a transaction which the law regards,

rightly regards, with jealousy, and, in order to justify such a purchase when
lleged, an agent who has bought the property of his client—at all events
n he has been employed to sell that property—must come into Court with
n hands, and must shew that his client was acting with full information
n every material matter, and that the price was adequate.” He must shew
he has “given the same disinterested advice that he naturally would have
n if the contract had been made with another party.” That is so when the
it is openly and avowedly transacting for himself. If, however, an agent
eals the fact that he is himself the purchaser, and purchases in the name of
her, the purchase is illegal and bad.

hat being the law, and Mr M'Pherson and Mr Watt having separated on
footing I have above stated, what happened next? Mr Watt came to Mr
herson at his place of business a few days afterwards, and said, “I have
d you a purchaser.” Had Mr Watt said, “I propose purchasing myself,”
t would have been the result? Mr M'Pherson would naturally and most
ably have said, “If that is the case, I shall take time for consideration, and
ably put the matter into the hands of another agent;” and his sisters say
would certainly have consulted another legal adviser. It would have been
proper that Mr Watt should have suggested to M'Pherson to do so. And
if he had declined, and Mr Watt had made a bargain avowedly on his own
ant, it would have been necessary for him to shew, if the transaction were
enged, that he gave “full information” and fair and “disinterested advice”
r M'Pherson. But nothing like this was done. All that Watt said was,
ave found a purchaser for you in the person of my brother.” Suppose, after
had taken place at the previous meeting, Watt had simply got a friend or
t of his own to give him his name in the purchase, or suppose Watt had
hased for a client at the reduced price of £1900, on condition of getting for
elf, as a bonus on the transaction, the additional £100 of price which Mr
herson wanted, I cannot think he could have retained benefits so obtained.
ld he, then, in the cases supposed, have been in any different position from
resent? I think not. When Watt came to M'Pherson to resume nego-
ns about the sale, M'Pherson, having regard to the relation which subsisted
een them, and to what had occurred at the previous meeting, was, I think,
led to assume, and did assume, that Watt would give him full information
lisinterested advice in the matter.

ind no difficulty in realising the position of an agent acting for both buyer
eller in a contract of sale. It is a thing, I apprehend, of daily occurrence.
rings seller and purchaser together; he assists in adjusting the price by telling
hat he thinks he should take, and the other what he thinks he should give.
doing he does not act or profess to act as an arbiter, but as an agent giving
nation and disinterested advice to each party. After the personal contract
le is made the agent in such circumstances acts for both parties in com-
ig the transference by preparing the necessary deeds. Where the subject
s not a large or important one, and the title simple, this is a very common

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occurrence, and both parties are entitled to get their common agent's disinterested advice and assistance in the transaction. There is no substantial difference that I can see between the case of seller and purchaser, and borrower and lender, where one agent often acts for both parties in arranging the terms of the loan and the security to be given. In neither case is the mere examination of documents and making up of titles the whole duty devolving on the agent of either party.

I have no difficulty, then, in conceiving of one man acting as common agent for both seller and purchaser. But the agent who holds that position occupies a position of considerable delicacy. He is not an arbiter bound to decide between the parties, but an agent who is bound by his employment to give disinterested advice and assistance to both, and in the whole transaction he must be perfectly straightforward, and shew perfect candour.

What, then, did Mr Watt, who was occupying that position, do? He bowed down for his brother, and concealed the fact that he himself was purchaser to the extent of one-half. What was his object in so acting? No object has been suggested in the argument, or occurs to me, except that of concealment with a view to obtaining a personal benefit, which otherwise he might not have gained. He concealed the fact that he was himself purchaser to the extent of half of the property, because he feared that if he disclosed this it would likely result in the transaction, or, at least, result in transferring the agency for the sale to some independent party, which would, in all probability, lead the sellers to insist on a price above that at which he wished to purchase. He had clearly a motive for excluding the interference of any independent party. It is true he did not apparently then mean to sell the two houses he was to acquire. But he had already, in writing to his brother, recorded his opinion that M'Pherson should sell the houses separately, and not as one property, in order to get their full value. When he himself came, within a month, to resell his two houses, he pressed the same view on the proposing purchaser, reminding him of the advantage to be got by advertising the houses separately for sale. The correctness of this opinion was amply demonstrated by the increased prices of £215 which the houses brought within a very short time. That was an opinion the advantage of which the sellers were entitled to get from Mr Watt had he acted as I think he was bound to do.

It is said that Mr Watt, at the meeting between himself and M'Pherson at which the sale was arranged, took up an antagonistic position. As acting for another client, he told M'Pherson that the price he was asking was too high and that he could not give more than £1900, and so far, it is true, his position was to a certain extent antagonistic. But if he was not truly acting for a client in the whole transaction why did he say he was? It was quite reasonable, as acting for another client as purchaser, he should tell M'Pherson that £1900 was all he could offer, and advise M'Pherson that it was an offer he should refuse if that was his real opinion. M'Pherson would act in the belief that he had the benefit of the disinterested advice of an agent acting for both parties. But it was not permissible that Watt should assume this position when he was himself truly the purchaser of half the property, and concealing that fact.

I adopt, then, the statement in article 3 for the defenders as proved, that in this transaction Mr M'Pherson and the defenders understood that Mr John M'Pherson junior was acting as agent for the sellers as well as the purchaser, as he was *facto* acting." And holding that view, I am of opinion that as Mr Watt was *facto* purchasing for himself the sale is in law invalid.

here are one or two minor points which I shall now shortly notice, as they No. 93.
 been founded on as conflicting with the view I have expressed.

here is, first, the form of the missives of sale which are addressed to and
 ed by Mr Watt and Mr M'Pherson, and are expressed in terms not incon-
 nt with the latter being agent for the trustees, and which are said to be irre-
 ileable with the view of Mr Watt being agent for both seller and purchaser.

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not think that that criticism is sound. It was necessary that there should
 igned missives, and in signing on the one side Mr Watt acted as he would
 done for an absent purchaser. Mr M'Pherson, on the other hand, being
 ent, signed as seller, or on behalf of the sellers, as he would have done if he
 been himself the seller acting on Mr Watt's advice. It was just as if the
 es M'Pherson had themselves signed the missives at Mr Watt's table.

ere are next the actings of the parties after the sale, and particularly Mr
 erson's conduct as affecting his credibility. It is said that, had there been
 dishonest purpose on the part of Mr Watt, he would not have so soon dis-
 d the fact that he was himself the purchaser. But Mr Watt had either to
 ose the fact immediately, or run the risk of some one else disclosing it for

For, as the properties which Watt bought were very soon the subject of
 tations for a resale, and were resold, he could not have kept it concealed.
 , as to Mr M'Pherson's negotiating as to making a loan on the security of
 roperty out of funds belonging to his marriage-contract trustees, I think he
 accounts for this. The position he took up, quite consistently, was this,
 he always thought the transaction unfair from the time he learnt Watt's
 connection with it, but was not aware until some time had elapsed that
 was any legal remedy. In the meantime he acted as he naturally would do,
 ured to make the best of what seemed to him a bad business. I think,
 fore, that his conduct in this respect is quite explained ; but I may further
 t appears to me to have no real bearing on the case, and that if any question
 rise as to credibility I should accept the view expressed by the Lord Ord-
 who had the advantage of seeing the witnesses.

the remaining point of the case, as to whether or not the sale should be
 ide as against Dr Watt as well as against his brother, John Watt junior, I
 ain great doubt as to there being sufficient ground for setting aside the
 transaction. It is not proved that Dr Watt was aware either that his
 er was agent for the trustees, who were the sellers, or that he was conceal-
 om them that he was himself in part the purchaser. Dr Watt was ignorant
 th these facts, and, therefore, I think that there is not the same ground for
 g aside the sale as against him. But though the transaction with him may
 lid, I think the trustees are entitled to recover any benefit their agent stipu-
 for, and was to receive, and are therefore entitled to recover the two houses
 h Dr Watt purchased really as a trustee for his brother.

THIS interlocutor was pronounced :—" Recall the said interlocutor of
 4th July 1876 : Repel the reasons of reduction : Assoilzie the de-
 fenders, Thomas Watt and John Watt junior, from the conclusions
 of the summons of reduction, and decern. In the declarator, find,
 declare, and decern against the defenders, Ann M'Pherson and Jessie
 or Janet M'Pherson, as trustees, in terms of the declaratory conclu-
 sions of the summons : Find the pursuer and defenders, Thomas
 Watt and John Watt junior, entitled to expenses in both actions
 hitherto incurred ; allow accounts thereof to be given in," &c.

No. 94.

MRS JESSIE THOMSON TOD OR CHRISTIE, Petitioner.—*Balfour—J. P. B. Robertson.*Mar. 6, 1877.
Christie v.
Christie's
Trustees.JAMES REID AND OTHERS (Christie's Trustees), Respondents.—*Mackie*

Trust—Powers of Trustees—Allowance for Children's education.—A husband who was bound by his marriage-contract to entertain, clothe, and educate children suitably to their station till their majority, when certain provisions came payable, in his settlement provided an annuity and certain liferents to his widow, declaring that these provisions were intended for the behoof of herself and the children of the marriage, it being his wish that the children should remain in the family with their mother, "and be maintained and educated out of the said annuity." The truster directed that on the death of his widow the whole estate should be held for behoof of his children and their issue, and that during the widow's life the surplus income, after providing for the annuity, should "be held and applied by my trustees for behoof of my said child or children, and the survivors or survivor of them, and the issue of the deceasers as aforesaid; it being hereby declared that my trustees shall have power, as they are hereby authorised and empowered, either to accumulate said surplus from year to year with and add it along with the interest accruing thereon in the capital of the trust-funds," "or in the option of my trustees, and if they, in the exercise of their discretion, shall see fit, to apply the said surplus, or any part thereof, to the outfit or establishment of such of them as shall be sons in business or professions, and such of them as shall be daughters in marriage, but of the expediency as well as the manner of exercising this discretionary power my trustees shall be the proper and exclusive judges."

Held that, during the widow's life, the trustees were entitled, out of said income, to make such advances as they might think desirable either for the education of any of the children, or for such change of residence as might be considered necessary for the health of any member of the family.

2D DIVISION.
R.

MR JOHN CHRISTIE, brick and tile maker, Stirling, died on 30th January 1876, survived by his widow and seven children. At the time of his death Mr Christie was possessed of means and estate amounting to the value of about £50,000, and yielding an annual return of about £2,000. Mr Christie's succession was regulated by the following deeds:—(1) nuptial contract of marriage between Mrs Christie and himself, dated September 5, 1861; (2) trust-disposition and settlement, dated February 18, 1867; (3) codicil thereto, dated March 31, 1871; and (4) codicil dated May 26, 1875. In the marriage-contract there was provided that Mrs Christie, should she survive her husband, a free annuity of £100, and a liferent use of household plenishing. Mr Christie bound himself to entertain, clothe, and educate the children of the marriage suitably to their station in life. There was also a provision of £2000 in the event of the death of both parties, payable to the children at majority, or at majority or marriage in the case of daughters, at which dates the share of each child was to vest. It was provided that the income from this sum of £2000 should be payable during the suspended vesting of the shares in the children for their education and maintenance.

By the third purpose of the settlement of 8th February 1867 the truster provided that his widow should receive, in addition to the annuity under the marriage-contract, an annual sum from the revenue of the estate sufficient to raise the annuity to £300. "And whereas, by my marriage-contract of marriage, I bound and obliged myself to aliment, entertain, clothe, and educate the child or children of the marriage suitably to their station in life, until the term of payment of the provisions to them then written, or until they should be otherwise provided for, I hereby declare

the liferent provisions hereinbefore conceived in favour of my said wife in the event foresaid are intended for the behoof of herself and my sole surviving children, it being my wish and intention that my said children shall remain in family with their said mother so long as she continues unmarried, and be maintained and educated out of the said annuity."

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The fifth purpose of the trust-disposition and settlement was in the following terms, viz. :—" On the decease of my said wife, in the event of surviving me as aforesaid, the whole trust-funds and estate then in possession of my trustees, or in or to which they shall have right in use of these presents, shall be held and applied by them (subject to the directions and conditions aftermentioned) for behoof of my surviving children, and the lawful issue of the bodies of such of them as have deceased *per stirpes*, that is to say, such issue taking the shares, original and accreting, that would have fallen to their respective parts if they had been alive, and that in such shares and proportions in case of there being more than one child) and under such conditions and restrictions as I, by any writing under my hand, and failing such appointment by me, then as my said wife in the event of her survivance foresaid, by any writing under her hand, may appoint, and failing any appointment, then equally among the said children and the successors of them and the issue of predecessors *per stirpes* as aforesaid in fee : declaring that the share of each child shall be payable to him or her at the first term of Whitsunday or Martinmas occurring after the decease of me and my said wife in the event of her survivance as aforesaid, after such child, being a son, shall have attained majority, or, being a daughter, shall have attained majority or be married, until which term of payment the share of each child shall not vest in him or her : But declaring that in the event of my said wife surviving me as aforesaid, the free annual proceeds of the said trust-funds and estate hereinbefore provided to be liferented by her, shall, in the first place, be imputed towards payment and satisfaction of the annuity hereinabove provided by me in favour ; and if the free annual proceeds of the said trust-funds and estate shall exceed the amount of the said annuity (or restricted annuity), the surplus shall be held and applied by my trustees for behoof of said child or children, and the survivors or survivor of them, and the issue of the deceasers as aforesaid : It being hereby declared that my trustees shall have power, as they are hereby authorised and empowered, not to accumulate said surplus from year to year with and merge it together with the interest accruing thereon in the capital of the trust-funds, but to pay the same to my said child or children and their foresaids in equal shares or proportions, and subject to the same conditions and directions, and at the same terms of payment as the rest of the trust-funds, or in the option of my trustees, and if they, in the exercise of their discretion, shall see fit, to apply the said surplus, or any part thereof, to the outfit or establishment of such of them as shall be sons in business or professions, and such of them as shall be daughters in marriage, but of the discretion as well as time and manner of exercising this discretionary power my trustees shall be the sole and exclusive judges : Declaring that the sum or sums to be applied or advanced for behoof of any child shall be held or imputed as a payment to account of his or her share in the trust-funds and estate ; and failing any surviving issue of my said wife, then the said surplus shall be held and applied for behoof of my heirs and assignees, to whom my trustees may in that event, after paying in their hands such a portion of the said trust-funds as may be

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sufficient to yield an annual income equal to the said annuity, pay over the balance."

By the codicil of March 31, 1871, Mr Christie bequeathed to his wife, in case she should survive him, a further life rent annuity of £100, expressing it as his wish and intention that, under the marriage-contract trust-disposition, and this codicil, his widow should be entitled to "an aggregate life rent annuity of £400," besides the life rent use of his household furniture, "and also the life rent use, during her widowhood, of my dwelling-house of Forthbank, with the offices attached thereto, which I hereby grant her." The codicil then proceeded as follows:—"Thinking subject to the foregoing direction, I appoint my trustees to hold and receive the whole trust-estate vested in them by the foregoing trust-disposition and settlement until the youngest surviving child of my said marriage shall attain the years of majority; but each of my said children, after attaining majority, shall be entitled to receive an equal share or proportion of the free revenue of my trust-estate, or such lesser annual sum as my trustees shall see fit to allow, after retaining a sufficient sum to meet all obligations and expenses connected with the trust, including the before-mentioned aggregate annuity of £400, so far as not secured by my said properties of Forthbank and Goosecroft. Fourthly, on my death and the decease or second marriage of my said wife, and the majority of the youngest surviving child of my said marriage, I direct and appoint my trustees to divide the capital of my said trust-estate between and among my said children, in terms of the instructions contained in the foregoing trust-disposition and settlement."

By the codicil of May 26, 1875, the truster directed his trustees to pay to his widow "an additional sum of £100 for the upbringing" of his family.

After the truster's death in April 1876 his widow continued to occupy the house of Forthbank, and to maintain the seven children of the marriage, and educate them.

On 9th January 1877 Mrs Christie presented a petition to the Court in which she set forth that she found "that the provision made by her husband for the maintenance and education of the children is altogether inadequate to enable her to continue to occupy the said house, and maintain the children, and educate them in accordance with the liberal views on the subject of education which were entertained by the truster, or even to enable the petitioner to maintain and educate the children according to their station in life, and she has therefore felt it to be her duty to petition the children to make the present application to your Lordships for an increased allowance for their maintenance and education."

It appeared, from the statement in this petition that the children of the marriage were the following:—(1) Jessie, aged fourteen; (2) Ann, aged thirteen; (3) George, aged eleven; (4) John, aged ten; (5) Robert, aged eight; (6) William, aged seven; and (7) Margaret, aged three. They all resided in family with their mother except George, who was at a boarding school, to which his father had sent him. Mrs Christie averred that the whole means she had under her husband's various dispositions upon which to maintain and educate the children was the annuity of £500, and a sum of £80, being the interest arising from the £2000 provided to children under the marriage-contract. She also stated that the education of the eldest son cost her £100 per annum, and the education of the other children, by a resident governess (at a salary of £100) £120 per annum. The second daughter had been ordered by a consulting physician to be taken at once to the south of England on account of her health. It was accordingly submitted that, in the circumstances, the

tees should allow the petitioner so much additional yearly out of No. 94.
plus income as would raise her annual income to £1000.

The trustees lodged answers to this petition, in which they admitted value of the estate as stated by the petitioner, and the necessity of Mar. 6, 1877.
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ing the second daughter to the south of England. They, however, did that the education of the family cost Mrs Christie so much as she red, and by including a sum of £100 a-year, which they alleged Mrs istie possessed of her own, and estimating the yearly value of Forth- k and the furniture in it at £140, they brought out Mrs Christie's ual income to be £820, which, they contended, was adequate for the sent requirements of the family.

argued for Mrs Christie ;—As the estate really belonged to the children, there was a large annual surplus over which the trustees had absolute er, a portion of the surplus should be devoted to maintaining and ating the children in their proper sphere in life, a thing which could be done upon the present income. The exceptional circumstances aving to remove the family to the south of England for the health of of the girls, who was too young to be sent away alone, was a good and for making an increased allowance. There was authority for such plication being granted.¹

rgued for the trustees ;—If Mrs Christie found that she could not l the condition upon which her annuity was granted her proper course to betake herself to her legal rights, and leave it to the trustees to ide suitably for the children. The estate here had not vested in the ren, and in a similar case such an application as this had been re- l²

t advising,—

RD JUSTICE-CLERK.—(After stating the object of the application)—It us that Mr Christie, by success in business, considerably raised his position e, and ultimately realised an estate of more than £50,000, which he left to uestees, and of which the annual income is at least £1700. There are seven ren, the eldest of them fourteen years of age, who are now living with the w, and for the support of herself and them in a suitable home all that she es from the trustees and otherwise is £820 a-year. She says that with that he cannot possibly support them in the position of life in which their father hem. There are two boys who have reached an age at which they might rly be sent to a school suitable for their social position, and the health of cond daughter has rendered necessary a residence at Bournemouth. The on accordingly asks us to find that the trustees are entitled to pay an addi- allowance to the widow for the maintenance and education of her children. e terms of the trust-deed are peculiar. The truster provides his widow an annuity which I do not say is illiberal in the circumstances, but he on her the burden, or at least expresses the wish or intention that the r should remain with her “so long as she continues unmarried, and be ained and educated out of the said annuity.” This idea, that the children l live with their mother, also runs through the codicils which followed. with regard to the provisions for the children, the settlement provides— clause giving estate and surplus annual proceeds to children]. That is a clause, because the whole surplus belongs to the children. Then occurs

Baird v. Baird's Trustees, Feb. 24, 1872, 10 Macph. 482, 44 Scot. Jur. 299.
Fendell, Jan. 24, 1862, 24 D. 327, 34 Scot. Jur. 142.

No. 94.

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the declaration relative to the application of the surplus proceeds—[re Now, with regard to the first declaration which I read from the settlement, I am of opinion that it must be taken in a restricted sense; it appears intended to apply only when the children are of comparatively tender years, for no man of common sense could suppose that the truster intended that his widow should be obliged to keep her family at home any longer than was proper for their educational and other interests. But, apart from that, the truster undertook in his marriage contract to entertain, alimēt, and educate his children in a suitable manner. The children have therefore a right to alimēt apart from the settlement, and the time has come when it is inconvenient to carry out the truster's wish that they should reside with their mother. Now, as regards the power of the trustees (who are bound by the marriage-contract) to deal with the surplus income, they are entrusted with a large discretionary power; but it is said that two alternative applications are specified—accumulations and advances for outfit—and that these exhaust the power of the trustees. Now, as the testator's estate, principal as well as interest, is vested in the trustees for behoof of the children, I think that these are only illustrations of what the trustees may do. The trustees are quite entitled to meet an emergency such as has now occurred, and to provide for the suitable education of the children. I do not think this should take the form of an increased allowance to the widow, but the trustees may in the exercise of their discretion grant an additional allowance for the education and alimēt of the children.

LORD ORMDALE concurred.

LORD GIFFORD.—The difficulty in this case arises from the terms of the disposition and settlement and codicils of the late Mr John Christie, the testator's husband.

It was contended on the part of Mr Christie's trustees (the argument was stated in the discharge of their duty, and in order fully to bring the case before the Court) that according to the sound reading and construction of the deed and codicils the testator's intention was that the sum of £500 sterling annuum provided to Mrs Christie by her husband was, and indeed it is expressed to be provided by him to be, the full allowance for behoof both of the testator herself and of the whole surviving children, the deed bearing, "it being the wish and intention that my said children shall remain in family with their mother so long as she continues unmarried, and be maintained and educated out of the said annuity." The trustees farther contended that they are expressly ordered to retain any surplus of the free annual income of the trust-estate to accumulate it, and that the only two purposes to which such surplus can be applied are, in the discretion of the trustees, first, for the establishment of sons in business or professions, or second, in payment to daughters on their marriage; and the trustees further urge that these purposes are made the more emphatic as the vesting is expressly suspended, and as whatever vests in any of the children, at least until after the death of the testator, and until majority.

I am fully sensible of the weight and importance of the argument urged on behalf of the trustees, and it is not without considerable difficulty that I can give it full effect. There are no doubt strong indications in the deed and codicil that the testator contemplated, at least in the first instance, the

allowed to his widow should include the maintenance and education of No. 94.
 children, it being kept in view that the rent or yearly value of the house, Mar. 6, 1877.
 Forthbank, the proceeds of the widow's separate estate, and the income Christie v.
 marriage-contract fund, raises the total income of the widow to about Trustees.

while always disposed to give the greatest possible weight to the explicit intentions of a testator, even in cases where I might think that his were unreasonably narrow or limited, I am of opinion that in the present case the trustees are not absolutely debarred from applying any part of the annual surplus in their hands (a surplus the annual amount of which is or £900), so as to provide for the greater advantage of the children of marriage, or of such of them as may be found to require additional allowance; and that even during the survivance of the widow, and before anything absolutely vested in any of the children.

I think that the testator in fixing the allowance of £500 a-year contemplated that the children should reside in family with their mother, and should be kept at home, and the £500 was intended, with the addition of the other referred to, as the expense of one establishment, for the maintenance and education of the whole family. But if it becomes necessary or expedient (and stated in the petition that this expediency has arisen) that some of the children should be placed at boarding schools or at public schools, I do not think it was or can be held to have been the intention of the testator that the expense of this—an expense which may be very considerable—should be paid by the widow out of her small allowance of £500. In like manner, if any unforeseen contingency should arise, such as the necessity of a foreign journey on account of the health of the family or any of them, or in the event of a similar emergency, I think the trustees have power to make a further use out of the free surplus income in their hands to meet such contingencies and extra expenses.

I do not read the two special modes in which the trustees are authorised to use the free surplus income as excluding every other application of that income. On the contrary, I think the general direction of the trust-deed overrules and controls the two special instances or powers which the trustor has given. The general declaration is that the free surplus income "shall be applied by my trustees for behoof of my said child or children and survivors or survivor of them, and the issue of the deceasers as aforesaid," and only by way of explanation or example that the trustor then proceeds to state that the trustees shall have power to accumulate the surplus and add it to the general capital of the trust-funds, or to apply it in the outfit of a business, or the establishment of daughters in marriage. The deed does not say that the surplus is to be applied only in these two ways; but the provision is that it shall be held and applied for behoof of the children, and the special enumeration of these two applications does not, I think, apply to the exclusion of a liberal interpretation, derogate from the general power.

On the whole, therefore, and while admitting that the case is one of some legal difficulty, I think we may authorise the trustees to advance from the income in their hands such sums as may be necessary to meet the expenses of the education of such of the family as are educated out of their family and in separate establishments, and also such special expense as

No. 94. may be occasioned by the state of the health of any of the children, and advances being always made under the declarations contained in the trust-deed.

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THE COURT pronounced this interlocutor:—"Find that the trustees under the trust-settlement of the late John Christie are entitled out of the surplus income of the trust-estate to make such advances as they may think desirable either for the education of any of the children at a distance from home, or for such change of residence as may be considered necessary for the health of any member of the family, and decern: Find the expenses incurred in connection with this application payable out of the trust-estate, and remit the Auditor to tax the same, and to report."

WEBSTER, WILL, & RITCHIE, S.S.C.—MITCHELL & BAXTER, W.S.—Agents.

No. 95. THE CLYDESDALE BANKING COMPANY, Pursuers.—*Guthrie Smith*—*Real*.
DANIEL PAUL AND HIS TRUSTEE, Defenders.—*Burnet*—*Alison*.

Mar. 8, 1877.
Clydesdale
Bank v. Paul.

Fraud—Principal and Agent.—A stockbroker's clerk, who had authority to represent his principal on the Exchange, entered into speculative transactions for his own behoof in his principal's name, without his knowledge, but for which the principal was bound. In order to meet a balance due to the principal, resulting from the clerk's speculations, on settling day the clerk cashed a forged cheque at a bank, and applied the proceeds for that purpose. Held, that the principal was bound to repay the amount to the bank, in respect (1) that the money had been obtained by the fraud of his representative (though that was not have been sufficient of itself), and (2) that the principal had been bound by the fraud to that amount.

Opinion (per Lord Shand) that a person cannot retain a benefit obtained by the fraud of another, even though himself innocent of fraud, unless a valuable consideration has been given, and that this rule is not limited to cases in which the relation of principal and agent subsisted between the person benefited and the wrongdoer, but is of general application.

1st Division.
Lord Rutherford
Clark.
B.

SEQUEL of case reported, *ante*, vol. iii. p. 586.

The following narrative is taken from the Lord Ordinary's *dicta*. "Mr Paul carried on business in Glasgow as a stockbroker, and was a member of the Stock Exchange. It is proved that no person can transact business on the Exchange except a member, or a person representing a member. The brokers deal with each other as principals.

"For some years Mr Paul had in his employment a clerk named Martin. In consequence of age and infirmity Mr Paul became unable to conduct his business personally, and from April 1875 Martin was allowed to represent him on the Stock Exchange. He entered into transactions which his employer had not authorised. Though they were regularly entered in what is called the exchange-book, they were not carried to the contract-book in which the names of the customers or of the broker appear. The reason was that they were speculative transactions carried on by Martin, for which he had no order. It is enough that Mr Paul had no knowledge of these irregular transactions, though at one time he had suspicions of Martin's fidelity, and might have ascertained the truth by examining his exchange-book.

"At the settling-day, on 30th November 1875, the balance due to Mr Paul on all the transactions made in his name was upwards of £2000. But, apart from the irregular transactions, the balance was only £1000 more than £2000. The money was payable at one o'clock, and Mr Paul provided his clerks with a sum sufficient or nearly sufficient to meet the smaller balance resulting from the clerk's speculations.

"In order to enable him to meet the actual sum which was due on all transactions, Martin passed a forged cheque on the Clydesdale Bank, bore to be a cheque drawn by Dixon Brothers in favour of Paul, and forsores by the latter. Both signatures were forged. Being a crossed cheque, it was presented to the Royal Bank, who were the bankers of it. It was cashed, and the money, along with that which Paul had himself furnished, was handed to the secretary of the Stock Exchange to discharge the debt appearing on Paul's fortnightly balance-sheet. The Royal Bank, in settling with the pursuers, received credit for the contents of the cheque." No. 95.
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The forgery was discovered on the 9th or 10th of December. Martin absconded, and has not since been heard of."

The Clydesdale Bank raised this action against the Royal Bank and Paul, and the trustee on his sequestrated estate, for payment of £4800 (being the amount of the forged cheque). The Court having assailed the Royal Bank on 11th March 1876 a proof was led.

The Lord Ordinary pronounced this interlocutor:—"Decerns against defender Paul, in terms of the conclusions of the libel: Finds the pursuers entitled to expenses," &c.*

The defenders reclaimed, and argued;—The liability was alleged to arise either on agency or the benefit received by Paul. But an agent does not bind his principal by an act of fraud, which was not within his date, express or implied. As to benefit, there was authority that if a wrongful act was done in a man's interest and he got the benefit of it he was liable to that extent, but when a person committed a wrong in his own interest, and a third party happened to benefit by it, he did not incur responsibility.

The pursuers argued for the pursuers;—Paul having been bound to pay the money, and incurring severe penalties, and having got the benefit of the cheque, was liable for it to the bank.¹

NOTE.—(After the foregoing narrative)—The pursuers maintain, in the first place, that as the cheque was paid on the request of Martin, who held a substantial place in Paul's employment, Paul is liable to repay them. The Lord Ordinary is of opinion that this plea is not well founded.

But they urge, in the second place, that as Paul received the benefit of the cheque, inasmuch as the money was applied in discharging his liabilities, they are entitled to recover from him.

The answer of the defenders is this—They admit that Paul was liable for the debt arising on all the transactions; but they say that in a question between Paul and Martin the latter was the true debtor on the balance arising on the irregular transactions, that he discharged that debt, and that they have no concern with the source from which the money came, or the means by which it was obtained. They urge that they are in the same position as if Martin had borrowed the money and applied it in payment of his own debt.

In the opinion of the Lord Ordinary the pursuers are entitled to decree. The objection was raised by Martin as the representative of Paul. It is true that this was without his authority; and still more that he did not authorise the means which were employed. But the advance was not the less an advance on his behalf, and if he receives benefit from it he must, it is thought, be dealt with as if he had given previous authority to obtain it. The Lord Ordinary therefore thinks the pursuers are entitled to decree."

Authorities quoted.—*Scholesfield v. Templer*, March 9, 1859, 28 L. J., Ch. 652; *De Gex and Jones*, 429; *Eyre v. Burmester*, June 25, 1863, 33 L. J., Ch. 652, 4 *De Gex, Jones, and Smith*, 435; *Barwick v. English Joint Bank*, May 18, 1867, L. R., 2 Exch. 259; *Traill v. Smith's Trustee*, June 6, ante, vol. iii. p. 770.

No. 95. At advising,—

Mar. 8, 1877.
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LORD PRESIDENT.—I am of opinion that the interlocutor of the Lord Ordinary is sound. Paul carried on business as a stockbroker and member of the Stock Exchange in Glasgow. He was an old man, and required to do his business by deputy. The person chiefly in his confidence was a man named Martin. There is no doubt that Martin transacted almost the whole of Paul's business. He did so by the authority of Paul, and he was entitled, by the authority given him, to buy and sell shares, and to bind Paul personally for fulfilment of his bargains to the other members of the Stock Exchange.

The question whether a part of the bargains which Martin made was authorised by Paul would be of no consequence in the question of Paul's liability, because he had given general credentials to Martin, as his representative on the Stock Exchange, to transact with the other members. There is no doubt, therefore, that on 30th November 1875, when there stood against Paul in the Stock Exchange a balance of upwards of £7000, he was liable to make that good, though at that point of fact a great deal of it consisted of unauthorised and fraudulent transactions of his clerk Martin, entered into as a private speculation. Accordingly Paul, under the rules of the Stock Exchange, fenced by somewhat severe penalties, was obliged to make that balance good before one o'clock on the 30th of November. On the other hand, Martin also found himself in an embarrassed position, not knowing how to meet this large balance. If he had gone to Paul his frauds would have been discovered. This induced him to forge the cheque, which was cashed by the Royal Bank, and ultimately by the Clydesdale Bank. He forged the name of the drawers, Dixon Brothers, who were customers of the Clydesdale Bank, and also Paul's name, who was a customer of the Royal Bank. The Clydesdale Bank sue Paul and his trustee, on the ground that the money was obtained from them by the tortious proceedings of Paul's agent and representative Martin, and that the money so obtained was applied exclusively for the benefit of Paul. On the combination of these two facts the liability of Paul and his trustee is perfectly clear. No doubt an agent will not be held to be authorised to commit forgery or any other wrong; but if, in the course of doing his business of an agent, he does commit a wrong or a crime, and if the principal is benefited, then the principal is liable to the extent to which he is benefited. That is the plain and simple ground on which this case falls to be decided. It is a plain case in the law of principal and agent, and the doctrine which I have stated has been laid down long ago in Carey's work on Principal and Agent and other authorities, and has been recently illustrated in two instructive cases, one in Scotland and one in England—the cases of Traill and Barwick.

LORD DEAS proposed a declinature, as a shareholder of the Royal Bank, which was repelled. His Lordship then concurred.

LORD MURE concurred.

LORD SHAND.—I agree with your Lordships in thinking that the Lord Ordinary's interlocutor should be adhered to. The principle by which I apprehend the case must be determined is thus expressed by Lord Chancellor Campbell in the approbation of Lords Justices Knight Bruce and Turner in the case of Scholefield:—"I consider it to be an established principle that a person who

il himself of what has been obtained by the fraud of another, unless he is only innocent of the fraud, but has given some valuable consideration." No. 95.

This principle is not, in my opinion, limited to the case of employer and clerk, principal and agent. In many of the cases, including that of Barwick in Eng- Mar. 8, 1877.
Clydesdale
Bank v. Paul.

land and the recent case of Traill in this country, such relations have existed. The rule is not, however, limited to cases of that kind, but is of general application. A familiar illustration will be found in the reduction of settlements. Settlements are frequently set aside *in toto* which have been procured by the deed of a single individual but which confer large benefits on other parties. A guilty person may have no relation to the beneficiaries principally interested, the settlement is set aside entirely on the broad ground that it was procured by fraud, and that the persons benefited had given no valuable consideration. The case of Scholefield was not a case of principal and agent or master and servant, but is an illustration of the application of the general principle on which I desire to express my opinion. The same law was applied in the case of Eyre v. Burroughs, and determined the decision of that case; and the general principle involved was the subject of much discussion in a very important case, Gibbs v. British Linen Company, decided by me in the Outer-House in July 1875, which has not been reported.*

I think it is proved that Paul got the direct benefit of the fraud that was here committed. The forgery produced a sum which went directly through Paul's hands to the secretary of the Stock Exchange, and wiped out his liability to the effect of £4800, and saved him from being dealt with as a defaulter on the Stock Exchange. It is also clear that he was innocent of the fraud; and the question remains whether he gave any valuable consideration. I am of opinion he did not. The money procured from the bank by the forgery was paid into his account in the Stock Exchange, and no consideration was given in

the argument for Paul's trustee it was sought to bring up the case to one in which no valuable consideration was given. The argument was presented on the facts and the law. One is stated in the Lord Ordinary's note, where he states that the Lord Ordinary "say that in a question between Paul and Martin the latter was the true debtor on the balance arising on the irregular transactions, that he discharged that debt and that they have no concern with the source from which the money came." I am of opinion that this view is unsound. I do not think it was the true state of facts that Martin was the debtor in the sums which appear on the Stock Exchange statement for the week. That statement was prepared for the purpose of shewing Paul's obligations, and did shew them, and though it may be true that Martin was bound to relieve Paul of the £7242 there brought out, to the effect of £4800, the fact remains that the payment to the secretary of the Stock Exchange was in no proper sense Martin's debt, but Paul's. It was farther from the truth that it now appears by investigation that Martin had embezzled upwards of £1000 of Paul's funds, and it was said that Martin having paid £4000 to Paul's trustee it was so far discharging his debt to Paul. The answer is that this could not be the reality of the transaction. Paul did not even know that he was Martin's trustee, and there was no transaction between him and Martin on that footing—no admission or recognition of a debt due by Martin to Paul, and no discharge by Paul of part of that debt in respect of a payment to account of £4800.

* Reported *infra*, p. 630, as a footnote to this case.

No. 95. If that had been the true state of the facts it might have made all the difference in the result in this case, but a great deal would have depended on the special circumstances, the particular terms of the conversations between the parties, the special form and result of the transaction. There is no room for such a question here, and as no valuable consideration was given the pursuers are entitled to succeed.

THE COURT adhered.

RONALD, RITCHIE, & ELLIS, W.S.—J. W. & J. MACKENZIE, W.S.—Agents.

No. 95/1.

RICHARD GIBBS, Pursuer.—*Asher*.

THE BRITISH LINEN COMPANY, Defenders.—*Balfour*.

June 23, 1875.
Gibbs v.
British Linen
Co.

Security—Principal and Agent—Fraud.—A debtor to a bank transferred certain shares in a joint stock company to the bank absolutely, but retained security of a portion of his debt. He afterwards sold the shares and paid the price to the bank, who executed a transference to the purchaser, and granted a discharge *pro tanto* of the debt. In an action by the purchaser against the bank concluding for rescission of the contract of sale and for repayment of the price, on the footing that the bank were the true owners, and on the ground of fraudulent misrepresentation on the part of the seller, *held* by Lord Shand that although the debtor had induced the sale by fraud the bank were not liable to the fraudulent representations; (2) that the debtor being entitled to the shares did not do so as the agent for the bank, although they received the price; (3) that though the bank could not have retained the benefit of the seller's fraud gratuitously, yet as they gave onerous consideration by releasing their debt and discharging the debt *pro tanto*, they were not liable to make restitution of the price of the shares.

Outer-House.
Lord Shand.

This action was raised at the instance of one of a number of purchasers of shares to the amount in all of between £90,000 and £100,000, of the Phospho-Guano Company (Limited), to try the liability of the defenders, the British Linen Company, to take over the shares, and repay the price, which it was not due to the company had received.

The facts relating to the purchase and disposal of the price, and the transfer of the shares, are stated in the opinion of the Lord Ordinary, after a preliminary statement of the legal principles involved are also there fully stated it is unnecessary to make any preliminary statement.

LORD SHAND.—The pursuer of this action, Mr Richard Gibbs, of St Andrew's House, Cornhill, London, in April 1872 purchased, through Mr Watson acting as broker for Messrs Peter Lawson and Son, 250 fully paid British Linen Company shares at £10 each of the Phospho-Guano Company, Limited, at par, making a total price of £2500. In the same month the purchase was completed by payment of the price and delivery of a transfer of the requisite number of shares, and by William Spence and William Paterson, bankers in Edinburgh, in which the pursuer was registered as a shareholder of the company, and of the usual certificate of ownership of the shares. In July 1872 a dividend at the rate of 10 per cent was declared and paid by the company, and the pursuer received the amount corresponding to his shares. He avers that in February 1873 he became aware that certain representations which had been made by Messrs Lawson, and which had induced him to make his purchase, were fraudulent, and also that the shares at the time of the sale had belonged to the defenders, the British Linen Company, bankers in Edinburgh, for whom Messrs Lawson had acted as agents in the sale. Accordingly, by letter of the 6th February 1873, addressed to the defenders, he called on them to refund him the price he had paid, and to take back the shares, but this demand was declined by letter from the defenders' law-agents on the following day.

The object of this action is to enforce the demand thus made. The pursuer seeks to rescind the transaction on the footing of its having been entered into

tween him and the defenders, and he asks for decree for the price paid by him for the shares and stamp duty of transfer, amounting to £2512, 12s. 6d., the interest from the date of his purchase, and at the same time offers restitution of the shares, the market value of which is now about £1, 10s. per share, and repayment of the dividend received by him in July 1872.

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It appears from the evidence that the shares purchased by the pursuer were a part of a quantity of 10,000 B shares of the company, almost the whole of which were disposed of through Mr Westgarth, apparently on the same representations by the Messrs Lawson which induced the pursuer to make his purchase; that these shares had been all held in the names of Messrs Spence anderson, two of the officers in the defenders' service, on behalf of the defenders, whom transfers were executed in favour of the various purchasers; and that the price of the shares sold, which amounted to between £90,000 and £100,000, was received by the defenders from Messrs Lawson and Son in the same way as in the case of the pursuer's purchase. Certain of the purchasers of these other shares appear to have contributed to the expense of trying the present action, and it is evident that besides important legal questions which have been raised for decision the pecuniary amount at stake, so far at least as the defenders are concerned, is very considerable.

The legal grounds on which the pursuer rests his claim are—(1) That he was induced to purchase the shares acquired by him by false and fraudulent representations made by the Messrs Lawson, and that although they appeared in the transaction as sellers, they were merely agents for the defenders, the principals in the transaction, who were the parties truly interested in the shares, and who willingly granted the transfer through their officials, in whose names the shares were held for their behoof, and received the price; and (2) that even if the pursuer has failed to shew that the Messrs Lawson acted as the defenders' agents in the transaction, yet the purchase having been procured through fraud, the defenders, who received the price, are not, in the circumstances disclosed in evidence, entitled to retain the benefit so gained.

The defenders, in answer to these grounds of action, deny that the Messrs Lawson acted as their agents in the transaction. It has been proved, and they admit, that the money received as the price of the shares was paid over to them by the Messrs Lawson; but they deny that this payment was the result of a transaction in which Messrs Lawson acted in any way as their agents, and explain that Messrs Lawson and Son having sold the shares, which were their own property, paid the price received towards the partial extinction of a large debt by them to the defenders. They explain farther, that the shares had been transferred to the names of two of the bank's officials as a security for payment of Messrs Lawson and Son's debt, and that this security was released, and a transfer of the shares executed in reliance on Messrs Lawson and Son applying the price received towards reduction of their debt. In answer to the second ground of the pursuer's claim, it is maintained that even assuming Messrs Lawson and Son to have been guilty of fraud, which is not admitted, the defenders cannot be required to repay the money received by them in ignorance of any fraud, because the payment was received for valuable consideration given in the release of the security which they held over the shares, and in the discharge of Messrs Lawsons' debt to them, to the extent of the sum received.

The estates of Messrs Lawson and Son were sequestrated in February 1873, and have yielded a dividend of 3s. or 3s. 6d. per pound.

The first question to be determined is, whether the pursuer was induced to enter into the purchase by false and fraudulent representations made to him by Messrs Lawson, who were the parties with whom he treated. The pursuer denies any communication of any kind with the defenders, and believed that he was transacting entirely with the Messrs Lawson through their broker, Mr Westgarth.

He had no personal communication with the Messrs Lawson, and the representations complained of were contained in certain documents which were obtained from them, and which, it is clear, were laid before him in the knowledge and with the authority of the Messrs Lawson for the purpose of inducing his purchase. Mr Westgarth, in his evidence, explains that he had communica-

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tions with two of the younger partners of the firm of Peter Lawson and Son, viz., Mr Henry Lawson and Mr George Lawson, both of whom resided in London, and conducted the business of the firm there, and also acted as managers of the Phospho-Guano Company, Limited. He states that when these gentlemen asked him to undertake the sale of the shares for their firm he explained it would be necessary to have a statement prepared to be laid before intending purchasers, and it was then arranged with them that documents should be prepared to be used in that way in order to effect sales. Accordingly, from the information which had been given to him verbally by Messrs Lawson, he prepared the draft of a letter from them to himself and relative memorandum, which he submitted to them for their revision and signature, and these documents having been revised and signed, were given to him with copies of the original prospectus of the company, and the reports by the directors to meetings of the company, and relative balance-sheets of June and December 1871, that he might use them in endeavouring to effect sales of the shares, which at that time do not appear to have been in demand by the public. These documents were in the way submitted to the pursuer, and there appears to be no doubt their contents were the inducing cause of his purchase.

The representations of which the pursuer now complains are contained partly in the original prospectus of the company, and partly in the reports and balance-sheets, and also in Messrs Lawsons' letter, which is dated 13th March 1872, and relative memorandum.

[His Lordship then reviewed the evidence relied on as shewing that the representations complained of were false and fraudulent, and concluded on this branch of the case as follows :—] It is possible to suppose that the Messrs Lawson might have been able to offer explanations to shew that they believed the truth of the reports and balance-sheets ; but they were not examined. The inference to be drawn from the fact that the defenders did not call them as witnesses is, that such explanation could be given ; for of course if the defenders could have satisfactorily disproved this part of the case they would have succeeded on that ground, and any inquiry into their transactions with Messrs Lawson or the relations subsisting between them would have been excluded. No explanation occurs to me, or has been suggested, which could lead to the inference that Messrs Lawson could have believed that the company had realised the profits represented ; and it is a very strong circumstance against the idea that they entertained that belief that in January 1873, as appears from Messrs Lawson's letter to Mr Syme of the 17th, they proposed again to pay dividends out of profits, knowing that these profits had not been earned,—a proposal which was at once rejected by the directors and Mr Guild, as appears from Mr Guild's letters at the time. The Messrs Lawson may have believed, and I think there is evidence in their letters to shew they did believe, that the company was in possession of a business which was sound, and which, under proper management, would succeed ; and they probably deluded themselves into the belief that great success would attend their future operations as would in a short time place the company in as favourable a position as the reports represented. But the evidence leads, I think, to the necessary conclusion that they knew that the reports and balance-sheets did not shew the actual state of the company, and that, to a most material extent, the profits represented as realised had not been earned ; and it is clear, therefore, that the representations on which the pursuer proceeded in making his purchase must, in the present question, be taken to have been false and fraudulent.

[His Lordship then dealt with the averment of knowledge on the defence part of the false nature of the statements contained in the reports and balance-sheets, and that the defenders were aware that these documents were to be used in order to induce parties to purchase the shares, and having stated the grounds on which he held that these averments were not proved, he proceeded :—The case must therefore be taken on the footing that the representations complained of, made by the Messrs Lawson, were not false to the knowledge of the defenders, and that, on the contrary, those in the management of the bank believed the Phospho-Guano Company to have been and to be then a sound

sperous, and that the dividends had been paid to the shareholders out of the profits actually earned. Even on this assumption, however, the pursuer maintains that the representations made by the Messrs Lawson affect the defenders and render them liable for his present claim. The Messrs Lawson, he alleges, are simply the defenders' agents in the sale. He pleads that the defenders, as principals in the transaction, cannot retain a benefit gained by the fraudulent representations of their agents.

It is said the defenders were principals in the transaction because they were the owners of the shares, the price of which they received in that character; alternatively, that they held the shares in security, knowing their debtors to be hopelessly insolvent, and that the Messrs Lawson having been put forward as allowed to realise the shares with their authority and consent, and only on condition that the prices should at once be paid over to them, must be regarded as their agents in the sale.

His Lordship then went very fully into the evidence, which had occupied several days, and stated the grounds on which he came to the conclusion (1) that the Messrs Lawson and not the bank were the owners of the shares sold, that the bank held the shares in the names of certain of their officials in security only of a debt of large amount due to them by Messrs Lawson, and (2) that the Messrs Lawson were not agents of the bank in selling the shares. He proceeded:—This being the nature of the transaction, the Messrs Lawson are not in any sense the agents of the defenders in effecting the sales of the shares which took place. The transactions of sale were entirely between the pursuer and other purchasers, and Messrs Lawson and Son, the owners of the bank. There was no privity of contract between the pursuer and defenders, no legal relation was created or subsisted between them in the transaction. In fact that the defenders granted the transfer by which Messrs Lawson and completed their transaction with the pursuer is of no materiality, for it is a veryday occurrence that a sale of shares by one person is implemented by a transfer granted by another. This is so common that the ordinary printed forms of transfer contain a note in which attention is drawn to the circumstance that in the case of a sub-sale the full price that has been paid between the parties must regulate the stamp-duty. The transfer may come from a party other than the seller, either because the seller has acquired his right to the shares by an intermediate transaction, or, as in the present case, because the shares, though the property of the seller, have in the meantime been held by a third party in security, but on an absolute title. The real and only transaction in which the defenders were parties was an agreement with Messrs Lawson and to discharge their security for payment of the price to be received for the shares, which should be applied in discharge *pro tanto* of the debt due to them. It is having been the state of the facts and the nature of the relations between the parties, I am of opinion that the pursuer has no legal claim against the defenders on the ground of agency on the part of Messrs Lawson. According to the invariable practice, securities granted over heritable property contain a clause of sale. If the debt be not paid the creditor after due intimation may sell the property, and if he be guilty of fraudulent misrepresentations in the sale he will be responsible for the consequences; or if he sell the property through an agent who is guilty of fraud he cannot retain the benefit of the contract.

But if, in place of selling the property himself, he allows his debtor, the proprietor, to effect the sale, the legal relations and consequences are entirely different. The contract of sale is then made between the purchaser and the debtor; and the only agreement to which the creditor, as holder of the debt, is a party, is a contract between him and his debtor to release the debtor for payment of his debt. It appears to me to make no difference in principle that the debt is so large as to absorb the whole price to be received for the subject of the security. Neither in the case in which the creditor stipulates that he shall receive the whole, nor in that in which he stipulates for only a portion of the price as a condition of releasing the security, is the debtor his agent in transacting the sale. It would be a remarkable result that if the debtor had received and paid one-half of the sum realised to the security-holder and the

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No. 95/1. other half to another unsecured creditor, the security-holder would be liable to claim of repetition on the ground of agency in the sale, while the unsecured creditor was liable to no such claim; nor can the true nature of the transaction or the relation between the parties, be affected by such considerations as the probable ultimate consequences to the debtor in depriving him of a greater or less part of his property. There is no principle for making a distinction on such ground. The difference, in fact, is clear and well defined between the case made by a creditor himself of the subject of his security, in which case he is the contracting party in the contract of sale, and a sale by the owner, in which case he is the contracting party, the contract with the creditor being one for the lease of his security only. In this view, therefore, and as the sale was made by Messrs Lawson and Son, the owners of the shares, I am of opinion that the pursuer fails in his argument on this part of the case.

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The remaining ground on which the pursuer maintains the action is, assuming the Messrs Lawson were not in any sense the defenders' agents, the defenders cannot take the benefit of the fraud committed on him by raising the price of the shares. This ground of action involves the right of the pursuer to follow the money which he paid to Messrs Lawson and Son, which was paid by them to the defenders, but which, so far as the pursuer concerned, might have been paid by Messrs Lawson to any of their creditors. The argument was supported by reference to the cases of *Wardlaw v. Mackenzie*, 21 D., 940; *Bridgeman v. Green*, 2 Vesey senior, 626; *Huguenin v. Bas*, 14 Vesey junior, 273; and *Scholefield v. Templer*, 1859, *Johnson's Reports*, 155, and *Law Journal*, vol. xxviii. (Chancery), 452. The circumstances of the decision in this last case was appealed was not noticed at the discussion; the decision was affirmed with a variation, and is reported in vol. iv. Deane and Jones' Reports, p. 429. The principle established by these authorities appears to me plainly to fall short of what is required to support the pursuer's argument. It is a recognised principle both in the law of this country and that of England that a gratuitous benefit conferred or obtained by one person and gained through the fraud of another cannot be retained by the person benefited, even though innocent of the fraud. The most familiar application of this principle is the case of legatees or beneficiaries taking under a settlement which has been procured by fraud, to which they were no parties, and of which they were entirely ignorant. They cannot retain a benefit so gained. But this principle is throughout the authorities limited to the case of benefits conferred or received gratuitously, and does not apply where a valuable consideration has been given. The rule with its limitations is stated by the Lord Chancellor affirming the decision in the case of *Scholefield v. Templer* thus—"I consider to be an established principle that a person cannot avail himself of what has been obtained by the fraud of another, unless he not only is innocent of the fraud but has given some valuable consideration." If the person resisting the claim of restitution is not only innocent of the fraud alleged, but has given some valuable consideration in the transaction, the person defrauded has no remedy against him.

The position of the defenders in the present case is that of parties not innocent of the fraud which was committed, but who gave valuable consideration for the money they received; for they granted not only a release of the security but also a discharge *pro tanto* of the debt due to them. If the shares which formed the security had not been so released, they might have been to advantage by the defenders through their own broker, and no question would have been raised by the purchaser; and the defenders could not be restored to the position in which they were in April 1872 in a question with Messrs Lawson and Son, their debtors, by debiting them again with the amount of the pursuer's claim when it was intimated to them nearly a year after, in February 1873.

The cases of *Eyre v. Burmester* and others, April 1862, 10 House of Lords Cases, p. 90, and *Eyre v. Burmester*, April and June 1863, 33 *Law Journal* (Chancery), 652, and 4 De Gex, Jones, and Smith, p. 435, may be usefully read with reference to the various points urged for the pursuer. I had no

neft of any argument on these cases (which were not cited in the discussion), No. 95/1. I have no doubt the judgments in the House of Lords have an important aring as authorities in the present case. The first of these cases, which was appeal against a decree of the Lord Chancellor of Ireland, illustrates the rule at a gratuitous benefit, obtained through the fraud of a third party, could not retained even by one innocent of the fraud. A banking company agreed to id a considerable sum on the security of estates in Ireland, already mortgaged, ignorance of the existence of the mortgage. Before the whole of the money as advanced they became aware of the existence of the mortgage, but made e full advance on their debtor promising to procure a release of it. John dleir, the debtor, afterwards induced the mortgagee to release his security in change for substituted securities consisting of railway shares, and other docu- nts, which were all forged and worthless. It was held, reversing the decision the Court of Chancery in Ireland, that the mortgagee's right subsisted in a estion with the bank, because it appeared that the bank had really not given y valuable consideration after the release of the mortgage and in reliance of it, they having advanced the money before the release was granted, and not on : faith of the release actually executed. Lord Cranworth puts the case thus : f indeed the release to Sadleir had preceded the advance of the money, and if t advance had been made on the faith of the title which the release gave or eared to give to John Sadleir, the case would have been different. The k would then have altered its relation with John Sadleir, relying on what : in fact the representation by the appellant under his hand and seal that so as related to his security the title of John Sadleir was clear, and it would e been no answer to the bank by the appellant to say that his execution of deed had been obtained by means of a gross fraud practised on him'—(Rep., 110) ; and Lord Chelmsford, p. 115, referring to the bank, says : "They did advance the money upon the release itself, but upon the faith and expecta- n that a release would be executed. They relied upon John Sadleir and not n any agreement with Eyre."

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n the succeeding case, which is perhaps of most importance in the present stion, some of the same facts occurred, but with reference to a different pro- ty which was included in the two mortgages already noticed. It appeared t the banking company who made the large advance already referred to,— ng still in ignorance of the fraud which Sadleir had committed in the trans- on for the release of the security of the prior mortgagee,—on the application Sadleir concurred for their interest in a farther mortgage of certain of the es held by them in security granted to other parties for a sum of £90,000, hich £36,000 was presently advanced, on the arrangement that in return their concurrence in this new mortgage they should receive £35,000 of the ance in payment *pro tanto* of the money due to them, which sum they ally received, while Sadleir obtained the balance of £1000. The estate was rwards sold by the last mortgagees, who applied the balance of the purchase- ey in payment of their own debt. Thereupon the mortgagee who had been eed to release his security on receiving the substituted securities, consisting rged and valueless documents, sought to recover from the bank the £35,000 ch they had received in cash when they concurred in the subsequent mort- e under which the estate was sold. The Master of the Rolls, regarding the : as having been substantially decided by the decision in the first case, ted decree giving the relief asked. His opinion is reported at length in the r Journal. He seems to have regarded the mortgage for £90,000, though ted by Sadleir, the owner of the estate, with the concurrence of the bank their interest as security-holders under their mortgage, as being in substance de by the bank, the purchase-money having been really received by them, ith the exception of £1000 which the bank allowed John Sadleir to retain." s decision was, however, also reversed by the Lord Chancellor (Lord West- f) on appeal ; and not only the judgment, but many of his Lordship's rrvations, apply directly to such a case as the present. After referring to view stated by the Master of the Rolls that the case was decided in principle the former case, his Lordship proceeded—"No such consequence follows

No. 95/1. from the decision of the House of Lords, or the principles on which it was founded. The House had not to consider the effect of any dealing subsequently to and on the faith of the release between John Sadleir and a purchaser of valuable consideration without notice." And after referring to the view taken of the transaction, as if it were a sale by the bank, who got the benefit of the advance, he goes on—"That, however, as I have also said, is not the nature or effect of the deed of December 1855. The deed, a copy of which I have before me, is a simple mortgage by John Sadleir to the Messrs Backhouse, in which the bank joins merely for the purpose of postponing its own security to the security of the Messrs Backhouse. The deed proceeds upon a contract of borrowing by John Sadleir of the Messrs Backhouse, and upon an agreement by the bank to assist John Sadleir in that transaction by postponing its own security to the extent of the property comprised in the security given by this deed to the Messrs Backhouse.

"The money, therefore is simply money received by John Sadleir and given over by him to the bank, his creditor, *bona fide* so far as the bank was concerned. The bank had no knowledge of the fraud which had been practised in obtaining the release at the time when the mortgage to the Messrs Backhouse was made, and at the time when the £35,000 was received.

"It was ingeniously put in argument by Mr James that the money obtained by the use of a fraudulent instrument, and that the person who suffered by that use of the fraud which had been practised upon him had a right to pursue that which was obtained by means of that fraud. That might have been perfectly right if the money had been still in the hands of the Messrs Backhouse, or in the Incumbered Estates Court. The plaintiff might then have had a right to say that he was still the prior incumbrancer; and although he could not have recovered against the Messrs Backhouse, as purchasers for valuable consideration on the faith of his release, anything to the prejudice of the security, yet he might have pursued, subject to that right, the whole of the property that was comprised in the release and also in the mortgage to the Messrs Backhouse.

"But that is not the transaction. The plaintiff admits that he cannot follow the estate. He admits that he has no claim against the Messrs Backhouse, and he seeks to have repaid to him money which was *bona fide* received by the bank from its debtor John Sadleir. The plaintiff might just as well have asserted a right to reclaim from any other creditor of Sadleir, his wine-merchant or his tailor, money that had been paid by John Sadleir to such creditor. The money was borrowed by John Sadleir from the Messrs Backhouse, and the money was *bona fide*, so far as the bank was concerned, paid by John Sadleir to the bank, and there is no possible relation in which the bank stands to the plaintiff which entitle the latter to recover any portion of that money, . . . and when the question of the fraudulent dealing is imported into the case, the answer to it is, that, at the time when the money was received, the bank, who received it being *bona fide* creditors of John Sadleir, knew nothing at all with regard to the fraud of Sadleir or the fraudulent use made of it by him."

These observations appear to me to apply almost in terms to the present case, in which, as I have said, the defenders, being *bona fide* creditors of the Messrs Lawson, and knowing nothing of the fraudulent representations which induced the pursuer to make his purchase, received the price which he paid, from the debtors, for the valuable consideration of a release of their security and discharge *pro tanto* of the debt due to them.

As the result, I shall find by judgment that the pursuer has failed to establish facts inferring liability on the part of the defenders for any of the claims set out in the conclusions of the summons, and therefore assolvie the defenders from these conclusions, and find them entitled to expenses.

HILL & FERGUSSON, W.S.—WEBSTER & WILL, S.S.C.—Agents

HENRY SHAW, Pursuer.—*Mair*.
DAVID MORISON, Defender.—*R. V. Campbell*.

No. 96.

Mar. 9, 1877.

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Morison.

Statute—Act Abolishing Imprisonment for Civil Debts of Small Amount, 1835 and 6 Will. IV. c. 70), sec. 1—Interest.—A person who had borrowed £10, of which 15s. was deducted by the lender as interest in advance, granted a promissory-note for the £10, and by a separate writing bound himself to repay that in weekly instalments of 10s., and in the event of failing for two successive weeks to pay these instalments then to pay to the lender “an additional sum of for each pound, or part of a pound, of the total amount of said bill, and that for every week’s failure, till such time as” the lender proceeded to recover as otherwise provided for. *Held* that these additional payments were to be regarded as interest in the sense of the “Act abolishing, in Scotland, imprisonment for civil debts of small amount,” 1835, which enacts, “that it shall not be lawful to impose on any person or persons on account of any civil debt which shall not exceed the sum of £8, 6s. 8d. sterling, exclusive of interest and expenses thereon.”

THIS was an action of damages for wrongous imprisonment at the instance of Henry Shaw, coachman, Edinburgh, against David Morison, manager of the “Edinburgh Liberal Loan Company,” 77 West Port, Edinburgh. 2^d DIVISION.
Ld. Craighill.
I.

The pursuer along with three other persons had granted a promissory-note in these terms:—“£10.—Edinburgh, 31st March 1873.—One day after date we promise to pay Mr John Elder, treasurer of the Edinburgh Liberal Loan Company, at the office No. 77 West Port, Edinburgh, the sum of ten pounds sterling for value received.”

For the £10 for which this promissory-note was granted £9, 5s. only was paid over, the remaining 15s. being retained as forehand interest.

On the same date the following additional letter of obligation was signed by the parties to the promissory-note:—“Mr John Elder, 77 West Port.—Sir,—We have this day accepted a bill drawn by you upon us for £10, payment of which you have agreed to receive in weekly instalments of 10s., commencing on 7th April 1873, and continuing till the whole be paid up. But, in the event of our failing for two successive weeks, or for three weeks altogether, to call upon you and pay said instalments, you are to be entitled to recover from us, at any time thereafter, the whole sum, or balance, due on the said bill, with the expenses thereof, and the same were now payable in full. And we have also agreed to do, in the event of such failure, an additional sum of 2d. for each pound, or part of a pound, of the total amount of said bill, and that for every week’s failure, till such time as you proceed to recover from us as aforesaid; and which additional sum you may either retain from the first instalments afterwards placed by us in your hands, or may debit us with at any other time.”

As the instalments not being duly paid a small-debt summons was, on 1st March 1876, served on the pursuer at the instance of the defender, and had succeeded John Elder in the management of the Edinburgh Liberal Loan Company, having annexed the following account:—
Mr Henry Shaw, coachman, Gilmour Park,

“To David Morison, 77 West Port, Edinburgh.

To amount of bill, dated 31st March 1873, drawn by me on and accepted by you, and payable one day after date,

Less paid to account,

£10 0 0
1 14 0

Carry forward, £8 6 0

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Brought forward, £8 6 0
 "To sum due for 100 weeks since last payment, at the rate of 2d. per pound on amount of said bill, in consequence of your failure to pay same regularly by weekly instalments, all in terms of your back-letter to me, dated 31st March 1873.—Restricted to twelve weeks, 1 0

£9 6

On this summons decree in absence was pronounced against pursuer on 5th April 1876, on which decree he was subsequently incarcerated.

The pursuer, founding on 5 and 6 Will. IV. c. 70,* pleaded, *inter alia*—The pursuer's imprisonment having been for less than £8, 6s. 8d. principal the same was illegal.

The defender pleaded;—The pursuer's averments are irrelevant, insufficient to support the conclusions of the action.

The Lord Ordinary, on 13th December 1876, pronounced this interdict:—"Finds (1) that the sum of £1, covered by the decree upon which pursuer was imprisoned, and which is set forth in the account decreed as 'sum due for 100 weeks since last payment, at the rate of 2d. per pound on amount of said bill, in consequence of your failure to pay same regularly by weekly instalments, all in terms of your back-letter to me, dated March 1873, restricted to twelve weeks,' is interest, in the sense of first section of 5th and 6th Will. IV. cap. 70; and (2) that the said sum of £1 being deducted from the £9, 6s., the amount of the debt contained in the said decree, there remains a sum less than that for the recovery of which, according to the provisions of said statute, execution by imprisonment may lawfully be employed: Therefore repels the first plea in law for the defender, and appoints the cause to be enrolled for further procedure," &c.

The defender reclaimed, and argued;—(1) The 2d. a week charge was a consequence of failure to pay the instalments when due was not interest but penalty.¹ (2) If not so, then the 2d. a week was a pure contract accruing to the principal, but arising out of a separate condition of contract. While it was exacted the creditor in the obligation could sue for the principal, and though it was exacted, interest might be charged as well.²

Argued for the pursuer;—This so-called penalty of 2d. a week was interest in the sense of the usury laws. It was money paid for "forbearance" to exact or sue for the principal sum.³

LORD JUSTICE-CLERK.—The question raised in this case is an important one for this company and for loan companies of a like nature, and still more so for the class which are induced to deal with such companies. It depends entirely on the construction of the Act of 1835.

* 5 and 6 Will. IV. c. 70, "An Act for abolishing, in Scotland, imprisonment for civil debts of small amount," 1835, enacts, sec. 1, "that from after the 1st day of January 1836 it shall not be lawful to imprison any person or persons on account of any civil debt which shall not exceed the sum of £8, 6s. 8d. sterling, exclusive of interest and expenses thereon."

¹ Craig v. M'Beath, July 3, 1863, 1 Macph. 1020, 35 Scot. Jur. 587.

² Borthwick v. Lord Advocate, Dec. 5, 1862, 1 Macph. 94, 35 Scot. Jur.

³ Hume's Com. i. 501.

on whether or not this sum of £1 is or is not of the nature of interest. Now, No. 96. take it that interest is what has been described in the usury laws as the sum per cent per annum taken for the "forbearance" to exact or recover a sum lent, Mar. 9, 1877. that is, a payment for the use of money lent. I do not know that a better Shaw v. definition could be given of it. The question is whether this payment of 2d. a Morison. week falls under it.

I do not comment on the nature of the transaction out of which this question arises. It was legal no doubt. For the usury laws being repealed it is open to lenders to make any conditions they please as to the repayment of a loan of money. It is impossible not to observe what the character of the transaction really is.

Four persons unite to grant this bill, admittedly for the benefit of one of them. Then they grant what is called a back-letter, but what is really an additional obligation bearing reference to the bill. It is in these terms—(Reads as quoted, *supra*, p. 637).

What, then, is the effect of that document? Now, the first thing we are told is that the whole sum of £10 was never advanced. That the whole amount of advance was £9, 5s., fifteen shillings being deducted as interest for the stipulated period. Then there is the provision that while the whole sum of £10 is to be repaid by instalments of 10s. weekly, if failure is made in payment of any of the instalments 2d. a week per £1 is to be paid in addition on the whole £10. It is the same as saying that a sum equivalent to £7, 10s. per cent per annum be taken off in the first place, and then if there is any failure in the repayment of instalments a sum at the rate of forty-three per cent per annum more is added during the period of the failure. I can quite understand that loan companies, who deal with persons having no visible means, are obliged to insist on a wide margin of profit, and to adopt very stringent terms in their transactions to secure themselves against loss. But still, however they may put it, the real question is, whether such sum stipulated to be paid in the event of failure is interest or not—is money to be paid to them for forbearance to sue for or recover money lent. I am unable to see what else it can be called. It is not a duty: that is clear. It is something to be paid, if the use of the money lent is continued over a certain period. I doubt very much whether they could avoid interest over and above on the instalments not paid. Had this been the case under the usury laws there would have been no doubt whatever that the transaction would have been void under their provisions. It would have been one of the most palpable devices to get over the statute of Queen Elizabeth.

That being the case, this sum of £1 contained in the decree is interest, and the remainder of the sum decreed for is of such amount that recovery by interpleader is incompetent under the statute of 5 and 6 Will. IV. I am therefore of opinion that the Lord Ordinary's interlocutor should be adhered to, and the case remitted to him for further procedure.

LORD ORMDALE.—This case resolves into the question whether the sum of £1 is or is not, to be dealt with as interest and nothing else. The best way of settling this question is by putting another. If it is not interest, what is it? According to any view I can take of the document, which has been somewhat inaccurately called a back-letter, nothing in the way of interest can be claimed if not the £1. Neither has the defender attempted to claim any other sum, and I do not think he could do so successfully. If, therefore, the sum

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referred to is not to be held as being interest the result would be that the defender neither made, or could make, any claim for interest at all. It is not expenses. It is not a penalty. And it is not damages, except in so far as interest, may be held to be of the nature of damages.

Mr Campbell for the defender referred to two cases as authorities for the view that the £1 was a penalty. But they are not, I think, in point. In both of them the contract was *ad factum prestandum*, and there was a penalty for non-performance. But the analogy does not hold when the contract is one of loan, and the debtor's obligation is to repay money. What is the £1 I again ask? It is just interest payable by the one party for the use he has had of money belonging to the other, and in respect of the forbearance of that other to enforce payment of money owing to him. The loan company practically said, we were under no obligation to abstain from enforcing our debt, but so long as we don't get it payment of 2d. per pound per week must be made. What, then, is that 2d. per pound per week but just interest according to the universally accepted definition of what that is.

The result is, therefore, that after interest is deducted the debt, for payment of which the pursuer was incarcerated, is reduced below £8, 6s. 8d. of principal, and consequently the incarceration was illegal.

LORD GIFFORD.—I am of the same opinion. The question is a very general one, and I treat it as such, and have looked at the principle on which it rests carefully as I can. The Act of William IV. says,—“It shall not be lawful to imprison any person or persons on account of any civil debt which shall not exceed the sum of £8, 6s. 8d. sterling, exclusive of interest and expenses thereon.” It is admitted that exclusive of the sum of £1, charged against the pursuer in terms of the letter of obligation relative to the bill, the debt on which the pursuer was imprisoned was less than £8, 6s. 8d.; and the question is whether this sum of £1 is, in the sense of the statute, interest, or whether it is itself a civil debt, which is not interest, and to recover which, if it had been above £8, 6s. 8d., imprisonment would be competent.

It is very seldom that questions like the present now arise, but such questions did arise very frequently under the old usury laws. Very often the question under the old laws relative to usury was, whether a sum or penalty stipulated for by the creditor was or was not interest, for if it was interest or a cover for interest or a device to levy interest under some other name, then, and in these cases, the exaction was struck at by the usury laws. Now, the case now drives us back to the principles which ruled the decisions under these laws. The question is not, as it would have been when these laws were in force, is the sum due? but, is it interest or not? For though interest may now be stipulated to any amount, it is not legal to imprison for it by adding it to make up the sum in a civil debt—that is, it is not legal to add interest to the principal to make the sum due above £8, 6s. 8d. Now, looking at the reality of the transaction in the present case I have come to the conclusion that this sum of £1 is not of the nature of interest, and I think it would certainly have been held to have been interest if the question had arisen under the old law prohibiting usury. Interest is defined to be a sum paid for forbearance to exact the principal. I think this £1 is really paid for forbearance to exact the principal sum in the bill. No doubt the terms used in the letter above referred to are “till such time as you proceed to recover from us as aforesaid.” But a forbearance

proceed to recover" is just a forbearance to sue or to exact. I cannot take the intimation that this is not a sum paid for forbearance, but a penalty for failure in paying the weekly instalments. The substance and real meaning of the transaction is to be looked at, and the substance is really this—"If you fail in any of the weekly instalments we are entitled to recover, and so long as we choose to forbear to recover you are to pay us 2d. per pound per week for the forbearance." The spirit of the enactment of Will. IV. is just the spirit of the old laws, and the principles on which they were interpreted are applicable. A creditor, therefore, is not entitled to increase by any device his principal debt so as to avail himself of the very stringent weapon of imprisonment in order to recover.

THE COURT adhered, and remitted the cause to the Lord Ordinary for further procedure.

D. HOWARD SMITH, L.A.—ALEXANDER WYLIE, W.S.—Agents.

WATT, PHILP, AND COMPANY, Petitioners.—*Alison*.

No. 97.

Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), sec. 67—Error in appointing Meeting—New Meeting ordered.

Mar. 10, 1877.
Watt, Philp,
and Co.

The estates of Watt, Philp, and Company were sequestrated by the Sheriff of Lanarkshire on their petition, with concurrence of a creditor. The 67th section of the Bankruptcy Act provides that "the Lord Ordinary or the Sheriff, by the deliverance which awards the sequestration, appoint a meeting of the creditors to be held at a specified hour on a specified day, being not earlier than six nor later than twelve days from the date of the Gazette notice of sequestration having been awarded," for the purpose of electing a trustee.

1st DIVISION.
B.

In the deliverance awarding sequestration, the Sheriff, *per incuriam*, intimated the meeting to be held on 6th March, being only four days notice could be given in the Gazette, the first publication of which was on 2d March.

The petition of the bankrupts and of the concurring creditor the Court appointed another day of meeting, and appointed intimation thereof in the intimation.

WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

ALEXANDER MUIR MACKENZIE, Bart., Pursuer.—*M'Laren—Keir*.

No. 98.

JOHN ORD MACKENZIE, W.S. (Matthew Sharpe's Trustee), Defender.—*Fraser—Gloag*.

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FRANCIS GORDON AND ANOTHER (William Sharpe's Trustees), Defenders.—*Kinnear—G. R. Gillespie*.

SIR THOMAS KIRKPATRICK, Bart., Defender.—*Balfour—Low*.

WILLIAM KIRKPATRICK RILAND BEDFORD, Defender.—*Trayner*.

Session—Destination—Partial Revocation of Conveyance.—An heir of entail in possession having in 1835 obtained a judgment declaring that the entail was null and void to prevent gratuitous alienation, died in 1845, leaving (1) a *mortis causa* heir, whereby he disposed of the estates to his brother A in liferent allanarly,

Authorities quoted.—Gray v. Cockburn, Feb. 2, 1844, 6 D. 569, 16 Scot. Jur. 515; Love v. Anderson, July 17, 1844, 6 D. 686, 16 Scot. Jur. 324; Foubister, petitioner, Oct. 20, 1869, 8 D. 1016, 18 Scot. Jur. 522; Kellock v. Anderson, Dec. 14, 1875, ante, vol. iii. 239.

No 98. and the heirs of his body in fee, whom failing, to his brother B in life; allanarly, and the heirs of his body in fee, whom failing, to the heirs of the body of his deceased sister, whom failing, to his sister D and the heirs of her body; whom failing, to his "nearest heirs and assignees whomsoever;" and (2) a deed of restriction of subsequent date, whereby he revoked, cancelled, and annulled "the said destination and order of succession in so far as regards the person called and appointed to succeed after my brothers therein named;" declaring to be his intention "that the destination and order of succession in the said trust-disposition and settlement shall not take effect beyond my said brothers and the heirs of their bodies, and that the person or persons further called to the succession shall have no claim to the same, but shall be entirely excluded therefrom, and are hereby excluded accordingly." He reserved a right to name a new series of heirs, and declared that his trust-settlement, in so far as it was restricted, should remain in full force and effect.

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After the death of A and B, who survived the trustor but left no issue, it came in a question between the next heir called under the destination in the deed and the disponees of the last brother B, who had served as heir in general to the trustor, (1) that the terms of the deed of restriction did not revoke the destination in the trust-settlement to the trustor's "heirs and assignees whomsoever;" and (2) that B's right as heir whomsoever was not prejudiced by the fact that a life interest allanarly had been conferred upon him by the same deed.

Opinions, that if the deed of restriction had had the effect of revoking the destination to the grantor's heirs and assignees whomsoever, the trust-settlement failing (in consequence of the death of A and B without issue) to convert the fee would have passed on the trustor's death under the unvacated destination in the entail to the next heir of investiture, and through him to B and his disponees.

2d Division.
Lord Rutherford
Clark.
R.

ON 13th June 1876 Sir Alexander Muir Mackenzie of Delvine, B. raised an action of declarator against Sir Thomas Kirkpatrick, Bart., the Rev. Mr Bedford, to have it found that the pursuer alone had right to the lands of Hoddum, &c., and on 14th August 1876 he raised a similar action against Mr Ord Mackenzie, sole surviving trustee of General Mackenzie Sharpe, and William Sharpe's trustees.

Defences were lodged for all the parties, and the actions were joined.

General Sharpe held the estate of Hoddum under imperfect entail executed by Matthew Sharpe the elder in 1768, and Richard Mackenzie the judicial factor on his estate in 1823, and it was found, by decree of declarator dated 12th June 1835,* that he possessed the right of granting alienation. He died in February 1845, leaving a trust-settlement dated 25th December 1841, by which he conveyed the lands of Hoddum for purposes therein stated. The eighth direction of the trust-deed is expressed:—"So soon as my said trustees shall have paid my debts, and the whole legacies bequeathed by me, and sufficiently secured the annuities owing or bequeathed by me, they shall immediately demit the lands and others hereby conveyed, and of the whole trust-funds and

* This interlocutor applying the judgment of the House of Lords (1 S. M'L. 594) contained, *inter alia*, the following finding:—"That the pursuer has full and undoubted right and power gratuitously to alienate and dispose of the foresaid lands . . . in any manner he may think proper, and to grant and execute all dispositions, conveyances, deeds, and writings whatsoever, which may be requisite or necessary for effectually conveying the whole or any part of the said lands and others to any person or persons whatsoever, and in any manner that he may think proper; and that the defenders, or any of them, have no claim or demand of any description against the pursuer, or against his heirs and representatives in the event of his death, for or in respect of such alienation or disposal of the said lands and others, or dispositions or other writings which may be granted or executed by the pursuer."

ch may be vested in them, and convey the same *omni habili modo*, but
 ect to the liferent of Hallguards and others in favour of the said Wil-
 Sharpe, to and in favour of the said Alexander Renton Sharpe, in life-
 for his liferent use allenarly, and the heirs whomsoever of his body in
 whom failing, to the said William Sharpe in liferent, for his liferent use
 arly, and the heirs whomsoever of his body in fee; whom failing, to
 heirs whomsoever of the body of my deceased sister Dame Jane
 pe or Kirkpatrick, wife of the said Sir Thomas Kirkpatrick; whom
 ag, to my sister Mrs Grace Campbell Sharpe or Bedford, wife of the
 end William Riland Bedford, rector of Sutton-Coldfield, in the
 ty of Warwick, and the heirs whomsoever of her body; whom
 ag, to my nearest heirs and assignees whomsoever, heritably and irre-
 rably, the eldest heir female secluding heirs-portioners, and succeed-
 lways without division throughout the whole course of succession."

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 Mackenzie v.
 Sharpe's
 Trustees, et al.

William Sharpe and Alexander R. Sharpe were brothers of the truster.
 16th September 1843 General Sharpe executed a deed of restric-

It was in these terms:—"I, General Matthew Sharpe of Hoddom,
 dering that in December 1841, or about that time, I executed a
 -disposition and settlement regulating the succession of my heritable
 es, and being now resolved to restrict the destination and order of
 ssion therein contained, I do hereby revoke, cancel, and annul the
 destination and order of succession, in so far as regards the persons
 l and appointed to succeed after my brothers therein named, and the
 of their bodies; declaring it to be my will and intention that the
 nation and order of succession in the said trust-disposition and
 ment shall not take effect beyond my said brothers and the heirs of
 bodies, and that the person or persons further called to the succes-
 shall have no right or claim to the same, but shall be entirely ex-
 d therefrom, and are hereby excluded accordingly; reserving to
 lf full power to call and appoint (or name) a new series of heirs to
 id estates after my said brothers, and the heirs of their bodies, by
 riting under my hand, which shall have the same force and effect as
 tained in the said trust-disposition and settlement; and I hereby
 re that the foresaid trust-disposition and settlement, in so far as not
 y restricted, shall remain in full force and effect."

the death of General Sharpe the trustees made up a title to the
 conveyed by the trust-deed, partly under the direct conveyance
 ined in the settlement itself, and partly under a conveyance which
 obtained from Charles Kirkpatrick Sharpe, the immediate younger
 er of the truster (in which he reserved any right he might have),
 at their request, served himself heir of entail and provision. At the
 of the action the estate was held by Mr John Ord Mackenzie as the
 rrviving trustee.

General Sharpe was survived by three brothers, Charles Kirkpatrick
 e, Alexander Renton Sharpe, and William Sharpe. They were the
 sive heirs of provision under the investiture upon which the estate
 eld, and they all died without issue. William was the last sur-

He died on 18th December 1875. On his death the succession
 estate of Hoddom, assuming the investiture to remain unaltered,
 have opened to the pursuer, who accordingly raised the present
 s to have it declared that he had right to that estate, and that the
 es of General Sharpe were bound to convey it to him.

ides the trustee of General Sharpe, the defenders were—William
 e's trustees; Sir Thomas Kirkpatrick and the Reverend W. K. R.
 rd, the heirs-portioners of General Sharpe as at the present time.
 uestees of William Sharpe claimed the estate under a trust-deed and

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settlement executed by him on 11th May 1870, and the other defenders were willing to allow that claim. But they at the same time pleaded such rights as they individually possessed for the purpose of excluding the claim of the pursuer.

Before his death William Sharpe had made up titles in his personal heir of entail and provision under the investiture under which General Sharpe had held the estate. Thereafter he conveyed the lands to trustees for purposes to which it is unnecessary to refer.

William Sharpe had also served as heir in general to General Sharpe. The pursuer pleaded;—(1) The destination contained in the testamentary deeds of Matthew Sharpe the younger having received full effect regards the liferents thereby constituted, and being now exhausted, the succession to the said lands and estate is now regulated by the deed of entail executed by Matthew Sharpe the elder, and Richard Mackenzie, 1768 and 1823 respectively, so far as the destination therein prescribed is unexhausted. (2) In respect that the pursuer, Sir Alexander Mackenzie, is nearest heir of tailzie and provision under the said deeds of 1768 and 1823, the pursuer is, by survivorship of William Sharpe, vested in the personal fee of the said estates, and is entitled to demand and receive from the defender, the said John Ord Mackenzie, as trustee of General Sharpe, a conveyance thereof, as concluded for in the summa. (3) The destination in the trust-disposition of General Matthew Sharpe having been revoked by deed of restriction in so far as regards the persons called after his brothers and the heirs of their bodies, the defenders, the said Henry Gordon and John Gillespie, as trustees of William Sharpe, have no right or title to the said lands. (4) On the assumption that the beneficial fee of, or radical right to, the estate remained in the *hereditas jacens* of General Matthew Sharpe, the right thereto devolved on the heirs of provision under the entail in their order.

The defenders pleaded;—(1) On a sound construction of the deed of restriction executed by Matthew Sharpe on 6th September 1843, the destination in the trust-disposition of 25th December 1841 was revoked in so far as regards the persons called after his brothers, and the heirs of their bodies. (2) No heirs of the bodies of the brothers of Matthew Sharpe having come into existence, the destination contained in his testamentary deeds was ineffectual, except in so far as regards the liferents thereby constituted; and the beneficial fee of or radical right to the lands in question remained in his *hereditas jacens*. (3) The fee of the said lands and estate having been validly taken up by William Sharpe by the services condescended on, and effectually conveyed by his trust-disposition and settlement, the defenders, as his trustees, are entitled to be assoilzied.

The Lord Ordinary, on 9th November 1876, pronounced an interlocutor assoilzieing the defenders.*

* "NOTE.—(After narrating the facts as above)—In this state of matters the question is, whether the succession to the estate is regulated by the former investiture, or whether that investiture has been evacuated either by the deed of General Sharpe or by the deed of William Sharpe? The pursuer contends that the deed of restriction revoked the whole destination contained in General Sharpe's trust-deed, including the destination to his own nearest heirs and assigns; that William Sharpe's right was limited to a bare liferent; and that consequently General Sharpe's trust-deed had not the effect of evacuating the tailed investiture, and that William Sharpe, as a liferenter merely, could dispose of the estate. The success of the pursuer depends on his being able to establish two propositions, viz.:—1st, that the destination in General Sharpe's trust-deed to his own nearest heirs and assignees was recalled; and 2nd, that

Sir A. M. Mackenzie reclaimed, and argued ;—General Sharpe's deed No. 98.
restriction had the effect of cutting out of his trust-deed the whole
ination (including that to heirs and assignees whomsoever) after the
ination to his brother William in liferent and the heirs of his body in

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This was apparent from the following considerations:—(1) The
usion of heirs-portioners in the trust-deed made the destination
eirs whomsoever also a sort of *successio prædilecta*. (2) The expres-
in the trust-deed "throughout the whole course of succession" obvi-
y applied to the destination to heirs whomsoever as well as to the
r parts of the destination, and the expression the "said destination
order of succession" in the deed of restriction should therefore be
as applying to the same thing. (3) The fair meaning of the words
son or persons" in the deed of restriction made them applicable to
whole destination in the trust-deed, for heirs whomsoever secluding

am Sharpe was effectually excluded from the succession as nearest heir of
and provision. For if the destination to heirs remains effectual the pur-
is necessarily excluded ; and if William Sharpe was entitled to take up the
as heir of tailzie and provision, it is not disputed that he has effectually dis-
of the estate to his trustees.

On the first of these questions the Lord Ordinary has found considerable
ity in forming an opinion. He inclines, however, to think that the des-
on to General Sharpe's nearest heirs has not been recalled. He reads the
of revocation as applicable to the *successio prædilecta*, of which the des-
on to heirs whatsoever does not form a part. For, in giving his estate to
sirs whomsoever, the truster cannot be understood as selecting any class of
but merely as declaring that the estate shall descend as the law directs, and
difficult to hold that he intended to exclude the succession of his own
st heirs.

But if it be assumed that General Sharpe revoked the destination in favour
own heirs his trust-deed did not dispose of the fee of the estate. It is
hat in certain events, which did not occur, it would have disposed of the
out as it happened, it did no more than confer a successive liferent on
nder Renton Sharpe and William Sharpe. If the fee is not disposed of,
it, as the Lord Ordinary thinks, descend to the heirs under the investiture
ich it was held. Their rights could not be excluded except by a convey-
o others. It seems to the Lord Ordinary to be immaterial that during the
e of William Sharpe it was uncertain whether or not the fee was disposed
be fact remains, though now only ascertained, that there was no effectual
ance of the fee of the estate, and hence, in the opinion of the Lord Ordi-
the rights of the heirs of investiture were unaffected.

he pursuer argued that the trust-deed had the effect of recalling or
eding the destination, so far as William Sharpe was concerned. But it
s to the Lord Ordinary that the right of an heir, whether an heir at law
eir of provision, can only be defeated by a conveyance to another. This
ed as regards an heir-at-law, and the Lord Ordinary sees no difference be-
the case of legal succession and succession under a destination. Both must
take effect, unless the estate of the ancestor has been otherwise conveyed.

William Sharpe made up his titles as heir of entail and provision. Had
st-deed contained an effectual conveyance of the fee this title would have
f no avail. But as it turned out that the fee was undisposed of, the title
o the Lord Ordinary to be unexceptionable. As the purposes of the trust-
except as regards the liferent given to Alexander and William Sharpe,
together, the case as regards the fee is the same as if the trust-deed had
ed no purposes, or if it had never been executed. It was therefore open
heirs of the investiture to make up their title in ordinary form. But
ch as William Sharpe survived the Conveyancing Act of 1874 it seems of
sequence whether his title was complete or not, for by the 9th section of
t a personal right vested in him which enabled him to transmit the estate."

No. 98. heirs-portioners were as much persons as heirs-male *nascituri* of a s. Besides there was only one person called *nominatim* to the success. Mar. 10, 1877. The effect, then, of General Sharpe's trust-deed as limited by the restriction was (as events had turned out) to cut his brother Ch. Mackenzie v. Sharpe's Trustees, et al. Kirkpatrick out of the succession, to restrict Alexander Renton William to a liferent, and then to let in the heirs of entail. It argued that this was equivalent to saying that mere words of disinherence could exclude from succession. That was not a sound criticism. There was an absolute conveyance of the fee by General Sharpe to trustees, who held the fee, first, for the issue of Alexander or William they had issue, and if they had not, for the heirs of entail, passing Charles, Alexander, and William. These persons were not disinherited but the estates were absolutely conveyed away from them. If this argument was sound it could not be disputed that Sir Alexander Mackenzie was the heir of entail entitled to succeed.

Argued for William Sharpe's trustees;—Even if the deed of restriction revoked the ultimate destination to heirs whomsoever, General Sharpe's trust was conditional upon there being issue of his brothers. If there was no issue (which event happened) the trust was abortive. In a case the truster was not divested of the radical right or benefit which remained in his *hereditas jacens*.¹ In that view the persons entitled to the estates on the failure of issue of William Sharpe were the heir of entail—but the heir of entail not as at William Sharpe's death, as at General Sharpe's death, or the first heir of entail thereafter took up the right by service.² If the ultimate destination in General Sharpe's trust-deed was not revoked the heir whomsoever must be looked for as at the General's death. In either view, William was not ally in right of the fee of the estate, for he had expedite service in the possible character. But it was said that William being restricted to a liferent allienarily could never have any private interest in the estate; it was settled law that nothing except an actual and effectual conveyance to some one else could exclude an heir-at-law. So, if the ultimate destination in General Sharpe's deed did not stand, William was not excluded, for he then took as heir-at-law. The same principle applied if the ultimate destination stood. The liferent allienarily under General Sharpe's deed could not prevent William taking as heir of entail; the deed proved abortive.³

Sir Thomas Kirkpatrick and the Rev. Mr Bedford, while they submitted that the argument for William Sharpe's trustees was sound, maintained alternative pleas in the event of its not being effectual.

At advising,—

LORD JUSTICE-CLERK.—The different actions which are now before us

¹ Eddlestone's Creditors, Jan. 14, 1801, M. App. voce Adjudication, N. M'Millan v. Campbell, March 4, 1831, 9 Sh. 551, aff. Aug. 14, 1834, 7 Sh. 441; Gilmour v. Gilmour's Trustees, July 3, 1873, 11 Macph. 853, 4 Jur. 521; Cumstie v. Cumstie's Trustees, June 30, 1876, ante, vol. iii. 9.

² Souter v. Macgregor, Jan. 22, 1801, M. App. voce Implied Will. Balderston v. Fulton, Jan. 23, 1857, 19 D. 293, 29 Scot. Jur. 143; Colvin, Dec. 7, 1860, 23 D. 111, 33 Scot. Jur. 55, and July 15, 1865, 31 D. 1083, 37 Scot. Jur. 568; Storie's Trustees v. Gray, May 29, 1874, ante, vol. iii. 10.

³ Balderston v. Fulton, and Lord v. Colvin, supra, note 2; Stodart v. son, Feb. 5, 1734, Elchies, voce Succession, No. 1; Blackwood v. Dyke, Feb. 1833, 11 Sh. 443, 5 Scot. Jur. 269; Maxwell v. Wylie, May 25, 1834, 12 Sh. 1005, 9 Scot. Jur. 460; Sinclair v. Traill, Feb. 27, 1840, 2 D. 6, 1 Scot. Jur. 384.

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balance the same question. They relate to the right to succeed to the estate of Hoddum, and involve the consideration of the true import and effect of several deeds of settlement and conveyance relative to that estate. The parties to the dispute, although nominally four, are substantially only two—the trustees William Sharpe, who died in 1874, and Sir Alexander Muir Mackenzie, who claims the estate as heir of the old investiture under which it was held,—and the question is, Whether the estate of Hoddum was validly conveyed by William Sharpe to his trustees, or whether at his death it devolved on Sir A. Muir Mackenzie?

The old investiture under which Sir A. Muir Mackenzie, whom I shall call the pursuer, claims, is an entail executed in 1768 by Matthew Sharpe, who was at the time the proprietor of the estate. By the terms of that instrument, which was intended to be a strict entail, the entailor called to the succession, failing heirs of his body, Charles Kirkpatrick and the heirs-male of his body, whom failing, an entire series of substitutes, of whom it is not disputed that the pursuer is now the nearest, and the succession terminates with the granter's nearest heirs and assigns whatsoever. The entailor died without issue, and Charles Kirkpatrick, afterwards Charles Sharpe, made up titles to the estate, and died leaving four sons, of whom General Matthew Sharpe was the eldest. He succeeded his father in 1813, and also completed his title to the lands under the entail, and possessed them until his death in 1845.

In 1832 General Sharpe brought an action in this Court for the purpose of having it declared that he was entitled to alienate, burden, or convey the lands which he were a fee-simple proprietor. The alleged defect in the entail on which he founded was an error in the syntax of the irritant clause, probably occurring in the inscription, by which it was said to be left doubtful what nominative was the true part of the clause. The Court held that the error was only a clerical one, and the sense not doubtful. But this was altered in the House of Lords, and by the usage of their judgment the Court, on applying it, found “that the disposition and deed of entail is not sufficient to prevent the said appellant from selling or otherwise disposing or burthening with debt the said entailed estate, or from gratuitously alienating or disposing of the same.” The words in this decision are unusually broad, but it is not unimportant to remark that they cover only alienation and burdening. The destination in the entail still remained fenced by a prohibitory clause, which this judgment did not touch; and as the law then was understood, it was, to say the least of it, doubtful whether, as long as this investiture remained, it would have been safe to have held a violation of the prohibition. It does not appear that General Sharpe had any intention of alienating the estate beyond that of carrying it to a different class of heirs; and the course he followed, probably under advice, was the execution of a deed of trust, which is dated in 1841, the import and legal effect of which is one of the most important elements in the decision of this case. The import of that trust-deed, in so far as it was to take direct effect, was the payment of debts and legacies, and the securing of certain annuities after the death of the granter. It was entirely a *mortis causa* conveyance. For these purposes the estate of Hoddum and others were conveyed by a formal title to the trustees named, of whom Mr Ord Mackenzie is the last survivor; but they were excluded, after these purposes were fulfilled, to denude of the trust, and to convey the estates thus vested in them to Alexander Renton Sharpe, the third son of Charles Sharpe, and brother of the granter, in liferent, for his life.

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rent use allenerly, and to the heirs whomsoever of his body in fee; who failing, to William Sharpe, who was the youngest of the brothers, in liferent, &c. his liferent use allenerly, and the heirs whomsoever of his body in fee; who failing, to the heirs whomsoever of his two sisters, Jane Sharpe and Grace Campbell Sharpe, and the heirs whomsoever of their bodies in fee; whom failing, his nearest heirs and assignees whomsoever.

It seems sufficiently certain that but for the ultimate destination to his heirs and assignees, this deed, as it stood, would simply have interposed successive rights of liferent and fee conferred by it between the granter and other substitutes called in the existing investitures of the estate. There is mention of the old investiture in the trust-deed, nor are there any other words from which it could be inferred that the granter had any intention of interfering with it beyond the interest of the persons thus favoured. But the conveyance to his own nearest heirs and assignees of course, if effectual, would entirely have extinguished the former investiture, and left the succession to the estate to depend on the conveyance which the trustees were thus directed to execute.

For reasons which do not appear, it seems that before his death General Sharpe had altered his intention with regard to the descendants of his sisters, and accordingly executed a deed or instrument, in which he recalls the instructions given to his trustees to include them in the conveyance which the trustees were directed to grant when the purposes of the trust were fulfilled, and cancels and revokes the destination and order of succession in "so far as regards the persons called and appointed to succeed after my brothers therein named and the heirs of their bodies." The peculiar phraseology of this deed of restriction is adverted to afterwards. But it may be assumed that the testator's primary object in executing it was to exclude these persons from the succession, and that he had no intention beyond this of reviving the old destination, or in any way impairing the validity or effect of the trust-deed itself, by which he certainly intended to supersede it. Whether this, however, be the true import of the words, remains to be considered.

General Sharpe died in 1845. The trustees made up a title, in so far as they thought they could effectually, to the lands conveyed. But it is important to mention a fact which has a considerable bearing on the questions now at issue, that the two brothers on whom these liferent rights were conferred were not of them the next heir of the old investiture. There was a third and younger brother, the well-known Charles Kirkpatrick Sharpe, who was the next heir entitled to succeed under the former destination, and who was entirely excluded by the conveyance directed by the trust-deed. In order to fortify their title to the lands, the trustees applied to Charles Kirkpatrick Sharpe to obtain his assent, and he served as nearest heir of provision to his brother General Sharpe. Charles Kirkpatrick Sharpe accordingly, in 1845, executed a disposition of the whole lands to the trustees, in which he reserves any right which he himself might have had regard to them, and conveys them to the trustees for the purposes of the trust, and makes them his procurators to have him served as nearest heir of line and provision to his brother. From the statement on the record on this subject we gather that this procuratory was only used as regarded some of the lands comprised in the deed having temporarily fallen aside, the account of it given in the deed is imperfect. It is, however, in my opinion, an important element in the case. It has now been recovered.

The trust, which has now lasted for thirty-three years, has not yet been wound up.

, and no conveyance has been granted by the trustees, not because they had power to hold after the debts and legacies had been paid and the annuities provided for, but from some practical considerations which are of no importance. Charles Kirkpatrick Sharpe died in 1851. Alexander Renton Sharpe died up no title to the estate, and died in 1860 without issue. On his death William Sharpe expedite a service as nearest heir of provision to his brother Charles, who died last vest and seised in the estate, subject to the burden of the trust-right; and he also served to his brother General Sharpe as nearest heir of provision in the lands to which the service of Charles did not apply, and also served to the General as heir of line and conquest. While his title so stood, he executed a trust-conveyance of the estate of Hoddum to trustees, with directions to sell the estate and apply the proceeds in the manner directed by his testament. The question we have now to determine is, Whether these trustees, being the pursuer as the heir of investiture, are now entitled to the estate? If the destination in the trust-disposition of 1845 still subsists and is effectual there can be no question that the pursuer must fail, because the destination in the old investiture was truly extinguished. There can be no question that by his own nearest heirs and assigns whatsoever General Sharpe meant to call his estate-general, and not the heirs of investiture. But the pursuer contends that the words of the deed of restriction import not only a recall of the substitution in favour of the descendants of the grantor's sisters, but also a recall of the ultimate destination in favour of his own nearest heirs and assigns. The Lord Ordinary has repelled this plea, and in doing so he decides in conformity with the directions expressed (although no direct judgment was given) in a former litigation connected with this estate, by Lord Jerviswoode in the Outer-House and Lord Ardmillan in the First Division (not reported). I have come, with little hesitation, to think that the pursuer's construction is one which the words of the instrument will not admit of. I have already pointed out that the judgment of the House of Lords left the prohibition against altering the order of succession still in full force. It might have been made a serious question, on the principles established in the cases of Oliphant (June 7, 1816, F. C.) and Lindsay v. Earl of Boyle (H. of L. Sept. 5, 1844, 3 Bell's App. 254), whether the trust-disposition, as originally executed, was anything but an alteration of the order of succession, and so ineffectual *inter hæredes*, although no such question can arise, seeing that the title in the trustees derived from Charles Sharpe became complete in their persons by virtue of the Entail Act of 1848. But it cannot be denied that the truster, after having done what he could to extinguish and despite the old investiture, had any intention of reviving it. Neither can I suppose that he could recall the ultimate destination to his own heirs for the purpose of letting it pass to those of the entailor. But apart from these considerations, the phraseology of the instrument seems to indicate the intention of the maker of it beyond all reasonable doubt. It refers to persons "appointed and called" to the succession; it speaks of the "persons further called to the succession" having no right, but being "entirely excluded therefrom." The grantor reserves to himself "full power to call and appoint a new series of heirs" to his said estate, or my said brothers and the heirs of their bodies, by any writing under my hand, which shall have the same effect as if contained in the said disposition of the estate. These expressions seem to indicate quite clearly that his sole intention in executing this deed of restriction was to exclude the specific persons named and appointed and their heirs from the succession, and to call and ap-

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point a new series in their place between his brothers and the heirs of their bodies and the ultimate destination. To cancel the ultimate destination merely to replace it would not have been to call or appoint a new series; nor is it reasonable to suppose that, whoever might compose the new series, the ultimate destination would not have been the same.

These expressions, moreover, are not appropriate to such a destination. "Heirs and assignees" are hardly "called and appointed." The law calls and appoints the first, and a new exercise of power the second. The destination to him whatsoever merely amounts to a declaration that the disposer has no personal direct selection to make, and wishes his property to descend as the law may direct.

I feel, therefore, no difficulty in holding that the ultimate destination directed by the trust-deed remained entirely in force.

Having formed a clear opinion on this point, it might be unnecessary to press to the second view, on which the Lord Ordinary has decided, but I shall add one or two remarks on this aspect of the question, as I think that the pursued case on this head is quite as hopeless as on the other.

If we are to suppose that the directions contained in the trust-deed enjoin the trustees to execute a conveyance only to these two brothers in succession, liferent for their liferent use alienably and the heirs of their bodies respectively in fee, it is manifest that the trust-deed contained no effectual disposition of the fee in the event of there being no heirs of the bodies of the two brothers, so that therefore the beneficial right to the fee must be looked for elsewhere. If there was no subsisting investiture that beneficial right was vested at once in the heir at law of the granter, and that from his death. If, on the other hand, there was a subsisting investiture, then it may be that the right of fee vested in the heir of that investiture. But this right was not suspended, as seemed to be the impression, until it should be seen whether the brothers had issue. If there was no fiduciary fee in the liferenters. The fee vested at once, and became operative right from the date of General Sharpe's death. It is now settled that where one who is the nearest lawful heir at the time serves to an ancestor, although there be a nearer heir *in spe*, his right in the case of fee-simple land of intestacy becomes absolute notwithstanding that a nearer heir may afterwards be born—as was held in the case of *Grant v. Grant's Trustees*, Dec. 2, 1859, 22 D. 53. Even where the succession is tailzied, it was held in the *Carnock* case (*Stirling v. Nicolson*, Dec. 2, 1859, 22 D. 72) that the remoter heir acquires an active right by his service, although he may be under obligation to denude in the event of a nearer heir coming into existence. Assuming, then, on this hypothesis, that the old investiture still subsisted, and that the trust was a mere burden on the right of fee, the heir in right of this fee under the old investiture was Charles Kirkpatrick Sharpe, who took up the right by a valid service, and disposed of the fee to the trustees for their trust purposes. By doing so it may be that he postponed his own right to the liferent of his brothers, and the fee in their possession. But meantime the radical fee was vested in him, and from him it was transmitted to William Sharpe, who made up his title by service to his brother. If, then, there was nothing to exclude Charles Sharpe's right to the fee, there was as little to exclude that of the heir of Charles Sharpe, in whom the fee was vested in fee-simple at his death, and from whom they descended to the pursuers. William Sharpe was therefore fully entitled to vest the estate in himself and to deal with it; and I cannot doubt that he has dealt with it effectually. In either view there is no room for the pursuer's claim. The fee, being

of, vested at once in the nearest heir, whether at law or under the investiture, whatever may have been the obligations incumbent on him should a nearer heir have been born.

In this view it is plain that the restriction of William Sharpe's right to a contingent alienary under the trust-deed could not possibly deprive him of his share's succession, with which the trust-deed did not deal. The recent case of *Macfie* has no application. A conveyance to one for his life-tenant use alienary does not actually exclude him from the fee if it be given to some one else, and a destination to the heirs whatsoever of the life-tenant is a clear gift to some one, seeing that no man can be his own heir. But a destination to one in life-tenant alienary and the heirs of the granter in fee will not necessarily exclude the granter from the fee, should he ultimately come to be the heir.

LORD ORMDALE and LORD GIFFORD delivered opinions concurring with his Lordship on both points.

THE COURT adhered.

LINDSAY, HOWE, TYTLER, & CO., W.S.—MACKENZIE & KERMACK, W.S.—
GILLESPIE & PATERSON, W.S.—W. & J. COOK, W.S.—Agents.

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Mar. 10, 1877.
Mackenzie v. Sharpe's Trustees, et al.

THE BRITISH LINEN COMPANY, Appellants.—*Kinnear—Mackintosh.*
JOHN GOURLAY (Alexander and Baird's Trustee), Respondent.—
Asher—J. P. B. Robertson.

No. 99.

Mar. 13, 1877.
British Linen Co. v. Gourlay.

Bankruptcy Act, 1856 (19 and 20 Vict. c. 79), sec. 65—Security—Bill of Lading.—A, a manufacturer, shipped a cargo of goods to a foreign port, and made the bills of lading in the name of B. He then handed the bills of lading and authorised him by letter to hypothecate the goods, with liability to meet for any surplus realised, and in return obtained an advance for which he presented bills. B discounted the bills with a bank, handing them the bills of lading and letter of authority. The bank sent the bills of lading to a merchant as part of delivery with instructions to realise the goods and remit the proceeds to them. When the goods were only partially realised, and the remainder insufficient to meet the claim of the bank, A became bankrupt, and B also became insolvent.

The bank having claimed to rank upon A's estate for the balance due on the bills of lading called upon them to value and deduct the security they held in the goods unrealised, as being part of the bankrupt's property. *Held*, on appeal, the bank was not bound to value and deduct the goods, as, in a question between the bank and the bankrupt, the goods must be held to be the property of B.

The trustee on the sequestrated estate of Alexander and Baird, handkerchief manufacturers, Glasgow, rejected a claim of the British Linen Company for £2558, "in respect that the claimants have failed to value and deduct certain securities held by them over the bankrupts' estates, or the proceeds thereof. The portions of the bankrupts' estates over which the claimants hold a security are certain goods belonging to the bankrupts, hypothecated for advances, and held by the claimants."

The claimants, who maintained that the goods did not belong to the bankrupt estate, appealed to the Lord Ordinary on the Bills.

The facts of the case as admitted or proved by the documents produced are as follows:—In December 1874 Alexander and Baird prepared a bill of lading for handkerchiefs for shipment to Rangoon. They obtained an advance of £2957 upon the goods from Galbraith, Reid, and Company of Glasgow, and by letter dated 21st December they sent the latter firm bills of lading, which they had previously made out in their name as shippers, the goods being consigned to Galbraith, Dalziel, and Company

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No. 99. of Rangoon.* The letter proceeded,—“Against this shipment we have to receive £2957, and we hereby give you liberty to hypothecate the same to your order, and to request your friends in Rangoon to remit the proceeds on realisation, likewise to your order, handing us any surplus shown in account-current, and claiming from us any deficiency which may arise, and which we hereby promise to pay.—Yours faithfully, ALEXANDER & BAIRD.

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Alexander and Baird accepted bills for the advance, which Galbraith, Reid, and Company, the drawers, discounted with the British Linen Company, handing the bank the bills of lading with the following letter dated 23d December :—“We beg to enclose the documents undernoted as collateral security for bills held or discounted, or to be held or discounted by you, bearing the names of Galbraith, Reid, and Company, and Alexander and Baird, and we request that you will forward the bills of lading to Messrs Galbraith, Dalziel, and Company, Rangoon, with instructions that they will receive and realise on your account the goods which the documents sent herewith represent, and remit the proceeds to you in first class bank paper, such remittances to be applied by you in payment of the above-mentioned bills.

“It is distinctly understood that you shall have full power to transfer the goods at any time from the said Messrs Galbraith, Dalziel, and Company to any other house you may think proper for realisation, and to bring this transaction to a close within twelve months from the date hereof.”

In acknowledging receipt the bank wrote,—“It is distinctly understood that we shall be entitled to exercise the rights of ownership over the goods, but that no responsibility whatever shall be attachable to us for the realisation thereof, or for any remittances connected therewith.”

The bank then forwarded the bills of lading to Galbraith, Dalziel, and Company of Rangoon, with instructions to realise the goods and remit the proceeds to them.

This was done to a certain extent, but before all the goods were realised Alexander and Baird became bankrupt, and Galbraith, Reid, and Company also became insolvent.

The Lord Ordinary pronounced this interlocutor :—“Finds that the appellants are entitled to be ranked as creditors in terms of their claim, and ordains the trustee to rank them accordingly,” &c.†

* 16th December 1874.—“Shipped . . . by Galbraith, Reid and Company on board the steamship ‘Irrawaddy’ . . . unto Messrs Galbraith, Dalziel and Company.”

† “NOTE.— . . . The Lord Ordinary is of opinion that the deliverance of the trustee is wrong. He does not think that in a question with the bank the goods are to be considered as any part of the estates of Alexander and Baird, the partners of which they are bound to deduct in order to draw a dividend, in terms of the 65th section of the Bankruptcy Act. The bank did not transact in any way with Alexander and Baird, but with Galbraith, Reid, and Company, with whom, as holders of the bills of lading, and therefore as having a title to the goods, they were entitled to transact as owners. The bank are bound to account to Galbraith, Reid, and Company for the proceeds of the goods, and not to Alexander and Baird. Galbraith, Reid, and Company have stopped payment, and the bank maintain that they are bound to deduct the value of the goods in rank on their estate, and not on the estate of Alexander and Baird.

“Alexander and Baird received from Galbraith, Reid, and Company the proceeds of the bills, and, in respect thereof, transferred to them the goods in question. It would seem to be inequitable that Alexander and Baird, or their creditors, should thus receive the benefit not only of the proceeds of the bills, but also of the proceeds or value of the goods, while Galbraith, Reid, and Company, who advanced the money, are to be deprived of the benefit of the security which they had stipulated for and obtained.”

The trustee reclaimed, and argued ;—The real question was, who were the true owners of the goods ? The bankrupts granted their creditors full power to deal with the goods, but they never parted with the right of ownership. That appears distinctly from the letters which were handed to the bank, so that they knew that Galbraith, Reid, and Company were of the true owners. Indeed the true nature of the transaction was not denied. The bank, therefore, holding security over goods which were the property of the bankrupts, were bound to value and deduct it.

Argued for the British Linen Company ;—A creditor was not bound to value and deduct, unless the subject, but for the security, would have been available to the body of creditors. But this subject would not have been available. All the right that the trustee had against Galbraith, Reid, and Company was a claim to account in the event of there being a surplus. That right was not the right hypothecated to the bank. They got real security in the goods from Galbraith, Reid, and Company, who had an absolute right to hypothecate them. It was therefore in dealing with Galbraith, Reid, and Company that the bank must deduct the value of the goods at security.¹ Further, as the goods were not sufficient to meet Galbraith and Reid's claim, there was no estate of the bankrupt until that claim was satisfied. One firm had the absolute title and possession. The other had a mere security right. Both became bankrupt. The question was, to which estate the bank had to account for the goods.

At advising,—

Lord President.—The trustee in this sequestration has rejected a claim by the British Linen Company, “in respect that the claimants have failed to value and deduct certain securities held by them over the bankrupts' estates, or part thereof. The portions of the bankrupts' estates over which the claimants hold security are certain goods belonging to the bankrupts, hypothecated for advances, and held by the claimants.”

The question is whether the goods form any part of the bankrupt estate of Alexander and Baird.

That they originally did so admits of no dispute. The bankrupts were manufacturers of silk and cotton handkerchiefs at Glasgow. The goods were manufactured by them, and were intended for shipment to Rangoon. But as the manufacturers desired to obtain a pretty full advance upon the goods, they addressed themselves to the firm of Galbraith, Reid, and Company, which has also become insolvent, and obtained from them an advance of £2957. Of course the advance was not done without security, and the nature of the security is the point on which this case depends. On 21st December 1874 Alexander and Baird wrote to Galbraith, Reid, and Company as follows:—“We have handed you the goods for lading of”—then follows the description of the cases. “Against this advance we have to receive £2957, and we hereby give you liberty to hypothecate the same to your order, and to request your friends in Rangoon to remit proceeds on realisation, likewise to your order, handing us any surplus shewn on account-current, and claiming from us any deficiency which may arise, and which we hereby promise to pay.—Yours faithfully, ALEXANDER & BAIRD.”

Now, the bills of lading bore that the goods were shipped, not by Alexander Baird, but by Galbraith, Reid, and Company, and consigned to Galbraith, Reid, and Company, who were admittedly agents and correspondents of Gal-

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¹ Hamilton v. Western Bank, Dec. 13, 1856, 19 D. 152, 29 Scot. Jur. 77 ;
Elland v. Bank of Scotland, Feb. 27, 1857, 19 D. 574, 29 Scot. Jur. 269 ;
Royal Bank v. Forbes, Dec. 3, 1858, 21 D. 79, 31 Scot. Jur. 50.

No. 99. *Braith, Reid, and Company. Ex facie of the bills, therefore, Alexander and Baird had no connection with the goods, and the bills must be taken to have been made by them for the purpose of creating a direct title in their creditors to deal with and realise them, they being under an obligation, but an obligation not appearing on the bills, to account.*

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There was some argument as to whether under these documents there remained in the person of Alexander and Baird a radical right to the goods. That I admit of considerable doubt, because the obligations which Alexander and Baird were under to their creditors, apart from the title which they gave, was to allow them to realise the goods through their agents at Rangoon, and to be accountable merely for any surplus that might arise. Therefore the question whether anything was left to Alexander and Baird but a mere right of reversion may be doubtful.

I am, however, willing to assume that there might be a radical right. Still the security created in favour of Galbraith, Reid, and Company was in its nature a security which conferred a title of property *ex facie*. There can be no doubt that Galbraith, Dalziel, and Company, on receiving instructions from Galbraith, Reid, and Company, were entitled to sell the goods and remit the proceeds to Galbraith, Reid, and Company, and nobody, neither Alexander and Baird nor anybody else, could interfere to prevent them. The proceeds of the goods, when realised, were to come into the hands of Galbraith, Reid, and Company, and nobody else.

Now, the object for which this title was conferred by Alexander and Baird upon their creditors, Galbraith, Reid, and Company, was to enable the latter to transfer this security in the most effectual way to a bank, with whom they were about to discount the bills which they drew on Alexander and Baird, and the documents of title were transferred to the bank by Galbraith, Reid, and Company in letters which shew clearly that, following out this arrangement, the bank assumed the position of owners, and in that capacity dealt with the bank. It is perfectly clear from the terms of the letter of 24th December, giving the bank power to realise the goods to meet the bills. The bank accordingly added its own name to the foreign house, and gave them instructions to realise the goods on account of the bank. They were realised to a certain extent, and the proceeds were remitted to the bank. But when Alexander and Baird became bankrupt, and Galbraith, Reid, and Company stopped payment, a considerable balance was still due to the bank. Of course it is to be assumed that the proceeds of the remaining goods will be insufficient to meet this, otherwise there would be no interest in the contention. It is plain that the bank's debt will absorb the whole proceeds of these goods. The question is, whether, so far as not realised, they are to be dealt with under the 65th section of the statute as part of the estate of Alexander and Baird. The Lord Ordinary has expressed the law applicable to the case in a single sentence, which I entirely adopt:—"The bank did not transact in any way with Alexander and Baird, but with Galbraith, Reid, and Company, with whom, as holders of the bills of lading, and they as having a title to the goods, they were entitled to transact as owners. The bank are bound to account to Galbraith, Reid, and Company for the proceeds of the goods, and not to Alexander and Baird."

That is a very accurate statement of the law. Alexander and Baird, by their transactions with their creditors Galbraith, Reid, and Company, put themselves in a position to deal with the goods as owners. They did deal with the bank on that footing, and in the transaction with the bank Alexander and Baird had no

cern at all. On that ground, I am of opinion with the Lord Ordinary that the
tee has gone wrong, and that the goods must be dealt with, in a question with
bank, as belonging to the insolvent estate of Galbraith, Reid, and Company.

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ORD DEAS.—There are two forms in which, by our law and practice, securities
be granted whether over moveable or heritable estate,—one in the declared
of a security merely ; the other an absolute title with an obligation to
unt. The effect of each of these is quite different. There are a host of
s in the books on this subject relating to heritable estate, which are just as
h in point as those which have been cited, if it were necessary to quote them.
ference to many of them will be found in my opinion in the recent case of
on v. Gordon, &c., 26th June 1874, 1 Rettie, 1093.

do not think it either necessary or safe to go to England for authority on
particular point. Our law on this subject comprehends both heritable and
eable rights. The English law is not the same.

he whole question comes to be whether, on the face of these documents, the
of Galbraith, Reid, and Company, and consequently of the bank, was absolute.
I am clearly of opinion that it was so, and consequently that the obligation of
bank was merely an obligation to account subject to deduction of the debt.
letter of 21st December must be read along with the bills of lading which
sent with it. *Ex facie* of these documents, as framed by Alexander and
d, the title of Galbraith, Reid, and Company was undoubtedly absolute, and
it was so understood by the parties is clear from the documents which fol-
d, particularly the letter of 23d December.

he valuation and deduction are admittedly to be made in ranking upon the
estate or the other. I am clearly of opinion that this falls to be done in
ing on the estate of Galbraith, Reid, and Company and not on that of Alex-
r and Baird.

ORD MURE.—The question is one of some nicety, but I have come to the
conclusion. I think the transaction between Galbraith, Reid, and Com-
and the bank, *ex facie* of the documents, gave the bank an absolute right
e disposal of the goods, which, indeed, they expressly stipulated for. In
circumstances the handing over of the bills of lading to the bank by Gal-
h, Reid, and Company, in whose name they were drawn, seems to me to be
valent substantially to the granting of the delivery-order in *Hamilton v. The*
tern Bank (*supra*, p. 653, note 1); and having regard to the rules laid down in
and subsequent cases I think the interlocutor of the Lord Ordinary is right.

ORD SHAND.—The question is, whether the goods were, in the sense of the
section of the bankrupt statute, the estate of the bankrupts, in which case
value must be deducted, or of Galbraith, Reid, and Company. I do not
t that in a question between Galbraith, Reid, and Company, and Alexander
Baird, there remained a radical right of property in the goods in the latter firm.
goods were put under the full control of Galbraith, Reid, and Company for
sation. But, I think, that firm did not in any true sense become proprietors.
ander and Baird were, I think, entitled to get back the goods on payment
e advances and of any sums which that firm might properly claim for com-
ions. And if Galbraith, Reid, and Company had paid the bills to the bank
not doubt that on their making a claim against Alexander and Baird the
ee would have been entitled to require them to deduct the value of the goods

No. 99. on the footing that these goods were the property of the bankrupts, held in security; and would have been entitled to delivery of the goods under the provisions of the statute which entitle the trustee to purchase a creditor's security. Mar. 13, 1877. British Linen Co. v. Gourlay. But though this be so, the fact was that Alexander and Baird gave a title to Galbraith, Reid, and Company, which enabled them to deal with the goods practically as owners, and probably nothing short of such a title would have been accepted. Having this title Galbraith, Reid, and Company dealt with the bank as in right of the goods. It is not alleged that the goods will produce more than enough to pay the advance which the bank made to them; and, this being so, the goods must, I think, be taken to be part of their estate which has been exhausted in meeting their debt to the bank. I do not think with your Lordships that an absolute title was necessary to operate this result. Suppose the case of a title created by a bond and disposition in security, on an assignment of which the bank had advanced £5000, and the bank came to rank upon the estate of the person to whom they had made this advance, and who had granted them the assignation, I think they would be bound to value and deduct the estate conveyed by the bond and disposition in security though plainly it was held as a security title only, and the radical right of property was in another party. And, on the other hand, in ranking for any debt on the estate of the grantor of the bond (the owner of the property), they would not be bound to deduct the value of the property, assuming that its value was required to meet their claim against the insolvent grantor of the assignation to them.

It is also worthy of consideration that the practical result of sustaining the argument for Alexander and Baird might be that they would receive double payment in part at least for the same goods. Suppose that of £3000 worth of goods a small part, realising only £100, had been sold, the contention is that though the bankrupts had already got £3000 in the advance made to them by Galbraith, Reid, and Company at the time of consignment, the bank should again give the value for the goods, and value and deduct as if the goods still belonged exclusively to them: that would be obviously double payment or value for the same goods—a result which shews that the argument for the trustee is unsound.

It may not be necessary but it is often very useful to refer to English authority and I think the judgment we are to pronounce is much fortified by a case which in the course of the argument I referred to—*ex parte Brett*, L. R., 6 Ch. App., 838. If the law of England were based on any specialties it could not be advantageously founded on or referred to; but the rule in bankruptcy is precisely the same as in this country. The 99th rule framed in compliance with the English bankruptcy statute regarding the obligation of secured creditors to deduct the value of any estate belonging to the bankrupts, their debtors, &c. in these terms:—"A secured creditor, unless he shall have realised his security shall, previously to being allowed to prove or vote, state in his proof the particulars of his security, and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security." In the case of *Brett* the point now to be decided arose. The question was whether goods sent home by a merchant abroad for realisation on "sale and return" to a merchant in this country who had made advances on them and on the security of the bills of lading, and who in his turn had obtained advances from a bank, were to be deducted from the estate of the merchant in this country. The Judge in bankruptcy held that the merchant abroad was the owner, and that the bank were not bound to deduct

the value of the goods from their claim on the bankrupt estate of the merchant in this country; but Lords Justices James and Mellish reversed that decision, holding that the transference, though only in security, made the goods substantially part of the estate of the merchant who had made the advances to his foreign correspondent, and that the bank having got the benefit of the security from him must deduct its value in ranking on his estate.

THE COURT adhered.

MACKENZIE & KERMAK, W.S.—MACLACHLAN & RODGER, W.S.—Agents.

STEEL AND CRAIG, Pursuers.—*Balfour—Mackintosh.*

No. 100.

THE STATE LINE STEAMSHIP COMPANY, Defenders.—*Asher—Jameson.*

Mar. 18, 1877.
British Linen
Co. v. Gourlay.

Ship—Carrier—Bill of Lading—Negligence.—A bill of lading may be extended so as to exclude the shipowners' liability for loss caused by the negligence of his servants.

THIS was an action by Steel and Craig, grain merchants, Glasgow, against the State Line Steamship Company for damage to a cargo of wheat. 1st Division.
Lord Young.
B.

The following issue was tried before Lord Young and a jury:—Whether, on or prior to 31st August 1875, Messrs Sawyer, Wallace, and Company, grain merchants in New York, shipped on board the defenders' steamship 'State of Virginia' 15,409½ bushels of wheat in good order and condition, to be conveyed in terms of the bill of lading contained in the schedule annexed hereto; and whether the defenders, in breach of the undertaking contained in the said bill of lading, failed to deliver the wheat at the port of Glasgow in the like good order and condition, he loss, injury, and damage of the pursuers, as indorsees and holders of the said bill of lading?"

The bill of lading, after the usual obligation to deliver the goods in the good order and condition as received, bore:—"Not accountable for age, breakage, . . . howsoever caused. Not responsible for the bursting of bags, or consequences arising therefrom, or for any of the following losses, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or persons in the service of the ship, or for whose acts the shipowner is liable or otherwise: namely, risk of theft, or hulk, or transshipment, explosion, heat or fire at sea, in craft or on shore, boilers, steam or machinery, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, collision, straining, or other peril of the seas, rivers, navigation and transit, of whatever nature or kind soever, and howsoever caused, except as aforesaid."

The jury returned the following special verdict:—"In respect of the oral agreement between the said parties they find that Messrs Sawyer, Wallace, and Company, on or prior to 31st August 1875, shipped at New York, on board the defenders' steamship 'State of Virginia,' 15,409½ bushels of wheat, in good order and condition, to be conveyed to the port of Glasgow, in terms of the bill of lading set out in the schedule appended to the issue: Find that the defenders did carry the said wheat to the port of Glasgow in the said steamship, and did there deliver the same to the pursuers, who are the onerous indorsees and holders of the said bill of lading: Find that the said wheat when so delivered was not in the like good order and condition in which it was when shipped at New York, but damaged by sea-water: Find that, through the negligence of some of the crew, one of the orlop-deck ports of the said steamship was insufficiently fastened, and that in consequence the said sea-water was thereby

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The pursuers argued;—The clause, "not responsible," &c., was separated into two members, the second beginning with the word "collision." According to that reading, assuming that the cause of damage was a peril of the sea, the previous words, "whether arising from the negligence . . . of the . . . mariners . . . or otherwise" were not applicable; and as this peril was caused by the negligence of the mariners, for whose acts the shipowner was responsible, it was not an excepted risk. It was only a certain class of risks in the former part of the clause that were excepted even if caused by negligence.¹

The defenders argued;—There was only one clause. The words "not responsible" at the beginning governed the whole, and so did the word "excepted" at the end, though it was superfluous. It meant, "which is excepted." Therefore a peril of the sea, such as this accident, was expressly excepted even though caused by the negligence of the mariners. Indeed there were several insurance cases which decided that that would be so without express stipulation. The only responsibility left on the owners was to provide a seaworthy ship. But even if the clause were read in two parts, perils of the sea, "howsoever caused," are excepted and therefore the verdict should be entered up for the defenders.²

LORD PRESIDENT.—My Lords, by bill of lading, dated at New York on the 31st of August 1875, the defenders undertook to carry 15,000 bushels of wheat from New York to Glasgow by their steamship called the "State of Virginia."

¹ Lloyd v. The General Iron Screw Collier Co., May 30, 1864, 33 L. J. Ex. 269; Moes, Moliere, and Tromp v. Leith and Amsterdam Shipping Co., Jan. 5, 1867, 5 Macph. 988, 39 Scot. Jur. 546; Nugent v. Smith, May 29, 1867, L. R. 1 C. P. Div. 423; Phillips v. Clark, April 23, 1857, 26 L. J. C. P. 16; Czech v. General Steam Navigation Co., Nov. 9, 1867, L. R. 3 C. P. 14; Ly v. Mells, June 19, 1804, 5 East, 428; Stevenson v. Henderson, Nov. 25, 1862, ante, vol. i. 215, H. of L. June 1, 1875, ante, vol. ii. 71; Finlay v. North British Railway Co., July 8, 1870, 8 Macph. 959, Addison on Contracts (7th ed.), 50.

² Davidson v. Burnaud, Nov. 30, 1868, L. R. 4 C. P. 117; Redman v. son, June 28, 1845, 14 Meeson and Welsby, 476; Dixon v. Sadler, 1834, Meeson and Welsby, 405, affd. 1841, 8 Meeson and Welsby, 895; Walker Maitland, Nov. 3, 1821, 5 Barnw. and Ald. 171; The Duero, July 31, 1862, L. R. 2 Adm. 393; Peninsular and Oriental Steamship Co. v. Shand, June 22, 1865, 3 Moore, P. C. (N. S.) 272; Carr v. Lancashire and Yorkshire Railway Co., May 8, 1852, 21 L. J. Exch. 261; Austin v. Manchester Railway Co., May 3, 1852, 21 L. J. C. P. 178; McCawley v. Furness Railway Co., Nov. 1872, L. R. 8 Q. B. 57; Grill v. General Iron Screw Collier Co., June 4, 1868, L. R. 1 C. P. 600, and May 12, 1868, L. R. 3 C. P. 476.

assigned to the pursuers of this action. The special verdict finds that the defenders did carry the wheat to the port of Glasgow, and delivered it there to the users, but it finds also that the wheat when so delivered was not in the like good order and condition in which it was when shipped in New York, but was damaged by sea-water; and it finds further, "that, through the negligence of some of the crew, one of the orlop-deck ports of the said steamship was insufficiently fastened, and that in consequence the said sea-water was thereby admitted to the hold, after the ship had been five days at sea;" and "that as the ship was loaded, the said port was situated about a foot above the water-line, and that, if properly fastened by means of the screws thereto attached, the said port would have been water-tight throughout the voyage." Now, my Lords, if it had been dealing with an ordinary contract of affreightment,—I mean such a contract of lading as we were accustomed to in former days,—the effect of this special verdict could not have been doubtful, because it is distinctly found that the damage which was sustained by the wheat on board the defenders' ship was caused by the negligence of the mariners. No doubt the proximate cause of the injury was sea-water, but that sea-water was admitted to the hold of the vessel through the negligence of the mariners; and for that at common law, and independent of any express stipulation in the contract of affreightment, there cannot be the smallest doubt that the shipowners are liable. But this case has been brought before us in the form of a special verdict, in consequence of the very peculiar terms of the bill of lading, and particularly of that part of the bill of lading which enumerates excepted risks. The bill of lading stipulates expressly in usual form that goods are to be delivered at the port of destination in the like good order and condition as they were received at the port of loading; but there immediately follows a very long and special clause containing a number of exemptions from liability stipulated by the shipowners, and I think it is conceded on the part of the shipowners, the defenders here, that the object of this clause was to exempt them from all liability implied in the obligation to deliver in like good order and condition, except a liability which might arise from the unseaworthiness of the vessel. If they provided a seaworthy ship, tight, staunch, and strong, well manned and equipped, for the carriage of goods, they say that in consequence of the manner in which the clause of excepted risks is conceived they are free from all other liability. Now, that is not an illegal contract in itself. There is nothing to prevent shipowners stipulating and shippers agreeing that the ordinary liability of the shipowners shall be entirely discharged, and that although in form they undertake to deliver in the like good order and condition they shall not in effect be liable to do so. But, of course, in order to give effect to such an exemption from all the ordinary liabilities of shipowners, it is necessary that the exemption should be very distinctly expressed; in short, that such conditions of this kind must be interpreted *contra proferentem*. On the other hand, there is another kind of construction applicable to a bill of lading which it is quite necessary to keep in view along with that which I have stated,—and that is, that such a document must not be subjected to a too literal verbal interpretation. Documents of this kind are never grammatically constructed, and just as little are they expressed with any logical precision or accuracy; and, therefore, we must be content to construe the language, not literally, but according to what is the apparent meaning of the parties. Now, bringing these two rules of construction in view, the question comes to be whether the shipowners have here stipulated that they shall not be answerable for damage done to the cargo by sea-water through the negligence of the master

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No. 100. or mariners. The first part of the clause of exemption which begins with the words "not accountable," has not much bearing upon the present question. It consists of a variety of different risks for which the shipowners are not to be accountable; but it is needless to consider these in detail. A new sentence begins with the words "Not responsible," and it is within this second part of the clause of exemption from liability that the particular exemption relied on in the present case must be found, if anywhere. Now, the opening words are these,—"**Not responsible for the bursting of bags, or consequences arising therefrom, or from any of the following perils,**" and then there occur between three and four lines which plainly must be taken to be a parenthesis, and which I omit reading at present. The sentence without that parenthesis will run thus,—"**For any of the following perils,**" "namely, risk of craft, or hulk, or transshipment, explosion, heat or fire at sea, in craft or hulk, or on shore, boilers, steam, or machinery, or from the consequences of any damage or injury thereto, however such damage or injury may be caused, collision, straining, or other peril of the seas, rivers, navigation, or land transit, of whatever nature or kind soever, and howsoever caused, excepted." Now, the contention of the defenders is that the risk under which the present case falls in that enumeration is "perils of the sea." But this special verdict would under ordinary circumstances completely negative that ground of exemption, because what injured the cargo here was not in any proper sense of the term a peril of the sea. It was no doubt such damage as occurs upon the sea, and could hardly occur elsewhere, but the efficient cause of the damage was the negligence of the crew, and that is not in the eye of the law a peril of the sea in the ordinary sense of the term. And it is only by referring back to the words comprehended within what I have called the parenthesis that the defenders can get the benefit of that part of the clause which I have just read, namely, exempting them from perils of the sea; because the words within the parenthesis are—"Whether arising from the negligence, default or error in judgment of the pilot, master, mariners, engine-room, or persons in the service of the ship, or for whose acts the shipowner is liable or otherwise." Now the defenders contend that they are exempt from every peril of the sea caused by the negligence, default, or error in judgment of the master or mariners; and I confess it seems to me very difficult to say that that is the fair and obvious construction of this clause. A peril of the kind caused by the negligence of the master or mariners must, according to ordinary and common principle, cease to be a peril because it is caused by the negligence of the crew; but then this clause stipulates that though it is caused by the negligence of the crew it shall nevertheless be a peril of the sea,—for that, I think, is the effect of the words. And, therefore, it rather appears to me that giving full effect to the principle that this clause must be construed *contra proferentem*, it is still impossible to resist the conclusion that what has here occurred is just one of the things against which the shipowners stipulated by their bill of lading that they should not be liable. It was contended in argument, and, indeed, I think it was the main point of the pursuers' argument, that the clause upon which they have been commenting, beginning with the words "not responsible" and ending with the word "excepted" was not to be read as one clause, but as two, so that the first section of the clause, so to speak, ended before the word "and excepted," and in that way the second part of the clause, or the second clause, would consist of these words,—"**Collision, straining, or other peril of the seas, rivers, navigation or land transit of whatever nature or kind soever, and howsoever caused, excepted.**" If that were the true reading, then the result would be

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ording to the pursuers' contention, that perils of the sea would fall to be read the ordinary meaning of that term, and that it would not be possible to say that that second clause, within which in that case the defenders' claim of exemption must be brought, could be qualified by the words occurring in the first part of the clause, "whether arising from negligence," and so forth. Now, that is a very ingenious argument, and was most ably maintained on the part of the pursuers, and I think the greatest support which it received was from the occurrence of the word "excepted" at the end of the clause; indeed, but for that word it hardly suggested that this separation of the clause into two could be maintained. And there is no doubt that the occurrence of the word "excepted" is somewhat anomalous. If the clause is one clause and not two it is tautologous—quite unnecessary—because it expresses no more than is expressed by the opening words of the clause "not responsible." But I think the presence of the word there is very easily accounted for. There is no doubt that formerly, before it was the custom to introduce long strings of new exemptions into bills of lading, the way in which the excepted risks were expressed was always by a list. There first came an enumeration of the risks, not introduced by any such words as "not responsible" or "not accountable," but beginning thus—"The perils of God, the Queen's enemies, stranger princes, perils of the sea," and so forth, ending with the word "excepted." And there cannot be the least doubt that in introducing these long strings of excepted risks in this bill of lading the framers of the bill have just left in the old word "excepted," although it is no longer necessary or useful. But I cannot say that the presence of that word enables me to make that division of the clause into two which is necessary in the pursuers' case. On the contrary, it appears to me that the natural and true reading of the clause as it stands is that the shipowners are not to be responsible for any of the risks enumerated which are excepted. The mere tautology is plainly not sufficient to conduct us to a construction of the clause which it does otherwise bear, and I therefore come to the conclusion that the defenders are entitled to the benefit of this clause to the effect of exempting them from liability, and that the verdict must, in terms of the reservation contained in it, be given up for the defenders. I cannot say that I arrive at this conclusion with regret, because I am perfectly satisfied that the limitation of the liability of shipowners in the manner here stipulated, making them not responsible for any amount of negligence or misfeasance upon the part of their own servants, is likely to lead to a great deal of negligence, and to be attended with disastrous results. But if parties will contract in this form I can do nothing to effect to their contract.

THE DEFENDERS.—This bill of lading commences by acknowledging that the goods were shipped in good order and condition, and undertaking to deliver them at the port of Glasgow in the like good order and condition. The argument of the pursuers is, that, by the clauses which follow, this obligation is entirely excluded, and that, in consequence of these clauses, they are liable for nothing, in no circumstances, except that they have a seaworthy ship. Now, I submit to your Lordship that that is a contract which is not unlawful, but that is the meaning of it, it ought to be very clearly expressed, and in any way that the party reading it, under the circumstances, and in the manner in which these contracts are generally read, can have no doubt about its meaning. But the difficulty that I have in concurring with your Lordship

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arises from this, that that contract certainly does not, to my mind, clearly express that meaning,—does not, upon the face of it, clearly and distinctly express this—that although the shipowners undertake to deliver the goods in like good order and condition they are not to be bound to do so. If we read the words that are used grammatically, then I think the exception which occurs of perils of the sea, rivers, navigation, and so on, is an exception from the previous exception. If you read the words grammatically, and give the words “excepted” its natural meaning, that is the result. The objection to that reading is, that it leads to a consequence so extravagant that we cannot suppose it to be the meaning. That is the answer, and the only answer, that has been made to that reading of the contract. Now, it is just because of that extravagant result to which the reading of the words in that sense would lead that I doubt whether it is reasonable to hold that this meaning is so clearly expressed, and is so distinctly expressed on the face of this contract, as it ought to have been. If it is to be so read, I agree with your Lordship that it is very much to be regretted that a document of this kind should be expressed in so obscure, and I may almost say unintelligible, manner. But while I have great difficulty in concurring with your Lordship on the ground I have now stated, I cannot say that I am prepared absolutely to dissent from the result at which you have arrived. The point is very difficult. I should have been very much pleased if your Lordship had arrived at the opposite result, and I rather think I would have joined in that more willingly than I join in this; but, at the same time, it seems to be true, as your Lordship says, that these documents are not usually expressed in a grammatical or distinct manner. That also is very much to be regretted. It is impossible to have much sympathy with a practice of that kind, which may be—and I rather suspect is—taken advantage of by those who prepare such documents, just to mislead the other party who is entering into the contract. That is much to be regretted. But, on the whole matter when we read it carefully, and consider it deliberately—as is always done in a court of law—I cannot help agreeing with your Lordship that the meaning which was intended by those who framed it is the meaning that we must put upon it. I think that is the meaning they intended, though I doubt whether they were entitled to express themselves in that obscure manner. On the whole matter, I have very much difficulty and doubt, but I cannot say I am prepared to dissent from your Lordship’s opinion.

LORD MURE.—This is an important question, and it is not free from difficulty. As I understand the special verdict, the facts which we have to deal with are that the damage to the cargo arose from one of the orlop-deck ports of the steamer having been insufficiently fastened, through the negligence of some of the crew, in consequence of which the sea-water got into the hold of the vessel during the voyage.

Now, I agree with your Lordships that this is a neglect which, under the ordinary terms of a bill of lading, would have subjected the shipowners to liability. Upon that I do not understand that there is any difference between the parties, but the shipowners maintain that in this case they are not liable, because of the special terms of the bill of lading, which they say are sufficient to free them from liability. Now, the bill of lading is certainly a very special one; and its first impressions were rather adverse to its validity as a defence to this claim, because of its being calculated to mislead; for it is not clearly expressed

though it was apparently not written out in a hurry, but is in a printed form No. 100.
 ed by this steamship company. But while it is not very clearly expressed it
 very broad in its terms, and is not of an altogether unusual description. It
 not been stated that bills of lading containing the things here enumerated
 not occasionally used; and I observe that in the case of *Moes and Moliere*,¹
 ich has been referred to, the bill of lading contained almost all the same ex-
 tions. The bill of lading, therefore, cannot be said to be one of an alto-
 her unusual kind, and it was, I think, sufficient to put the party shipping
 goods on their guard, seeing that there are things stipulated in it which are
 erent from the ordinary risks. That, I think, is plain upon the face of the
 ument, and viewing it in that light I have come, though not without hesita-
 , to the same conclusion as your Lordship, that, on a sound construction of
 erms, it is sufficient to free the shipowners.

he negligence of the crew is specially mentioned in the parenthetical part of
 clause; and the main difficulty I have had is in consequence of the use of
 word "excepted" at the end of that part of the clause which deals with
 ls of the sea. If I could adopt the construction contended for on the part
 he pursuers, viz., that the bill of lading could be divided into three special
 ses, and that the part of it which begins with the word "collision" and
 with "excepted" was a separate and distinct provision, I think there
 ht be grounds for holding that the defenders were not entitled to succeed in
 defence. But I cannot so read the bill, because it appears to me that from
 t responsible" down to "howsoever caused" is a distinct clause by itself; and
 read by itself it is applicable to the negligence of the crew. It is, more-
 not unimportant to observe, as was pointed out by Mr Jameson, that the
 ession "howsoever caused" is a very broad and somewhat unusual expression,
 one which seems calculated to reach the perils of the sea, whether arising
 negligence or any other cause. In the English case of *Carr*,² founded on
 he defenders, which related to railways, it was held that the words "how-
 caused" were sufficient to extend the exemption from liability to every
 of damage that might arise from negligence of servants, and I see no rea-
 why the same effect should not be given to them here. On these grounds,
 fore, I have come to the conclusion that your Lordship has put a sound
 ruction on the contract between these parties.

ORD SHAND.—This is undoubtedly a case of great importance in the law of
 ping, because, as we have been informed, the bill of lading which is the
 ct of consideration has been in common use for some time in the shipping
 between New York and this country, and because I rather think this is
 rst instance in which it has been decided that the terms of the bill of
 g are such as entirely to free the shipowner from responsibility for the
 gence of his own servants.

he decision of the case depends upon the construction of the bill of lading,
 of that document two different readings have been suggested. It has been
 tained by the defenders, the shipowners, that the word "excepted" has
 left by mistake at the end of that part of the clause which has been the
 ct of discussion, and must be taken *pro non scripto*; or, alternatively, that
 o be regarded as a mere repetition, having the same force as the words
 responsible" at the beginning of the clause, thus making the clause prac-

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¹ *Supra*, p. 658, note 1.

² *Ibid*, note 2.

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tically end as if the words had been "all of which risks or perils above enumerated are excepted." On the other hand, it has been contended by the pursuers the owners of the goods, that the bill of lading is to be taken as consisting of three members, the first beginning with the words "not accountable," the second with the words "not responsible," and the third with the word "collision," and ending with the word "excepted."

I am of opinion that the defenders' construction of this bill of lading is sound; but I am further of opinion that even if the pursuers were right in their reading the clause, the result would be the same, and that the defenders are not responsible in the circumstances which are disclosed in this special verdict.

I think, in the first place, that there is no warrant for the view that the word "excepted" is to be struck out of this bill of lading, or dealt with *pro non scripto*. It may be, and probably is the case, as has been suggested by your Lordship in the chair, that that word has been left there by inadvertence. But I think it would not do for a court of justice, finding the word in the bill of lading, to disregard it, and say it shall be held *pro non scripto*, unless that was absolutely necessary in order to read the document sensibly. Taking the word as we have it, I agree with Lord Deas in thinking that if the clause were taken literally the true reading of the word "excepted" following the clause beginning with "collision, straining, or other peril of the sea," &c., would practically be that it expressed an exception from what had gone before,—the shipowner having said he was not responsible for certain things, the clause proceeds—collision, straining, and other perils of the sea, &c., "excepted." That taken literally, would mean this, that it was an exception from the stipulation of non-responsibility, or, in other words, that the shipowner stipulated that he would not be responsible for the bursting of bags, or consequences arising therefrom, and certain other perils enumerated, but would be responsible for collision, straining, or other ordinary perils of the sea. That meaning is obviously extravagant that it must be rejected, and in argument it was rejected accordingly by both parties. In considering the other meanings which have been attributed to the clause, I think it is obvious and clear that the whole purport of the clause from beginning to end was to exempt the shipowners from risks which otherwise they would be liable. It begins with the words "not accountable," again it repeats the words "not responsible," and again the word "excepted" occurs at the end. The result, in my opinion, is, that the sound construction of the bill of lading is that the shipowner has stipulated that he shall be free from all those risks against which the owner of the goods can secure himself by insurance; in other words, that while he shall be bound to present a ship in a seaworthy condition as regards her hull, masts, rigging, and appointments, and fit for her voyage at starting, with a crew suitable for the service, the owner of the goods shall take all risks beyond that, including the negligence on the part of the persons employed on board the vessel, or the service of the owner. It is said that there is a certain repugnancy or contradiction in the bill of lading, because the shipowner undertakes to deliver the goods in the like good order and condition as that in which they were received, and the observation is not without weight; but I think it is met, if not very satisfactorily at least sufficiently, by the consideration that the shipowner undertakes certain responsibility to which these words "in like good order and condition" may apply when he undertakes that his ship shall be fit and manned for the voyage.

I think it is clear, on the authorities, that the term "perils of the sea" has a much wider signification when contained in a policy of insurance than it has in a bill of lading in ordinary terms. In a policy of insurance the term includes damage done by the sea though really caused by the negligence of the master and crew. The term "perils of the sea," used in a policy, without any additional words, has that signification; and of this the case of Davidson, referred to in the discussion, and a number of earlier cases, are illustrations. So that inquiry in insurance cases, where the policy is so framed, is only this—Was the peril of the sea the proximate cause of the damage? for if so, it is one of the risks insured against, though it is clear that the damage would not have arisen from negligence. The case of Davidson is a very distinct instance of this. On the other hand, in the case of a bill of lading, in ordinary terms—the act of the ship, the Queen's enemies, and all perils of the sea, of what nature soever, excepted—it is held that the clause does not include a peril of the sea resulting from the negligence of persons in the employment of the shipowner or the crew of the ship; and of that many instances have occurred. The case of *Thompson v. Clark*, 26 L. J. (N. S.) C. P., page 168, and the cases of *Moes v. Thompson*, *Thompson v. Leith*, and *Amsterdam Shipping Company, Lloyd v. General Iron Screw Collier Company*, and *Grill* against the same company, which were referred to in the course of the discussion, are cases in which that rule has been applied. Keeping that distinction in view, it is in my mind clear that it was here intended by the terms used to limit the shipowner's liability by extending the class of perils for which he should not be responsible. In the first clause, after an enumeration of the perils, you have the words "howsoever caused;" in the second clause perils resulting from the negligence of the master, mariners, or persons in the service of the ship are expressly mentioned; and again, at the close of the clause, with reference to the various risks enumerated, you have the words "howsoever caused," repeated. Taking the clause as a whole, I am of opinion with your Lordships that the special words "whether arising from the negligence, default, or error of judgment of the master, mariners," &c., or others in the service of the ship, override the general words; so that you have an express stipulation that if damage shall result from negligence the shipowners shall not be responsible. I think the true interpretation of the clause at its close is as your Lordship has suggested. After stating that the shipowner shall not be accountable for certain perils, and shall not be responsible for certain others, and after an enumeration of these perils, the ellipsis is practically this—"which various perils are all" excepted. It is even if the clause were to be read as the pursuers have contended, by being broken up into three branches, and if the concluding part of it were to be as disconnected from what has gone before, thus—"Collision, straining, or other peril of the seas, rivers, navigation, or land transit, of whatever nature or kind soever and howsoever caused, excepted," I am of opinion that, in respect of the words "howsoever caused," the owner of the goods is not entitled to succeed in his action, because the shipowner has stipulated that he shall be free not only from perils of the sea, but from perils of the sea howsoever caused. It may be observed that without these words "howsoever caused," the shipowner would be free from liability for damage caused by the ordinary perils,—as, for example, a storm or a collision; and some force must necessarily be given to the words "howsoever caused." The argument for the pursuers gives neither force nor meaning to these words; for, according to the pursuers' argument, the

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No. 100. shipowner is freed from responsibility only with reference to the ordinary perils of the sea. The defenders, I think with reason, say that these words must cover something. They must cover some perils that would not be excepted if the words were not there; and therefore they must cover the only case which the ordinary clause would not already cover, namely, perils of the sea caused by negligence of the masters or seamen. It appears to me that a very good test of the soundness of this view may be found by taking the first of the perils here referred to, namely, collision. The words are—"Collision, or other perils of the sea, howsoever caused, excepted." The shipowner stipulates that he shall not be responsible for the consequences of collision, howsoever caused. Even with these words, "howsoever caused," the shipowner would not be responsible for collision unless it was caused by the negligence of his own servants. He is freed from the consequences of collision in all other circumstances, under the ordinary law which exempts him from liability for perils of the sea. What, then, is the meaning of these words, "collision, howsoever caused"? The only meaning which I think can be attached to them is that they shall exempt the shipowner in the only case in which he would have been liable before, namely, collision, even though caused by the negligence of his own servants. I can give no other meaning to the words "howsoever caused," and no other has been suggested. The force of these words has not come now for the first time under judicial consideration of the Court, for in the cases of *Carr v. Lancashire and Yorkshire Railway Co.*, and *Austin v. Manchester, Sheffield, and Lincolnshire Railway Co.*,¹ reported in 21 Law Journal, they received precisely the signification which, it appears to me, they must receive in this bill of lading, the signification, namely, that they protect the parties who had them in their contracts from the result of accidents or occurrences, even though caused by the negligence of their own servants. And I observe that in the case of *Philips v. Clark*, which I have already noticed, and in which the question of the shipowner's liability for leakage and breakage caused by the negligence of his servants was the subject of discussion, while the shipowner was held liable, Mr Justice Crowder made the observation,—"It is said that the intention was to free himself from all responsibility. In order to do that he ought to have expressed in clear terms that he was not to be liable for leakage or breakage arising from whatever cause," which are substantially the very words that have been inserted in this bill of lading. It is also worthy of notice that in a subsequent case, the case of *Lloyd*, reported in the 33d volume of the Law Journal, to which I have also referred, the present Mr Justice Brett, in giving the case, made the observation, that in the earlier cases cited for the defendants the words used are "damage, howsoever caused,"—"a well-known form of adjudged upon."

On these grounds, I am of opinion that the verdict in this case must be entered for the defenders. It may have been an imprudent contract on the part of the insurers. They may have paid a rate of freight too high, having regard to the risk and responsibility that the shipowner undertook, but I think that the contract is so distinct that it can only receive the effect which your Lordships have given to it. I concur with your Lordship in thinking it is to be regretted that the parties have thought fit to make a contract of this kind, and that the result may be to lead to negligence in the management of cargo-carrying ships. But on the other hand, it is not to be forgotten that the remedy is in the shipper's

¹ *Supra*, p. 658, note 2.

ds. They may either decline to send goods under such a contract, or insist No. 100.
n paying only such modified rates as are suitable to the shipowner's engage-
ts, which are of the restricted nature contained in this bill of lading ; in Mar. 16, 1877.
ch case I should think that prudent underwriters would either decline to v. Steel & Craig
re, or would very properly demand and receive a higher rate of insurance State Line
they would require where the shipowner is liable for the negligence of his Co.
ants, and therefore has the strongest motive to take care that such negligence
not occur.

THE COURT entered up the verdict for the defenders, and in respect thereof assoilzied them.

JOHN HENRY, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

THE EARL OF BREADALBANE, Pursuer.—*Kinnear—Lorimer.*
G. A. JAMIESON (Judicial Factor on Estate of the late Marquis of
Breadalbane), Defender.—*Balfour—Murray.*

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duil—Mansion-House—Obligation to Rebuild—Heir and Executor.—An
of entail in possession pulled down the greater part of the mansion-house,
h was in good repair, and proceeded to rebuild it on a more extensive scale.
re the new house was finished or made habitable he died.

an action by a succeeding heir of entail against the executors, concluding
they were bound to complete the house according to the plans, or alter-
ely to make it as good as it was originally, the defenders were *assoiilzied*,
e ground that the demolition of the house, with a view to rebuilding it,
g been in good faith, was a lawful act of the heir, and that no obligation
build transmitted against his executors (*diss.* Lord Deas, who held that it
only lawful for the heir in possession to demolish the mansion-house under
sonal obligation to rebuild, which transmitted against his executors).

erved (1) that substitute heirs of entail have no control over the heir in
ssion in the exercise of his proprietary rights, except as provided by the
of entail ; (2) that the only proceedings competent to heirs substitute of
against an heir in possession are interdict and declarator of contravention.

1862 John Marquis of Breadalbane had plans prepared for rebuild-
Armdaddy House, the mansion-house of the Argyleshire portion of
Breadalbane estates. The rental of the Argyleshire estates was about
000, and they were held under the same entail as the Perthshire
es, on which there was another mansion-house. The existing house
small but habitable. After part of it had been taken down, and the
building had proceeded a certain length, the Marquis died, in Novem-
862. His trustees roofed in the building, and compromised the
is of contractors for unexecuted work.

is action was brought by the Earl of Breadalbane, heir of entail in
ssion of the estates, against Mr Jamieson, judicial factor on the
-estates of the Marquis. The main conclusions were that the defender
bound (1) to complete Ardmaddy House according to the plans ; or
-wise (2) to build a house equal to the old one, or (3) to restore the
e to its former condition.

ie estates were disentailed by the pursuer in 1872.

appeared on a proof, and from the admissions of parties, that from
ommencement of the operations in 1862 about £5800 had been spent
ie house by the Marquis, and by his trustees after his death ; that of
sum £1960 was expended by the Marquis before his death, and an
n by the trustees against the next heir, the pursuer's father, for repay-
of three-fourths of that sum, was compromised ; and that it would
re about £5600 to complete the house according to the plans.

1st DIVISION.
Ld. Craighill.
M.

No. 101. The Lord Ordinary, after findings in fact, the substance of which been given above, assolizied the defenders.*

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* "NOTE.— . . . The house of Ardmaddy was part of the entailed estate; but there are in the entail no special provisions by which its existence or its maintenance was fenced. The heir in possession for the time might, out a violation of any condition, express or implied, have left it to fall into. Nevertheless, it was a part of the entailed estate, and he was not entitled to make spoil of it for his own benefit, and to the loss of those by whom he was to be succeeded. This was a point which was fixed by, or was involved in the cases cited by the pursuer. These are *Boyd v. Boyd*, 8 Macph. 637; *Don v. Gordon*, 24th May 1811, F. C.; and *Moir v. Graham*, 4 S. 737 (2). And the Lord Ordinary does not consider that anything besides, which has bearing upon the present controversy, was settled by any of these decisions. What is the subject of judgment on the present occasion is in his opinion a thing which is as much on the one side as on the other unforeclosed.

"The question, therefore, which has now to be decided for the first time is whether an heir of entail who finds the house on the estate unsuitable for property, because it is unsuitable for his occupation, in consequence of the insufficiency of its accommodation,—who for that reason resolves to replace what shall be a suitable residence,—who removes it that it may be so,—who has shewn by his expenditure upon the work the good faith in which it was commenced, and so long as he lived was carried on,—but who dies before the building is completed, transmits against his personal representatives an obligation to finish the structure as designed, or at any rate to restore a building equal to what was on the ground when his operations were commenced. The Lord Ordinary is at a loss to understand upon what principle this obligation could be sustained. An heir of entail, so far as not unfettered, is full of power; he is entitled to carry on the reasonable administration of the estate, without incurring a penalty for so doing; and the question as to the unsuitability of an existing house, and the propriety or necessity of its being replaced by another, is one of the things upon which he may, and indeed ought, to decide. If it is the contention of the pursuer to be carried? Must every work that begins to be finished by his personal representatives, if uncompleted at his death, be continued? Suppose that he has resolved upon the formation of a pond in his park, while a portion of the estate has been rendered unfit for ordinary use, and much cost to be incurred before what was intended can be accomplished; that an old bridge, too narrow for convenient use, is removed, and the new bridge by which it is to be replaced is left unfinished; or that the stead on the home farm is unfit for modern requirements, and the new one, by which improvement was to be effected on the property, is only partially constructed in these, or in any of these cases, which are only examples, is there a legal liability undertaken for the completion of the new work, or otherwise for the restoration of things to their original condition? The Lord Ordinary has come to this conclusion. In his opinion there is principle as well as authority against such a result; and, so far as he is aware, there is neither legal principle nor a decision by which it is sanctioned. The hardship inseparable from the opposite view, it is scarcely necessary to add, is all the greater that the personal representatives of a deceased heir have not the privileges of the heir conferred by the Montgomery Act. If they are to finish a mansion-house in the course of construction, the whole cost must be borne by them. None of it can be charged upon the entailed estate.

"These are the considerations upon which the foregoing judgment has been pronounced.

"Had the pursuer contended that the old house was suitable, or that the new house in course of erection was unsuitable, a different issue would have been raised. But neither of these points is matter of contention. The fact that the primary conclusion of the summons is for the constitution of an entail against the trustees of the late Marquis, under which they are to be bound to complete the new buildings begun by his Lordship, contains an implication consistent with both." . . .

The pursuer reclaimed, and argued;—Either the pursuer was entitled No. 101.
require the trustees to carry out the contracts as an obligation which
mitted against them, or alternatively, they were bound to restore Mar. 16, 1877.
mansion-house to a habitable state. If a man dies subject to a per- Earl of
obligation, his executors must fulfil it, and if the effect of it is to Breadalbane
ure a heritable right, the benefit goes to the heir.¹ But, at all events, v. Jamieson.
heir of entail in possession was bound to leave the next heir a habit-
house.² The test of this matter was what the substitute heirs could
e required the Marquis to do as a condition of being allowed to de-
ish the house. If an interdict had been brought, it would not have
refused, unless he had undertaken absolutely to complete the house.
ould not have been an answer to say that if he lived he might charge
e-fourths of the cost on the estate, but if he died he could not. That
an inevitable consequence of the position of an heir of entail. He
d bind his executors, but he could not leave them the power to charge,
could the substitute heir complaining consent to any such burden
g laid on the estate. There was no room for an interdict in the actual
instances; but that was the test; and though it might be assumed
the Marquis might have restricted his plans, as he did not do so they
t be carried out in full. It was said that the heir had got all he was
led to get, because the Marquis had actually spent on the house much
than one-fourth of the cost, and yet had not charged any part of it on
estate. But the answer was that the heir's demand upon the trustees
not to spend so much money, but to give him a habitable house.
gued for the defenders;—The Marquis, as heir of entail, was far of
estate. He was entitled to deal with it in any way, so long as he did
neur a contravention of the entail, and the remedies against heirs of
l were confined to those provided in the deed. Now, this was a per-
y lawful act, though not an ordinary act of administration. It was
cutting down trees.³ Assuming that there was an obligation to re-
it did not survive the heir in possession. It did not go beyond
that he could not pull down without intending to rebuild, and going
do so as long as he lived. No interdict would have been granted
s there was an apprehension of a wrong. Again, the obligation, at
ighest, was only to pay one quarter of the cost out of his private
; but he, and his trustees after his death, had spent much more.
advising,—

THE PRESIDENT.—I do not think it will admit of dispute that the house
Ardmaddy Castle is the proper mansion-house of the Argyleshire estates
Breadalbane family. It is true that these Argyleshire estates are held
the same entail with the Perthshire estates, and that the estates in these
counties very nearly adjoin one another, if they are not absolutely contiguous,
at on the Perthshire estates there is a very fine and suitable mansion at
outh. But even supposing that the estates in Perthshire and Argyleshire
o be considered as one entailed estate, there would be nothing at all in-
tent with the ordinary rules applicable to such cases in holding that there
be two mansion-houses belonging to estates of the extent and value of
which we are considering. That, I think, is quite settled in the well-

obson v. Macnish, Feb. 2, 1861, 23 D. 429, 33 Scot. Jur. 217; Malloch v.
n, Jan. 29, 1867, 5 Macph. 335, 39 Scot. Jur. 172; Brothie v. Stewart,
0, 1869, 7 Macph. 1031; Chiesley v. His Sisters, Dec. 22, 1704, M. 5531;
r v. Jarman, Dec. 4, 1866, L. R. 3 Eq. 98; Tod v. Moncrieff and Skene,
4, 1823, 2 S. 113, H. L. May 27, 1825, 1 W. and S. 217.

ordon v. Gordon, Jan. 24, 1811, F. C.

thcart v. Schaw, Jan. 31, 1755, M. 15,399.

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known case of the Marquis of Ailsa, which is reported in 15 Dunlop, 308. Taking it to be clear, then, that Ardmaddy Castle is the mansion-house of the Argyleshire estates, or (which is the same thing) one of the mansion-houses of the combined estates in the two counties, it follows, I think, of necessity, that this house is an essential part of the entailed estate. That is settled in the case of Gordon of Ellon, which is reported under date 24th January 1811, in the Faculty Collection. The heir of entail in possession, therefore, is not entitled to alienate or put away the mansion-house any more than he would be entitled to alienate or put away one of the farms on the estate. He must hand down the mansion-house to his successor just as he does the entailed lands. But the obligation is not inconsistent with his altering the mansion-house in the way of improvement, or even pulling down the mansion-house with a view to rebuilding upon the same site in a manner more suitable or equally suitable to the entailed estate. In this case the Marquis of Breadalbane, who seems to have spent some of his time in Argyleshire, living in this house of Ardmaddy Castle, was of opinion that the house was not suitable to the estate—that it was small and inconvenient—the estates in the county of Argyre being of very great extent, about 180,000 acres, and yielding a rental of about £23,000 a-year. It was quite within his power to reconstruct this mansion-house either in the way of additions or in the way of demolition and restoration, and he was entitled to make the expense of these operations a charge upon the entailed estate to an amount not exceeding two years' free rent of the estate, under the provisions of the Montgomery Act. Now, it is not disputed that what the Marquis did was quite within his power as heir of entail in possession, and that down to the time of his death he was doing no wrong and committing no violation of the provisions or conditions of the entail. He had plans prepared for the building of the new mansion, and these plans required that a considerable portion of the old house should be pulled down. This was done, and without any delay or interruption the work of reconstruction proceeded from the date at which it began down to the date of the Marquis' death in 1862. The operation of rebuilding and completing the mansion-house had not been finished at the time of the Marquis' death, indeed it had not proceeded so far as to substitute for the old house another habitable house, but a good deal of money had been spent, more than the value of the old house, and a good deal was intended to be spent farther if the Marquis had lived. It is quite obvious, therefore, that in what he did, the Marquis of Breadalbane was exercising his undoubted right as heir in possession of this estate. He was not violating any of the prohibitions of the entail, but he was doing that which any heir in possession would have been entitled to do. He had therefore committed no wrong, and the question which is raised in this record is, whether, in respect that he left the mansion-house unfinished at the time of his death, his executors and his general assignees are liable to a pecuniary claim of an amount requisite to finish and complete the mansion, or at least to proceed so far with its completion as to make it a habitable dwelling for the heir who has succeeded? It appears to me that this is a question of very great importance in the law of entail. It is in some respects a new question, but I think it is to be solved by a reference to principles which are very well established. It is trite law, that an heir of entail in possession is absolutely free as fiar of the estate, except in so far as he is expressly limited by the prohibitions and conditions of the entail, but it is quite necessary to start with that general proposition, because it is the foundation of the

licable to a question of this kind. If an heir of entail in possession violates the prohibitions of the entail then the appropriate remedy is a declarator of contravention and irritancy, to be brought by the next or any subsequent heir of entail; and I think for such a wrong done by the heir of entail in possession that is the only remedy which is provided by the law. It is the only remedy provided by the statute 1685, and by the terms of every perfect deed of entail. I think the law knows no other remedy for an act of contravention. Saying so, I am not leaving out of view that the next heir of entail may be well entitled to interdict a threatened act of contravention. But an application for interdict is not, properly speaking, a remedy. It is a preventive proceeding—to prevent a wrong being done—and not a proceeding to give a remedy for a wrong that has been done. At all events, there can be no doubt that the existence of the right to bring a declarator of contravention upon the wrong done naturally presupposes the right of the next heir or any other subsequent heir to prohibit that act of contravention before it is done. But with the creation of a declarator of contravention and irritancy, or an interdict to prevent an act of contravention, I think there is no remedy whatever against an heir of entail in this position. On the other hand, if the heir of entail does not commit an act of contravention, but does something which is not an act of contravention, I think, it necessarily follows that he has done no wrong, and that nobody is entitled to challenge or interfere with what he has done, or to interdict it. If it is done; in short, in respect he is not contravening any of the prohibitions or conditions of the entail, he is acting as a fee-simple proprietor might do, quite as free and unlimited as that fee-simple proprietor. Now, in the present case, I think it is not disputed that there was no contravention of the prohibitions or conditions of the entail. No doubt if the heir of entail in possession pulled down the mansion-house without any purpose of rebuilding it would be undoubtedly a contravention, as was found in the case of Gordon, which I have already referred to. But if he pulls down a part of the mansion-house as he did here, or even the whole of it, for the purpose of clearing a site for a new house, which he forthwith proceeds to build, then he is doing right and not wrong; he is doing what is desirable for the benefit of the estate, and that is not a contravention of the prohibitions of the entail. No man, therefore, can stop him from doing that, and just as little can anybody bring against him an action of contravention and irritancy. Now, it seems to me that as long as an heir of entail in possession and the next heir about to succeed him can be no obligation and no liability, except that which arises out of the terms of the entail. The heir in possession is free, except in so far as fettered by the terms of the entail. The terms of the entail are the sole protection of the heir who is next to succeed. If, therefore, the fetters cannot protect the heir next to succeed against that which his predecessor has done, it seems to me to follow of necessity that the heir next to succeed can have no ground of complaint and no claim of any kind in respect of that which has been done. It was said, no doubt, in argument, that when a person pulls down the mansion-house, being the heir of entail in possession, he is under an implied obligation to rebuild it, and that if that obligation is not fulfilled during his own lifetime his representatives must fulfil it as coming in their place. Now, I am humbly of opinion that as between an heir of entail in possession and the heir next to succeed there can be no implied obligation. The heir of entail is not to be interpreted in such a way as to extract from it any obligations by implication. It is *strictissimi juris*. If you cannot find the

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No. 101. obligation expressed upon the face of the deed of entail it is worth nothing Mar. 16, 1877. entail law. And, therefore, the heir of entail in possession pulling down a or the whole of the mansion-house, and proceeding to reconstruct it, is no Earl of Breadalbane my opinion, under any implied obligation. In proceeding to reconstruct it v. Jamieson. only doing that which is necessary to shew that in demolishing it he has been committing an act of contravention. It shews that, and it prevents interference of the next heir by a declarator of contravention and irritancy but it raises no obligation by implication, which, I think, is impossible under a deed of entail. In short, it appears to me that for an act so done, being a perfectly lawful and right act, and no contravention or violation of the entail, there can be no remedy to the next succeeding heir, and that under no circumstances so far as I can see, can there ever arise a pecuniary claim to the heir next succeeding against the executors of the last heir in possession. It has been held in well-known cases of *Ascog*¹ and the *Queensberry leases*² and *Bruce v. Bruce*³ all of which occurred in the House of Lords about the same time, and are reported in the 4th vol. of *Wilson and Shaw*, and in the more recent edition of *Eglinton v. Montgomerie*, 4 D. 425, H. L. 2 Ball's App. 149, although a contravention may have been committed by the heir in possession which has damaged the estate in consequence of the entail not being recorded or in consequence of a defect in one of the prohibitions, that can only obtain a remedy of a declarator of contravention and irritancy, but can found no pecuniary claim whatever at the instance of the next succeeding heir against the representatives of the heir in possession. Now, surely if the next heir succeeding cannot have a claim of reparation against the executors of the party who committed the act of contravention, still less can he have any claim against the executors of an heir who committed no act of contravention, but did that which he was entitled to do as an unfettered fiar of the estate. In short, it appears to me that the principle involved in these cases is quite sufficient for the decision of the present case. I think that the principle is, that the only measure of damages and liability between the heir in possession and the next succeeding heir can be found in the express prohibitions of the entail, and that the only remedy competent to the next heir or any succeeding heir is, as I have said before, a declarator of irritancy; but beyond what is secured to the next heirs by the prohibitions of the deed of entail, they have no right and no remedy whatever against the heir in possession or his executors. For these reasons the court entirely concur in the judgment of the Lord Ordinary..

LORD DEAS.—The late Marquis of Breadalbane was for a number of years prior to his death on 8th November 1862, heir of entail in possession of the Breadalbane estates, which comprehended, *inter alia*, the lands and estate of Breadalbane in the county of Perth, and the lands and estate of Nether Breadalbane in the county of Argyle. When the Marquis succeeded there were and had been two mansion-houses on the entailed estates,—the one the castle of Breadalbane in Perthshire, and the other the house of Ardmaddy on the Nether Breadalbane estate in Argyleshire. The lands in both counties are understood to have been held under the same entail, but that is of no moment here, because the

¹ *Stewart v. Fullarton*, July 16, 1830, 4 W. and S. 196.

² *D. of Queensberry's Exrs. v. M. of Queensberry*, July 16, 1830, 4 W. and S. 240.

³ *Bruce v. Bruce*, July 16, 1830, 4 W. and S. 240.

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thermore alone is, admittedly, expected to have been made in the two years' rent contemplated by the statute, commonly called the Montgomerie Act, 10 Geo. III. cap. 51, sec. 28.

The late Marquis, after he succeeded, expended, between Martinmas 1837 and Martinmas 1839, £3275, 3s. 7d. in repairing and improving the mansion-house of Ardmaddy, and in building offices in connection with it. For £2456, 7s. 8½d., three-fourths of that sum, the Marquis obtained decree of constitution under the statute just mentioned on 19th July 1844.

At although the house of Ardmaddy had been thus put in full repair the Marquis appears to have soon afterwards come to think that the accommodation provided was short of what it ought to be, considering the rank of those by whom it was meant to be occupied, and the extent and value of the estate. Accordingly, the Marquis, from time to time, obtained plans for rebuilding or restructuring the house of Ardmaddy, first, from the late Mr Gillespie Graham, architect in Edinburgh, and after his death from Mr Robert Baldie, architect in Glasgow, who prepared working-contracts early in 1862, and obtained estimates for execution thereof, amounting in whole to £5647, 0s. 9d. Thereafter the Marquis consulted Mr David Bryce, architect in Edinburgh, and he suggested additions to and improvements on the plans, which increased the estimates to £5998, 11s. 3d.; and, upon the footing of these increased estimates, the Marquis entered into contracts with the different classes of tradesmen for taking down and re-erecting a great part of the mansion-house, and upon these contracts work of demolition and re-erection was commenced in June 1862. In the

course of these operations it was found necessary, with a view to strength and security, to authorise the contractors to take down considerably more of the building than had been anticipated, and the consequence was that, at the death of the Marquis in November 1862, the greater part of the old house had been taken down while the re-erection was only partial. The sum expended by the Marquis between the commencement of his operations on 12th June 1862 and his death on 8th November same year, was £1964, 17s. 6d., and the Marquis having, as is regarded that expenditure, complied with the requisites of the Montgomerie Act, his executors obtained decree of constitution for three-fourths thereof on 1st December 1862.

In addition to this sum an expenditure was found necessary of £19s. 4d., which was disbursed by the executors, to cover and protect the house as it stood from the effects of the weather,—leaving the house still inhabitable. In the meantime a compromise had been made with the different contractors, and arrangements were also made about the unused materials, the particulars of which I need not enter into.

Under these circumstances, and without noticing, in the first instance, the dissentient other procedure which took place after the death of the Marquis, the first question arises for consideration, whether, as contended for by the Earl of Breadalbane, the Marquis laid himself under, and transmitted to his executors, an obligation either to finish the house of Ardmaddy in conformity with the contracts which he had entered into and begun to execute at his lifetime, or, at all events (alternatively) to make the house as good and as it was before his operations for its demolition and re-erection began? My opinion I have formed is that the Marquis did incur, for himself and his executors, this last or minor obligation.

The contention of the executors is that the Marquis laid himself and his

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No. 101. general representatives under no obligation to do anything more with reference to the mansion-house than he had done in his lifetime,—that having been intended to restore and indeed greatly to improve the mansion-house, and having done all that time and circumstances permitted to carry out that intention, his death, while it terminated his right to the rents and beneficial enjoyment of the estate, terminated also all his duties and obligations connected therewith, and devolved them on the heir of entail who then entered into the beneficial possession.

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The Lord Ordinary has given effect to this contention, basing his judgment, as appears from his note, upon the principle that “an heir of entail, so far as unfettered, is full fiar,” and observing that “he is entitled to carry on the reasonable administration of the estate without incurring a penalty for so doing, and the question as to the unsuitability of an existing house, and the propriety or necessity of its being replaced by another, is one of the things which he may and indeed, ought to decide.”

In supplement of this view it has been argued that the act of the Marquis in pulling down the mansion-house of Ardmaddy must either have been an act of contravention of the entail, which inferred forfeiture, or a lawful act, which inferred a mere conditional obligation, namely, to complete or restore the mansion-house if he lived and enjoyed the rents till this had been done. I am not convinced by this reasoning.

I have not the most remote idea that the Marquis ran any risk of forfeiture or that what he was in the course of doing could have been interdicted as unlawful. His generous desire in what he did, and intended doing, to support the dignity of those who were to inherit the ancient family title after him, was palpable. But I demur to the inference that, because there could be neither forfeiture nor interdict, there could be no obligation. The contrary, indeed, involved in the very terms of the argument. The act was not struck at by the entail. It was a lawful act. Nevertheless it, admittedly, implied a conditional obligation—conditional it is true, but still an obligation—and the question consequently simply is, What was the obligation which this lawful act implied? In my opinion it was an unconditional obligation to restore the mansion-house to at least as good a state as that in which it was before he pulled it down.

I do not dispute the doctrine that an heir of entail in possession is far as not fettered. But he is fiar only during his life. He ceases to be fiar the moment the breath is out of his body, and a new fiar comes in his place. This new fiar does not, like an heir at law or a *mortis causa* donee, derive his rights from the deceased fiar. He has rights of his own, which come into instant operation, and which the deceased fiar could not touch. No personal obligations undertaken by the deceased fiar can be devolved by him upon the new fiar, either directly or indirectly. He cannot, on the one hand, lay upon the new fiar an obligation to rebuild the demolished mansion-house. Nor can he, upon the other hand, deprive the new fiar of the mansion-house which he previously had, any more than he can deprive him of any other part of the estate. The conclusion seems irresistible,—that he must restore the demolished mansion-house at his own expense. The lawfulness of his act is the answer to the binding nature of his obligation. It was that obligation alone made the act lawful.

The new fiar was left no choice. He must either restore the mansion-house at his own expense,—which he certainly was not bound to do,—or he must

without it. According to the contention of the executors there was thus imposed, by the voluntary act of the deceased fiar, an obligation on the new fiar to restore the mansion-house at his own expense, under the penalty of having no habitable mansion-house on the estate. I think the deceased fiar had no more power to impose that penalty than he had to bind the new fiar in express terms to pay the expense of the restoration. It would be of no relevancy to say that a new fiar might have laid three-fourths of that expense upon the estate or exceeding heirs under the Montgomery Act. He certainly could not have done so if it was his right, and consequently his duty to the succeeding heirs, to recover the amount from the general representatives of the deceased fiar, which is the question now to be decided. At common law the heir in possession could not burden the next heir or the estate with the expense of any improvements whatever which he had either made or undertaken to make on the estate. If the burden now in dispute really rests on the succeeding heir, it has not been shown how he either can or could lighten that burden under the Montgomery Act, and, indeed, any plea of that kind would be subversive of the leading argument for the executors in the case.

A clause in the building-contracts bearing to bind the next heir or the estate to the expense which might necessarily be incurred under the contracts after the contracting heir's death would neither have enabled the contractors to recover from the next heir nor freed the executors of the contracting heir from being liable to the contractors without relief against the succeeding heir. It would be very anomalous if the contracting heir, who could not bind the next heir directly, could do so indirectly by subjecting him to the loss of a part of his estate (namely the mansion-house) if he did not take upon himself the burden of the restoration.

The accommodation which the old house of Ardmaddy afforded before it was pulled down is set forth in detail in article 20 of the condescendence, and the accuracy of that statement is admitted in the answer. The parties are further agreed that, in addition to all the money expended by the late Marquis and his tutors, a sum of £1500 is still required to restore the mansion-house of Ardmaddy to the condition in which it was before the Marquis commenced his meliorations of 1862. I think it very clear that by no act of the Marquis, however lawful, could he impose the burden of that restoration on his successor in the entailed estate. He could not have done so even if it had been the cost of meliorations for the benefit of the next heir. Far less could he do so when it was the cost of meliorations at all, but simply the cost of replacing things as they were. I think it also clear that by no act of the Marquis, however lawful, could he impose upon his successor in the entailed estate the obligation to accept of a mansion-house which required £1500 to be expended upon it in place of a mansion-house which required no such expenditure.

I have attended to the various cases which have arisen under leases. But I think the only cases of that class which have a bearing on the present question are those which relate to liability for the expense of meliorations made under leases granted by an heir in possession, and which expired after the succession was opened to the next heir. These cases seem to me to be examples of the principle on which my opinion proceeds, and I shall therefore notice some of them in the order of their dates.

In the case of *Dillon v. Campbell*, 14th January 1780 (M. 15,432), the lease granted by the heir in possession bore that the tenant was to be entitled, at the

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No. 101. end of the lease, to the value of buildings to be erected by him during its currency. In an action against the succeeding heir at the instance of the tenant for the value of the buildings, Lord Braxfield (Ordinary) assoilized the defender in respect he did not represent the granter of the lease otherwise than as heir of entail, "which entail contains the usual prohibitory, irritant, and resolutive clauses *de non alienando vel contrahendo debita*." Against this judgment it was pleaded that "by the improvements in question the defender enjoys an addition to his fortune and income. To that extent, therefore, independently of a passive title, he must be liable, upon the principle *quod nemo debet cum alieni jactura fieri locupletior*. Nor can the statute 1685, by which heirs of entail are prevented from selling or burdening the estate, be understood to bar claims of this equitable nature."

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It was answered, in substance, that no debt could be made to affect the succeeding heir of entail which could not be also made to affect the estate, and consequently that to bind the next heir, even for improvement debts, other than under the Montgomery Act, would infer a contravention of the clause of the entail against the contraction of debt, the efficacy of which could not be recognised.

The report bears—"The Lords, at first, moved by the equitable nature of the pursuer's demand, found the defender liable in the prestations of the lease; but upon advising a reclaiming petition they returned to the judgment of the Lord Ordinary"—that is to say, they affirmed the principle of Lord Braxfield's interlocutor that the heir in possession has no common law power to bind the succeeding heir for the expense of improvements, however much these may have increased the value of the estate, because this would be equivalent to contracting debt on the estate contrary to the terms of the entail.

The principle thus sanctioned by the high authority of Lord Braxfield was found to have been carried out to its legitimate consequences under the various circumstances of subsequent cases of leases granted in the ordinary course of administration. The obligation to reimburse the tenant for the cost of buildings to be erected by him is construed as binding the granter of the lease and his general representatives only, and not the heir of entail, because to construe otherwise would infer a contravention of the entail.

In *Webster v. Farquhar*, decided in December 1789 (Bell's 8vo Case 1790-91, No. 7), the lease granted by Mr Thomas Farquhar, the heir in possession, in 1722, for nineteen years after Michaelmas of that year, bore—"As in respect there are no houses at present upon the foresaid ground, the said John Webster or his above-written are to have liberty to build a barn, byre, stable, or other houses they may judge necessary thereupon, it being hereby agreed that immediately upon such houses being built and finished, the same shall be appraised by men mutually chosen by both parties; and whatever the houses shall be thereby valued at the said Thomas Farquhar hereby obliges himself, his heirs and successors, to pay the amount thereof to the said John Webster or his assigns at the expiry of this tack."

The granter of the lease died in spring 1789 without any general representative, and was succeeded in the entailed estate by John Farquhar, who declined to name a valuator at the end of the lease, and consequently Charles Webster, the son of the original tenant, brought an action against John Farquhar, then in possession, for the value of several houses which had been erected on the farm. The Sheriff sustained the claim, and gave decree accordingly. A

vacation it was pleaded for the tenant that the obligation imposed by the lease No. 101.
the grantor's successors to pay for the houses did not fall under the prohibi-
tions of the entail, and must therefore be applicable to the heir in possession of Mar. 16, 1877.
estate; and, besides that, as the heir in possession was *locupletior factus*, he Earl of
must be liable for the improvements. Lord Henderland (Ordinary) found that Breadalbane
defender represented the grantor of the lease only as heir of entail, and there- v. Jamieson.
fore absolved him, and the Court by a majority adhered.

Then, in *Taylor v. Bethune of Balfour*, decided shortly afterwards, viz. in
1 (Bell's 8vo Cases, No. 8), the lease granted by the heir in possession bore
In regard that the houses on the said farm have been appraised by two
real persons at Martinmas last, therefore it is agreed by both parties that if
same are found to be of less value at the expiry thereof, in that case the
heir shall be obliged to pay up the difference; and if they shall be found to
be of greater value, the said proprietor shall be obliged to pay up the difference
to the tenant." The appraised value of the houses at the end of the lease ex-
ceeded the appraised value at the commencement, and the tenant claimed the
balance out of the last year's rent due to the succeeding heir, who was by that
in possession. The Sheriff gave effect to the claim, as the ameliorations
were *in rem versa* of the defender; but Lord Braxfield (Ordinary) recalled this
verdict, and the Court adhered to his Lordship's interlocutor.

On the points which I should say were plain enough as matter of inference
from the above cases were made matter of express decision by this Court and the
House of Lords in *Moncrieff v. Tod* and *Skene*, which is fully reported under
17th May 1825, 1 W. and S. 217. In that case the lease, granted by the
heir in possession, for the ordinary period of nineteen years, at a time when
she was eighty-seven years of age, expressly bound her "or the then proprietors
of the lands, at the end of this lease," to pay to the tenant at the expiry thereof
the sum of £620, which the tenant had agreed to expend, and did expend, in
erecting a new steading on the farm, he being allowed a deduction of £21 a-year
from his rent on condition of keeping the steading in repair during the currency
of the lease. The action brought by the tenant was directed against the executor
of the deceased grantor, and the executor brought an action of relief against the
heir of entail, who was by this time in possession, so that all parties were in
judicial bond.

The executor pleaded, in the House of Lords, that the grantor had not bound
herself, executors, and successors, but only the proprietor of the lands at the
expiry of the lease—viz. the heir of entail—that "he alone will derive all the
benefit arising from the improvements, and consequently ought to pay for them
and thereby be benefited," and that the Act of Geo. III. has merely the effect
of rendering the heirs liable whether they are *lucrati* or not; but at common law
an heir is *lucratus* a liability is affixed to him.

And it was answered that the obligation undertaken by the grantor could
not be enforced against her personally, and consequently could be equally so
against her representative. "The entail contains a prohibition against contract-
ing or burdening the lands with sums of money, and therefore Mrs Skene
had no power to do so; and as she did not avail herself of the statute no claim
can be made against the respondent, Mr Skene, who does not represent her.
The general question has been settled by a series of decisions in which
the arguments urged by the appellant both in law and equity were repelled."

The Court Lord Gillies (Ordinary) decreed against the executor, and, in

No. 101. the process of relief, assoilized the heir of entail. The Court adhered (2 S. and D. 104), and the House of Lords affirmed the judgment.

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There are a number of subsequent decisions to a similar effect. Among them I may mention *Fraser v. Fraser*, June 7, 1825 (4 S. and D. 76); *Do. v. Do.*, May 29, 1827 (5 S. and D. 673); and *Do. v. Do.*, January 29, 1830 (8 S. and D. 409), affirmed on appeal February 25, 1831 (5 W. and S. 69).

It is obvious that the principle given effect to by this train of decisions is the principle of general application, arising from the nature and terms of a deed of strict entail. It was based upon that general principle, by Lord Braxfield in the Court, in the early case of *Dillon*, and this has been followed ever since. Each heir of entail is *fiar* during his life so far as not fettered. But the very terms and nature of the entail prevent the heir in possession, by any voluntary act or deed of his, from either depriving his successor of any portion of the estate, or laying him under an obligation either to make or to pay for meliorations on that estate, otherwise than under and in terms of the *Montgomery Act* (extended as it has been by the *Entail Amendment Act*).

The present case, in the view I take of it, is *a fortiori* within the principle of the above cases. It is not a case of meliorations, but of simple restoration. What the late Marquis did was, undoubtedly, voluntarily done on his part. It was lawfully done, because he undertook restoration, and neither he nor his representatives can, I think, escape from fulfilment of the obligation to restore which alone made his act lawful.

The death of the Marquis, of course, prevents his executors from obtaining a decree of constitution under the *Montgomery Act* for any expenditure incurred or falling to be incurred subsequent to his death, and I have considered attentively whether the claim against the executors might not be equitably restricted to the same amount as if the whole necessary expenditure had been made and duly vouched by the Marquis in his lifetime, as required by the *Montgomery Act*. But I am reluctantly satisfied that the law has provided no other valents for the relief competent under that Act.

I am still more reluctantly satisfied that the disentail of the estate after the death of the Marquis can make no difference on the result. It is true the present summons was raised and is insisted in by the Earl as heir of entail, as he is now neither heir of entail nor the representative of the other heirs in the entailed estate. He is fee-simple proprietor, and the money to be recovered must go into his individual pocket. The intention to disentail was intimated by the present summons was raised, and the disentail followed as a matter of course, no consents being necessary. But I have come to think that the claim must be regarded as at the date when it arose, and that no subsequent proceedings, once fully adopted, by disentail or otherwise, can take away the right and title of the Earl to sue for and recover the full sum claimed of £1500.

We have nothing here to do with such cases as arose out of the Queen's leases, or with other cases of that class, in respect of acts of contravention. There has been here no contravention. The claim arises out of a lawful administration. Not an act of ordinary administration, it is true, such as the granting of a nineteen years' lease with conditions as to buildings, but an extraordinary administration with respect to the mansion-house,—a disposition which surely cannot be in favour of the executors. Neither can it make any difference, in the principle applicable to the case, that the necessity for expending £1500 arises from an act done by the Marquis which obliges the Earl to

ward as pursuer, in place of from a contract of lease granted by the Marquis, No. 101. which would have left the Earl, in the first instance, at all events, in the position of a defender. The circumstances of the case are new, but the principle applicable to it is not new. The heir in possession cannot by his act, any more than by his written deed, affect the succeeding heir with any burden with which he could not equally affect the estate, except in so far as competent under the Montgomery Act. The Marquis could certainly not affect the estate with the burden in question—namely, the cost of restoring the mansion-house to as good a state as that in which it was before it was pulled down—and it is not to be assumed that he intended to do what he could not lawfully or effectually do.

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The fact that the executors are defenders and not pursuers cannot change the nature of the question, which really comes to be, Whether the late Marquis could burden the estate with the £1500 necessary to replace what he took away from

That would have been to burden or contract debt upon the estate contrary to the fetters of the entail as clearly or more clearly than if the £1500 had been expended on expense of meliorations, as in the various cases which I have cited above. The Marquis had meant to limit his obligation to rebuild the mansion-house to his own lifetime, that would have been to devolve the burden on the estate merely to the tailzie. There is no presumption either of law or of fact in favour of that view of his intention. The Marquis meant to perform a lawful and laudable act of administration, and he must be held to have undertaken the obligation which the law exacted from him in order to make that act lawful, namely, an obligation that the mansion-house should neither be thereby despoiled nor the estate burdened to preserve it from being despoiled.

I am therefore for recalling the Lord Ordinary's interlocutor, and decerning that the £1500, with an alternative, if the defenders desire it, of themselves restoring the mansion-house to as good and habitable a state as it was in before the Marquis pulled it down.

AND MURK.—I do not think the parties are much at issue as to the broad legal facts on which we are called upon to decide. It appears to me that it is distinctly made out upon the evidence, and upon the allegations on which I find, that what was done by the late Marquis of Breadalbane was not only within his power, but that it was done in perfect *bona fides*, and with the full intention of improving the mansion-house on the estate of Ardmaddy. I find no allegation on the record to the effect that that was not the position of the Marquis at the time of his death; and in taking the steps which he did it is clear that he was exercising a power conferred upon him by statute. He was acting with a view to the benefit of the entailed estate; and he was not only authorised to do what he did, but the statute is so framed as to shew that it was intended to encourage heirs of entail to make improvements of that description. The 17th section of the Montgomery Act proceeds upon the allegation that it frequently happens that mansion-houses on entailed estates are not suitable for the habitation of the parties occupying these estates, and that it would be for the benefit of the estate and of the heirs of entail that they should be authorised to expend money in building, or improving, or adding to these mansion-houses; and the statute provides that if they do so lay out money, they shall be entitled to charge the larger proportion of that money against the succeeding heirs of entail. Now, I understand Lord Breadalbane was proceeding to avail himself of the power conferred by that clause of the statute; and if he had com-

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pleted the large improvements which he contemplated, as shewn upon the plan prepared by the late Mr Bryce, he would have put up not only a much larger house than the one he was improving, but one of a description that would have enabled him to charge a very considerable sum against the succeeding heirs of entail. But in that position of matters, and before these improvements were completed, Lord Breadalbane died; and the question which we have to consider is, Whether the half of the mansion-house having been pulled down, and the rest of it having been in the meantime rendered incapable of beneficial occupation, the executor of Lord Breadalbane can be called upon at the expense of his personal estate to complete this erection upon the entailed estate? That a very considerable benefit was in the course of being conferred upon the estate is plain; because it appears from the evidence of Mr Baldie that the value of the west wing, which was pulled down, was not £1500, and that for that sum a house could now be put up, replacing the west wing, so as to put the mansion-house in as good a condition as it was at the time that wing was pulled down. All that Lord Breadalbane did, therefore, was to take down a house of the value of £1500, while the sum actually expended by him and the executors is proved to have been nearly three times that amount, viz. £5664.

I concur with your Lordship in the chair as to the legal rules upon which this case must be disposed of. It appears to me that the remedy of the heir must be found either within the terms of the entail itself, or within the terms of the statutes under which such proceedings are made lawful for heirs of entail; and being of the opinion expressed by your Lordship, that the principles which were laid down in the House of Lords in the cases of the Queensferry leases, of Ascog, and the later case of Montgomerie, are applicable to a claim of this sort, I should in ordinary circumstances have been content to abstain from entering into any further detail, and with simply stating that I concur in the grounds on which your Lordship has proposed to decide the case. It is only that the remedy in cases of this description must be by irritancy for contravention, or that there may be special cases, such as the case of Gordon, where the interdict may be applied for, to stop a party from doing what would be a contravention of the entail; and I should not have thought it necessary to say so, had it not been that when the case originally came before me in the Outer House, and when I allowed a proof, I pronounced an interlocutor indicating my views on the questions raised, though without committing myself to them. That was on 18th June 1873, and I see I stated that as then advised I was disposed to think that the pursuer, "even upon the assumption that the allegations upon which he and the defenders are at issue are well founded, would not be entitled to demand the reconstruction of the mansion-house in question according to the plans prepared for and approved of by the late Marquis of Breadalbane, whatever expense that reconstruction might involve." That was with reference to the first conclusion of the summons, that the plans of Mr Bryce should be carried out at the expense of the defenders. But I added, that in regard to the special circumstances of the case, and more particularly to the fact that the mansion-house taken down had been recently repaired, and that the expense of that was charged to a certain extent against the estate, I thought there might possibly be in equity some claim on the part of the present Lord Breadalbane to be relieved of the charges so made against the estate, and that at all events a mansion-house of a habitable description made good to him at the expense of Lord Breadalbane's moveable estate, and I allowed a proof of

cts upon which that claim was rested. That is the view which, without committing myself, I indicated before the facts were investigated. But upon reconsidering the matter, with the information contained in the proof, I am satisfied that in the special circumstances of this case no injustice will be done to the succeeding heir by refusing the remedy which has been asked. If Lord Breadalbane's original plan had been carried out, or even if the mansion-house had been finished in the more moderate way now proposed, what would have been the position of the succeeding heir? The sum actually expended by the late marquess and his executors amounts to about £5600, and it would require about £400 more to put the new west wing into habitable condition, and to connect it with the east wing, which has not been pulled down. Now, if that had been done by the late Lord Breadalbane during his life, and he had availed himself of the provisions of the statute, he himself would only have been liable for one-fourth part of £8000, and the estate or the succeeding heirs would have been charged in payment of the interest of the other three-fourths. Lord Breadalbane would thus have had to spend only £2000 out of his own pocket, and £6000 would have been constituted against the next heir and the entailed estate. Now, what is the present position of the succeeding heir? Upwards of £5660 have been expended in building a new west wing to the mansion-house, and all that is required to complete it is about £2400. The entailed estate has therefore been already benefited to the extent of £5600 by what has been done, and the injury that is sustained by the succeeding heir of entail is this, that in requiring the estate to remain entailed, he will require, in order to put the house in habitable condition, to expend out of his own pocket £600, and he would be entitled to charge the other three-fourths, viz. £1800, against the succeeding heirs of entail. I am therefore quite satisfied, dealing with the matter simply upon these considerations, that no injustice is done to the pursuer by refusing this claim. I am clearly of opinion that, as matters stand, your Lordship has put your decision upon sound grounds in law; but having indicated these views in 1873, I have thought it right to explain that on the evidence led I am satisfied that there is, on equitable considerations, no foundation for the pursuer's claim.

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LORD SHAND.—I am of the opinion of the majority of your Lordships. I think there are two settled principles of entail law which are sufficient for the decision of this case. The first is, that an heir of entail in possession is the proprietor of the property, in so far as he is not limited and restricted by the entail under which he holds the estate; and the second, which seems to follow from this, is that the rights of heirs *inter se*, and the remedies competent to them, are to be ascertained from the deed itself. It may be convenient to state these principles somewhat more fully before considering the particular case, and I cannot refer to any passage in which the principle of them is more distinctly put than the statement of Lord Brougham in the case of *Montgomerie v. Eglinton*, 2 Bell's App. p. 185, where his Lordship said:—"An heir of entail in Scotland is never considered a trustee for the subsequent heirs of entail. He is considered as a proprietor in all respects whatever, except in so far as he is tied up, bound down, and fettered; and I have often had occasion, both at the bar in your Lordships' presence and since I have come on the bench, to explain the great difference—I may rather say the contrast—between the Scotch law and the English law in that respect. If I here make a tenant for life by settlement, he is tied up *eo ipso*, and he can do nothing that

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shall endure beyond his own life-estate, unless in so far as I add powers to his estate. But in Scotland it is the very reverse. The heir of entail is the fiar—he is free. Here the tenant for life is fettered except so far as he is freed by powers. In Scotland the heir of entail is free except so far as he is fettered by the provisions of the entail. He is the fiar—he is in possession of the fee-simple of the estate in every particular, except in so far as he is tied up by the entail. This is the governing principle, and it is upon this governing principle that the decisions have gone.” And I observe that Lord Campbell, referring to the passage I have just read, says, at p. 193 of the report—“I entirely concur in the distinction which my noble and learned friend so forcibly pointed out between the English and Scotch law with reference to the subject of entails. Under the English law the tenant for life has no power except what is expressly conferred upon him beyond his own life, whereas the heir of entail in Scotland is armed with every power except that which is expressly taken from him.”

The other rule or principle which results from this is very well stated, I think, in a sentence in the notes by Mr Chalmers, which were referred to by the counsel for the defender in this case, as expressing correctly the result of the judgments in the cases of *Ascog* and *Tillicoultry*, and similar cases, and which has been repeatedly referred to with judicial approval. At p. 31 of the appendix to *Wilson and Shaw's Appeals*, vol. iv., the principle is thus stated:—“The rights of the several parties interested under the deed, and the remedies in case of contravention, can only be ascertained by what the deed itself contains. Judges are not at liberty to go out of it either to give or to take away, however plausible or seemingly equitable the construction may be.”

Having these principles in view it appears to me to be clear that at the time when the Marquis of Breadalbane proceeded to take down this mansion-house which I take to be the mansion-house of the estate, he was acting entirely within his powers as the proprietor of these estates. If, instead of having it in contemplation to improve or rebuild the mansion-house it had been his intention simply to take down the house and dispose of the materials, it would be clear that that would have been a contravention of the entail under which he possessed the estate; and the authority of the case of *Gordon of Elgin* shews that in that state of the facts an heir proceeding thus avowedly to contravene the entail would be restrained by preventive diligence from doing so. But if an heir has succeeded in demolishing the house and removing its materials, I know of no authority in the law for the view that there is a remedy against him by way of a pecuniary claim, or any remedy except that of an action of declarator of irritancy and forfeiture founded on contravention. If, then, the question which is now raised had arisen in the form of an interdict presented against the Marquis of Breadalbane when he began his operations, and it had been conceded that his intention then was to improve the mansion-house or to put up another, and that with that view he was partially taking down the present house, I take it to be clear that the interdict would have been refused, on the ground that he was doing nothing which was not within his powers as fiar of the estate. It may be that even after the interdict had been refused, if subsequently the Marquis having removed the house had refrained from putting up another—if he had ceased in his operations for a considerable time, so that it became evident that he had no intention of putting up another—he would have been liable to an action; but the action in this case would not have been an action to restore the house or to pay damages, but

action founded on his having violated a prohibition—an action of irritancy No. 101.
 of forfeiture for the contravention. There was no room for any such action so
 long as the Marquis lived, for it appears that from the time the house was
 moved until he died he continued to carry out his intention of restoring the
 mansion-house by putting up the building which at great expense is now upon
 property, although in an unfinished state. And therefore I take it that at
 death there was no action competent at the instance of the heirs of entail in
 respect of what had been done. He had either committed a contravention by
 what had been done, in which case the sole remedy was an action of irritancy
 founded on that contravention (the right to bring such an action having, how-
 ever, ceased at his death) or he had not committed a contravention, in which
 case he was exercising his powers as a fiar in possession—a proprietor dealing
 with his own estate—and he came under no obligation in consequence of his
 doing so. This last view I take to be the right one. It has not, indeed, been main-
 tained on the part of the pursuer that there was an act of contravention up to
 the time of the Marquis' death.

It has been argued that the Marquis having died without finishing the build-
 ing it must be held that in law his representatives were under an implied
 obligation to complete it. I cannot find any ground for that contention in the
 fact of entail on which the Marquis possessed, and I think the whole stream of
 authorities goes to negative that view. There have been two classes of cases in
 which practically the same argument has been presented, and in both of which
 the Court have rejected it,—I mean, in the first place, the cases of *Aiscog*, *Tilli-*
try, and *Montgomerie v. Eglinton*, and in the second, the case of the
Queensberry leases. The argument in the first of these cases was that as the
 Marquis of entail had sold the estate, contravening the entail in a question *inter*
creditors, he was bound, by an implied obligation to be gathered out of the pro-
 ceeds of the entail, to reinvest the price. But the Court held—and this was
 the principle on which the cases were decided—that no such obligation could
 be implied or reared up out of the entail—that what the Court had alone to deal
 with was the express terms of the prohibitions of the entail, and that the
 sole remedy, and the only remedy, for a contravention was an action of forfeiture
 and not a pecuniary claim. The case of the *Queensberry leases* (4 W. and S.
 101) was of the same character. The heir of entail in a question *inter heredes*
 contravened the entail by granting a lease at too low a rent. The lease was
 in violation of the prohibition against alienation, but was effectual to the tenant,
 and the entail was unrecorded. The next heir claimed damages on the ground that
 the prohibition inferred or implied an obligation to pay the loss or damage caused
 by its violation. But, again, the answer was that the remedy of a succeeding
 heir must be found in the express provisions of the entail, and that though the
 entail prohibited there was no ground in law for holding that an implied
 obligation to pay damages could be inferred. I think these cases on principle
 repel the notion that an implied obligation, such as is here insisted on,
 can be reared up from the prohibition of an entail. If such a claim were to be
 maintained, it is very difficult to say where it should end. Suppose an heir of
 entail has cut down the old trees that surround the family mansion, and which
 are of great importance to it, for ornament and shelter—suppose he has done
 so irrevocably which never can be restored, and dies after having done so—can it be said
 that because there was a prohibition in the entail which deprived him of right
 to cut down the trees, his executors would be liable in damages? I think that

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would necessarily follow from the argument which has been submitted on the part of the pursuer; and I do not see where the cases would stop if such an action as the present were entertained, for in numerous cases of minor disposition of the estate there would be no limit to the claims of reparation which might be made on the same ground.

The cases of improvements or meliorations made by heirs of entail in the case of entailed estates, with very great deference indeed to my learned brother Lord Deas, do not appear to weaken, but rather to confirm, the view which is now to receive effect by this decision; for I think the principle which is at the root of the decision of these cases is this, that the express provisions of the entail are decisive between the heirs, and that nothing can be founded on implied obligation to be reared out of these. The contention in the cases to which his Lordship has referred was substantially this, that because one heir had died after permanently improving an estate, and so enhancing the rents received by his successor, there was an implied obligation that his successor should pay for these meliorations; but the Court held that no such implied obligation existed. I think that just as the heir in possession cannot by his acts impose pecuniary liability on his successor beyond what the deed of entail authorises, so the succeeding heir cannot establish pecuniary liability against the representatives of his predecessor for the acts of his predecessor while in possession, and that appears to me to be the principle on which these cases were decided. If the pursuer succeeded in his demand this would certainly be the first case in which liability would be established against the representatives of a prior heir for acts done by him in dealing with the estate, and I confess if it were sustained I do not see to what length that principle might not go. I am therefore of opinion with your Lordship, on the general grounds stated, that this claim cannot be entertained.

We had a good deal of argument upon another point pleaded by the pursuer. It was maintained that even if he were not entitled to succeed under the doctrine of implied obligation arising from the provisions of the entail, yet, because of the Marquis of Breadalbane's actings, in having entered into contracts with builders and having materials on the ground and otherwise, shewing his fixed intention to complete the new house, there was some vested right in the pursuer to have these acts continued. That argument was founded upon cases which have occurred between heir and executor. In all of these cases the question was between parties who had a legal right to the succession of the estate with reference to the particular position in which the testator had left part of his funds and property which necessarily and by force of law belonged to one or other of them. I am of opinion—and I presume in saying so I express the opinion of all your Lordships—that these cases have no application to the present, and that there was nothing in the actings of Lord Breadalbane which could give these pursuers the right as beneficiaries, or *quasi* beneficiaries, to insist on this building being completed, if there be no legal obligation to do so. I have noticed that point in this case it should be observed that the argument had not received full notice. I believe your Lordships' reason for not commenting upon it was that you were quite satisfied, as I am, that the argument was untenable.

THE COURT adhered.

DAVIDSON & SYME, W.S.—GIBSON-CRAIG, DALZIEL, & BRODIE, W.S.—Agents.

PORTOBELLO PIER COMPANY, Petitioners.—*A. J. Young.*

No. 102.

HENRY CLIFT, Respondent.—*J. C. Smith.*

Mar. 16, 1877.

Portobello

Pier Co. v.

Clift.

Process—Expenses—Compensation.—Where the respondent in a petition had obtained an award of expenses against the petitioners, the Court refused to allow a decree to go out in name of the agent disburser, on the ground that in another litigation between the parties relating to the same subject-matter, disposed of at the same time, the petitioners had obtained a decree for expenses against the respondent, which they were entitled to set off against the respondent's account.

SEE *supra*, p. 462.

The Portobello Pier Company (Limited) presented a petition to the Sheriff of Midlothian, praying that Henry Clift, who had been their servant, whom they had dismissed, should be ordained to assign and deliver a certificate for the sale of exciseable liquors to Donald S. Fraser, whom they had appointed restaurateur in room of Clift.

1st DIVISION.
M.

Henry Clift also presented a petition to the Sheriff of Midlothian, praying for interdict against the Portobello Pier Company supplying the public with exciseable liquors during the currency of the certificate.

After various proceedings the two cases came before the First Division on appeal by Clift, and were heard and disposed of together. In the petition for interdict he instance of Clift he was found liable in expenses, and after the account had been audited the Portobello Pier Company, on 14th March, obtained a decree in their own name. In the petition at the instance of the Portobello Pier Company they were found liable in expenses, and as the account had been audited Clift moved that the report should be allowed of and a decree allowed to go out in his agent's name.

The company objected, on the ground that they were entitled to set off one account of expenses against the other, and were bound only to the balance, and that they could not do so if a decree was given in the respondent's name.¹

Clift argued;—Compensation did not take place except when both accounts were incurred in the same litigation. It must be clear from the deponent's sheet that the accounts were incurred in the same litigation.

JUDGMENT.—There were two petitions in the Sheriff Court relating to the same matter, one being for delivery of the certificate by which Clift was empowered to sell exciseable liquors, and the other for interdict against the Portobello Pier Company carrying on the business of the sale of exciseable liquors in their premises. In the latter case we decreed in favour of the Portobello Pier Company, with expenses, and in the petition for delivery of the certificate we gave a decree for delivery of the certificate, but found the Portobello Pier Company liable in the expenses. The Portobello Pier Company, after paying the account of expenses in the interdict case audited, yesterday got the Auditor's report approved of, and obtained a decree. The account now before us presented by Clift for his expenses in the action against him, and he asks for approval of the Auditor's report, and for a decree in the agent's name. In the other case this would be granted. The Portobello Pier Company object, because they desire to have the one account set off against the other, and only the balance paid. This raises the question whether the right of the agent dis-

ordon v. Davidson, June 13, 1865, 3 Macph. 938, 37 Scot. Jur. 494; *v. Craig*, June 1, 1852, 14 D. 829, 24 Scot. Jur. 477; *Stothart v. John-Trustees*, May 14 and 23, 1823, 2 Mur. 549; *Warburton v. Hamilton*, 30, 1826, 4 S. 639; *Graham v. M'Arthur*, Nov. 28, 1826, 5 S. 46.

No. 102. **Portobello Pier Co. v. Clift.**
 Mar. 16, 1877.
 burser for Clift can be defeated by the claim of compensation by the Portobello Pier Company. This matter must be decided by authority, and the only duty is to apply the authorities. In the cases of *Stothart v. Johnston* and *Warburton v. Hamilton*, where expenses were awarded to both parties *in contextu*, it was held that the one must be set against the other, and that no agent disburser could take any benefit by the ordinary rule that he may of decree in his own name. But in the cases of *Graham v. M'Arthur* and *Graham v. Davidson* the principle was carried still further. There the award had been made at an earlier stage of the litigation, and yet when the second award was made in favour of the opposite party he was held entitled to set the one against the other.

It was contended here that a different principle applied, because there were two actions and two applications for expenses. But there is no doubt that the two actions might have been conjoined, because they relate to the same subject-matter, and are between the same parties. If the actions had been conjoined they would have formed one action, and so the accounts here would have been taken under the rule of the earlier cases. I think that compensation must be granted, and that the best way of doing it is not to allow extract to go out in the agent's name.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THOMAS LAWSON, S.S.C.—W. N. MASTERTON, L.A.—Agents.

No. 103. **John Clark Junner, Pursuer.—Fraser—Rhind.**
 Mar. 17, 1877. **North British Railway Company, Defenders.—Balfour—James.**
Process—Proof—Skilled Witness—Reparation—Personal Injury—Inquiry by Medical Witness prior to trial.—Circumstances under which the pursuer can bring an action of damages for personal injury was held bound to submit himself to examination prior to the trial by a particular medical man selected by the defender.

2D DIVISION.
 Lord Adam.
 R.
 IN an action of damages at the instance of John Clark Junner, for personal injury occasioned to him through a collision which occurred on the line of the North British Railway Company on 11th Decr. 1876, the pursuer averred that in consequence of the accident he sustained severe injuries to his head and back, involving concussion of the spine and severe shock to his system.

The action was raised on 20th February 1877.

On 27th March the defenders' solicitor wrote to Mr R. Menzies, the pursuer's agent, requesting to be informed when it would be convenient for the pursuer to submit himself to examination on behalf of the company by Professor Spence, and Drs Dunsmure and Watson.

On 3d March Mr Menzies wrote in reply that Mr Junner was willing to be examined by Dr P. H. Watson, Dr Dunsmure, and any other medical gentleman the company might choose to send except Professor Spence. "Mr Junner declines to be examined by him because of the treatment he received from the Professor when he called upon him as an ordinary patient, while suffering greatly both in body and mind through the results of the accident. On that occasion Professor Spence declined to look at him, or to give him any advice which would tend to relieve his pain and anxiety, because he, the Professor, stated that he could not do so, being retained by the North British Railway Company to examine other patients, and give evidence in their behalf."

On receipt of this letter the defenders' solicitor communicated with Professor Spence, and on 5th March Professor Spence wrote in reply :—
 "I have received yours of this date, with the annexed copy of Mr Menzies' letter, stating Mr Junner's reasons for objecting to be examined by me. The statements in that letter so gravely misrepresent my conduct towards Mr Junner that I cannot but express astonishment that any legal gentleman should have written it without having taken further steps to ascertain the correctness of the statements advanced."

No. 103.
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 North British
 Railway Co.

"When Dr Young (Mr Junner's ordinary medical adviser) called on me Mr Junner, he said Mr Junner wished my opinion as to the effects of a railway injury which he had sustained. I then asked, Did he content me as to treatment or in view of legal proceedings? Dr Young lied that it was in view of a probable action for damages, as Mr Junner had been injured on the Portobello line. I then said that will be the case with the British Railway Company, and as they usually consult me in such cases I think it better to decline examining or giving an opinion in the case."

"Mr Junner certainly did not express any desire that I should examine him in reference to treatment, nor did he seem to be suffering either 'in body or mind' at the time. So far from appearing to be hurt at my declining to examine him I thought he appreciated the grounds on which I did so, for either he or Dr Young asked whom I would advise him to consult, and I named a medical gentleman."

"The defenders moved the Lord Ordinary to pronounce an order ordaining the pursuer to submit himself on their behalf to examination by Professor Spence, and Drs Dunsmure and Watson."

"The Lord Ordinary, on 13th March, pronounced this interlocutor:—Having heard counsel on the motion of the defenders for an order ordaining the pursuer to submit himself, on behalf of the defenders, to examination by Professor Spence and other surgeons, refuses the motion as regards Professor Spence, on the ground that the pursuer is unwilling to consult with that gentleman, and as regards the others, that the motion is unnecessary, in respect that the pursuer states that he is willing to submit to examination by any other surgeon or surgeons: and leaves to the defenders to reclaim against this interlocutor." The defenders reclaimed.

LORD JUSTICE-CLERK.—There was evidently a most unfortunate misunderstanding here between Mr Junner and Professor Spence. This is much to be regretted, but as the matter has come before us we must deal with it as we think proper in the circumstances.

"Mr Junner says that we are not to interfere with his liberty in the matter, and that to grant the order craved would be on the one hand practically to compel him to be procognosed, and on the other to subject him, while suffering from a serious nervous affection, to an interview which must necessarily be disabling to him in the extreme. I think there is no doubt, however, that we have power to make this order which the Lord Ordinary has refused, if we are satisfied that it should be granted. When a man says that he has suffered a real injury and craves reparation therefor, the question of his physical condition after the alleged injury is the most important element in the case. It is not to be inspected prior to the trial it is evident that the defenders will be put to a most serious disadvantage, amounting almost to deprivation of all medical evidence."

"The only question is, whether the pursuer, who says that he is willing to

No. 103. submit to the examination of any other medical gentleman than Professor Spence, is bound to submit to examination by that gentleman, against whom it appears to entertain some not very intelligible, and certainly entirely unfounded, grudge or pique.

Mar. 17, 1877.
Junner v.
North British
Railway Co.

I should be slow in a matter of such delicacy as this to disregard any objection made to examination by a particular doctor, even though the objection appeared to be somewhat fanciful. But, looking to the explanation given by Professor Spence, I am satisfied that the objection taken here should not be entertained, and that the order craved should be granted.

LORD ORMDALE and LORD GIFFORD concurred.

THIS interlocutor was pronounced:—"Having heard counsel on the reclaiming note for the North British Railway Company against Lord Adam's interlocutor of 13th March 1877, recall the said interlocutor, and on the motion of the reclaimers appoint Mr J. C. Junner to allow himself to be examined by Professor Spence, along with the other medical gentlemen, on behalf of the railway company, reserving the question of expenses, and decern."

ROBERT MENZIES, S.S.C.—ADAM JOHNSTONE, Solicitor.—Agents.

No. 104.

WILLIAM HAMILTON Senior, Pursuer and Respondent.—*Rhind*.
WILLIAM HAMILTON Junior, Defender and Appellant.—*Mair*.

Mar. 20, 1877.
Hamilton v.
Hamilton.

Jurisdiction—Appeal—Sheriff Court—6 Geo. IV. c. 120, sec. 40—A. S. 11th July 1828, sec. 5.—A. S. 11th July 1828 requires that in advocations for trial from the Sheriff Court under sec. 40 of the Act 6 Geo. IV., c. 120, leave of the Sheriff should be obtained in cases where the claim shall be simply pecuniary, so that it cannot appear on the face of the bill that it is above £40 in amount.

Held that an action in the Sheriff Court for 2s. 6d. per week of aliment to a man sixty-six years of age was a claim "simply pecuniary," and for more than £40, and could therefore be removed to the Court of Session under sec. 40 without leave of the Sheriff.

Parent and Child—Aliment.—A father brought an action for aliment against one of his four children. The defender pleaded that the other children should have been called. Plea *repelled*, on the ground that it was not supported by an allegation that the other children had a superfluity of means after providing for themselves and their families.

1ST DIVISION.
Sheriff of Midlothian.
M.

WILLIAM HAMILTON, Musselburgh, sued in the Edinburgh Sheriff Court his son, William Hamilton junior, lademan, Dalkeith Mills, for aliment at the rate of 2s. 6d. per week.

The pursuer stated;—(Cond. 1) "The defender is the pursuer's late son, who is employed as a lademan at Dalkeith Mills, Dalkeith, at a weekly wage of not less than £1, 5s. sterling." (Cond. 2) "The pursuer is upwards of sixty-six years of age. He is in a weak and infirm state of bodily health, owing to his suffering from disease of the heart and chronic bronchitis, and unable to earn his own livelihood."

The defender stated;—(Stat. 1) "The pursuer has been twice married and has four children, two sons and two daughters, the youngest of whom is upwards of nineteen years of age. His youngest daughter, Isabella Hamilton, who is an outworker, lives with him at Mason's Mill." (Stat. 4) "The defender is a lademan and has 21s. per week of wages. Previous to entering on this employment he was a railway porter and had 17s. per week of wages. He was married on 6th June 1873, and has

now a wife and two children depending upon him for support, with the prospect of having a farther addition to his family shortly." No. 104.

The defender made no statement as to the other children to shew whether or not they were able to contribute towards the aliment of the pursuer. Mar. 20, 1877.
Hamilton v. Hamilton.

The defender pleaded;—(1) The pursuer's other children not having been called along with the defender, the action ought to be dismissed. (2) The pursuer being able to earn his own livelihood, and being possessed of means of his own, is not entitled to support from the defender. (3) The defender's wages being barely sufficient for the proper maintenance of himself, his wife, and family, he is not liable to support the pursuer.

The Sheriff-substitute (Hallard) sustained the first plea in law for the defender, and dismissed the action.

The Sheriff (Davidson), on 15th February 1877, recalled this interlocutor, and repelled the defender's first plea in law.

On 2d March 1877 a proof was allowed by the Sheriff-substitute.

The defender appealed for jury trial.

The pursuer objected to the competency of the appeal, and argued;—(1) That, under the 5th section of Act of Sederunt 11th July 1828,* a previous petition to the Sheriff for leave to appeal was necessary.¹ (2) The pursuer was entitled to select any one of the sons, as they were all bound to support him. If the others were also liable, the defender could recover their proportion of aliment from them.²

The defender argued;—(1) The Act of Sederunt applied only to actions *factum præstandum*, whereas here the claim was pecuniary, and the amount above £40. (2) The father was not entitled to call only one child in an action of aliment. He was bound to call all who were in a position to aliment him.

LORD PRESIDENT.—I am quite satisfied that the appeal is competent, and that the 5th section of the Act of Sederunt of 1828 does not apply. That clause was intended to apply to the case where the claim was not simply pecuniary, so that it could not appear on the face of the bill that it was not above £40. It seems to me that this claim is simply pecuniary, and that a claim of £6 a-year aliment for a man of sixty-six years of age is a claim for more than £40. In that I can have no doubt, and I am therefore of opinion that the appeal is competent.

With regard to the first plea in law for the defender, I should have thought it worthy of consideration if it had been supported by a relevant statement of fact. If it was to be maintained that other children should be called it was necessary not only to aver that there were such children, and that they were in a position to support themselves, but also to state that they were possessed of

Section 5 of the Act of Sederunt, in dealing with sec. 40 of the Act 6 Geo. c. 120 enacts,—“Whereas it is enacted by section 40 that in all cases originating in the inferior Courts in which the claim is in amount above £40, as soon as order or interlocutor allowing a proof shall be pronounced . . . it shall be competent to advocate such cause to the Court of Session, it is enacted and decreed that if in such causes the claim shall not be simply pecuniary so that it not appear on the face of the bill that it is above £40 in amount, the party intending to advocate shall previously apply by petition to the Judge in the inferior Court for leave to that effect.”

Aberdeen v. Wilson, July 16, 1872, 10 Macph. 971, 44 Scot. Jur. 540.
Moir v. Reid, July 13, 1866, 4 Macph. 1060, 38 Scot. Jur. 551.

No. 104. such a superfluity of means as would enable them to contribute to the support of their father.

Mar. 20, 1877.
Hamilton v.
Hamilton.

In order to support a claim of a father two things are necessary,—1st, that the father should be indigent, and 2d, that the children should have a superfluity after providing for the maintenance of themselves and their own families. Unless both these circumstances occur the father has no claim. The allegation here is, that the defender is possessed of an income of 25s. a-week, and that may raise a nice enough question—whether this is such an income as will enable him to contribute to his father's support after providing for his own family. But that question is not now before us, and therefore I shall say nothing about it. There is no statement here with regard to the other children, and it is not therefore plain whether or not they can contribute to the support of their parent.

I think the Sheriff is right.

LORD DEAS.—I have no doubt as to the competency of this appeal. On the face of the petition a claim for 2s. 6d. a-week of aliment for a man of sixty-four years of age cannot be held to be *ex facie* a claim for less than £40. What the Act of Sederunt says is that if the claim is not simply pecuniary there shall be a previous petition for leave to appeal, and the petitioner is to give his solemn declaration that the value of the claim is above £40. Now, what could the petitioner's solemn declaration add to what appears on the face of his petition? This is not a claim *ad factum præstandum*. It is simply a money claim.

Upon the first plea stated for the defender in the Sheriff Court I agree that it would raise a question of some nicety if there had been a proper averment to found the plea. But all that is averred is that the pursuer has been twice married and that he has two sons and two daughters. With the exception of Isabella Hamilton, who is stated to be an outworker, neither the names, occupations, nor incomes of any of them are given. These would all require to be stated in order to disclose whether or not the children can be regarded as in a position to contribute to the support of the parent.

With regard to the statement for the pursuer at the bar to-day that the defender is in receipt of 25s. a-week, this may raise a serious question, so far as it does as regards expenses, if it turns out that this statement has been made at random without any inquiry on the subject; and as regards the merits, if the fact should be found to be that the defender has only 21s. a-week, and is a married man with two children to support, and the prospect of having more, the pursuer will have to say the least of it, a very narrow case.

LORD MURE.—I agree with your Lordships. If there had been a relevant allegation that the rest of the family were in a position to support their father I should have been ready to consider the first plea in law for the defender. But there is no such allegation.

LORD SHAND.—This being a pecuniary claim at the pursuer's instance for aliment during his lifetime, it is clear that the plea of the respondent as to the competency of the appeal must be repelled, for the liability sought to be enforced is obviously greater than £40 in value.

On the other question raised under the first plea in law for the defender it is

so clear, I think, that the obligation to support the father must be discharged No. 104.
 y such of the children as are capable of contributing. It is very desirable that
 l the parties liable—at least if resident in this country, and so subject to the Mar. 20, 1877.
 jurisdiction of the Court—should be before the Court, rather than that only one Hamilton v.
 ould be here, and that he should be compelled, if himself found liable, to Hamilton.
 ise an action or actions of relief against his brothers and sisters. But this
 ea requires to be supported by an averment that there are other members of
 e family in such pecuniary circumstances as enables them to contribute, and
 ere is no such averment here. The merits of the case cannot perhaps be safely
 posed of now in the absence of any admission of the truth of the defender's
 tement as to his own circumstances and family responsibilities. But I agree
 th Lord Deas that the case for liability is a very narrow one, and the pursuer
 ould consider whether he will get any benefit by going into a proof before the
 eriff, to whom the cause will be now remitted.

THE COURT pronounced this interlocutor:—"Repel the first plea in
 law for the defender, appellant, in respect it is not supported by
 any relevant averment, and adhere to the interlocutor of the Sheriff
 of 15th February 1877: And in respect the cause is not suitable
 to be tried by jury, remit to the Sheriff to proceed with the proof
 allowed by interlocutor of 2d March 1877: Find no expenses due
 to or by either party."

C. B. Hogg, S.S.C.—WILLIAM OFFICER, S.S.C.—Agents.

OMAS ABERCROMBY PETRIE HAY AND ANOTHER (John Gauld's Trustees, No. 105.
 and as such Administrators of George Gauld's Estate),

First Parties.—*M'Laren.*

JAMES PETERKIN AND OTHERS, Second Parties.—*M'Laren.*

MARGARET DUNCAN AND OTHERS, Third Parties.—*Moncreiff.*

Mar. 20, 1877.
 Gauld's
 Trustees v.
 Duncan, &c.

Succession—Testament—Conditio si sine liberis decesserit.—A testator be-
 athed to his only brother, who died without issue, the liferent of the residue
 is estate, and directed that such residue should, "after his death, be divided
 ally among the lawful children of my living and deceased sisters who may
 alive at the time, share and share alike, namely, the children of the late Mrs
 the children of Mrs G," &c. The whole children of his sisters survived the
 ator, but some of them predeceased the liferenter, leaving issue. Held that
conditio si sine liberis decesserit applied, and that the issue of the testator's
 hews and nieces predeceasing the date of vesting were entitled to their
 ents' share of the residue of the estate.

GEORGE GAULD, who died 27th April 1852, by deed of assignation and 2d DIVISION.
 lement appointed his only brother, John Gauld, his sole executor, and R.
 gned to him absolutely his interest in the lease and stocking of the
 n of Bomakellach, Banffshire, and gave him a liferent of all the rest
 is estate.

With regard to the fee he gave the following direction:—"And after
 (John Gauld's) death it is my will, and I ordain, that the principal
 unt of the money so belonging to me, after deducting the necessary
 enses and charges, shall be divided equally among the lawful children
 ny living and deceased sisters who may be alive at the time, share and
 re alike, namely, the children of the late Mrs Peterkin; the children
 Mrs Gauld, in Glenbeg; the children of Mrs Duncan, Corrie; the
 dren of Mrs George, in Mains of Drummuir; and Alexander Car-

No. 105. michael, presently student at King's College, Aberdeen, the surviving son of my late sister, Mrs Carmichael."

Mar. 20, 1877. The testator, and John Gauld, both died without issue.

John Gauld survived the testator, and died 20th June 1876, when his trustees fell to account to the beneficiaries under George Gauld's settlement for the amount of George Gauld's estate which had been liferent by John Gauld. It was, however, found that though his nephews and nieces, children of his sisters designated in his assignation and settlement had survived the testator, some of them had died leaving issue during the lifetime of John Gauld, the liferenter.

The question therefore arose whether the issue of the deceased nephew and nieces of "the trustor" were entitled to participate in the division of the estate.

A special case was accordingly presented to the Court by (1) the trustees of John Gauld, (2) James Peterkin and others, nephews and nieces of the testator who survived the liferenter John Gauld; and (3) Margaret Duncan and others, the issue of the testator's nephews William Duncan and Alexander Carmichael, who had survived him but predeceased his brother John Gauld, the liferenter.

The question submitted for the opinion and judgment of the Court was—"Are the third parties, the children of the said William Duncan, and the children of Alexander Carmichael, or either of these families, objects of the residuary bequest by the 'testator' in favour of the lawful children of his living and deceased sisters who might be alive at the period of the designated?"

Argued for the second parties;—The date of the liferenter's death was both the period of vesting and distribution, and by the express direction of the testator the bequest was limited to those nephews and nieces who should be alive at that date.¹

Argued for the third parties;—Though there was the apparent limitation of the bequest to those nephews and nieces who should be alive at a certain date, the settlement was clearly a family settlement, one in which to whom the testator stood *in loco parentis*, and his presumed intent was therefore let in the *conditio si sine liberis*.²

At advising,—

LORD ORMDALE.—The question to be answered in this case relates to the application of the condition *si sine liberis decesserit*, and is attended with some difficulty, arising chiefly, I think, from what, at first sight, appears to be a conflict of decisions on the point.

The testator, George Gauld, by what is called an assignation and settlement constituted and appointed his brother, John Gauld, his sole executor, and assigned to him his whole moveable estate, for the purposes, first, of paying his debts, deathbed, and funeral expenses, and, secondly, in order that he, the executor

¹ Wishart v. Grant, June 16, 1763, M. 2310; Fleming v. Martin, June 1798, F. C. and M. 8111; Hamilton v. Hamilton, Feb. 8, 1838, 16 S. 478, Scot. Jur. 263; McGown's Trustees v. Robertsons, Dec. 17, 1869, 8 Macph. 42 Scot. Jur. 161; McCall v. Dennistoun, Dec. 22, 1871, 10 Macph. 281, Scot. Jur. 160; Blair's Executors v. Taylor, Jan. 18, 1876, ante, vol. iii. p. 34; Nicol v. Nicol's Trustees, Jan. 18, 1876, ante, vol. iii. p. 374; Gillespie v. Macfarlaner, March 8, 1876, ante, vol. iii. p. 561.

² Wallace v. Wallaces, Jan. 28, 1807, M. voce Clause, App. No. 6; Christie v. Patersons, July 5, 1822, 1 S. 543, and F. C.; Thomson's Trustees v. Robertson, July 10, 1851, 13 D. 1326, 23 Scot. Jur. 619.

ould have the liferent enjoyment of the residue. And the testator goes on to declare it to be his will, that after the death of his brother the capital, after deducting necessary expenses, should be "divided equally amongst the lawful children" who might "be then alive" of his five sisters, whom he names, some of them being living and others deceased.

No. 105.
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It was assumed in the argument, and rightly, I think, that the date to which the testator refers as that when the children of his sisters should be alive is the period of distribution, after the death of his brother, the liferenter. The only disputed question was whether, although all his nephews and nieces, that is to say, all the children of his sisters, survived the testator, yet as some of them died before the liferenter, leaving issue, the latter are to be held entitled, as in the case of their deceased parents, to a share of the testator's estate in virtue of the maxim *si sine liberis decesserit*.

It is certainly not enough to exclude the application of the maxim that the parties claiming the benefit of it are nephews and nieces of the testator, for the contrary may be taken as settled law; and this was not disputed. The only contested point was whether the testator by referring, as he expressly does, to the children of his sisters who "may be alive" at the period of distribution, had not so limited the objects of his bounty as to exclude all room for that precatory will which is at the foundation of the maxim. It is certainly not sufficient to exclude the maxim that the words of the testator are not enough of themselves to effect that which, without it, could not be entertained, for the object of the maxim is to supply what is not expressed, but what, in accordance with certain natural and equitable principles, it may be fairly presumed the testator would have expressly provided for had he had present in his mind at the time he executed his settlement the precise circumstances, as they afterwards existed, in relation to the objects of his bounty. Now, certainly there is nothing to indicate in the present case that the testator would, if he had dealt expressly with the matter, have left that part of his estate which he destined to the children of his sisters, who, although they had survived himself, had died before the period of distribution, leaving issue, to the surviving children, to the exclusion of their issue. On the contrary, it is only natural and equitable to presume that the testator would have preferred the issue of such of the children of his sisters as had predeceased the period of distribution as coming into their parents' hands, to their surviving aunts or uncles; and in order to admit of this equitable presumption it is not necessary that there should be on the part of the testator words sufficiently expressive of such a preference. It is sufficient that there is nothing to indicate the condition which the law presumes, although it is not expressed, that in certain circumstances a child was intended to take not in right of but in the stead of a deceased parent as institute or legatee.

The principles I have now referred to have been repeatedly given effect to by the Court in circumstances which cannot, I think, be distinguished from the present. I refer, in particular, to the cases of *Wallace v. Wallaces*, *Christie v. Others v. Paterson*, and *Thomson's Trustees v. Robb*. It is true that the second of these cases has been questioned as an authority in some respects, but not, I think, in regard to the general principles with which we are presently dealing; and, at any rate, the other two cases stand, so far as I am aware, unimpeached. The case, indeed, of *Wallace v. Wallaces* is referred to by the Court in the other two with marked approval; and as its similarity to the present, if not its identity, so far as all the essential circumstances are concerned,

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But then the case of *M'Call and Others v. Dennistoun and Others* was presented upon the consideration of the Court as an adverse and the most recent authority. It appears to me, however, that this case, when closely examined, is distinguished in its circumstances from the others to which I have referred, as well as from the present, and must be held to have been governed by considerations which have no place in these other cases or in the present. In *M'Call's* case the question related to a specific legacy of £1000 bequeathed, not to the children generally as a class, of the testator's sisters, as here, but to "each of the children of my late brother Samuel M'Call who shall be alive at the period of my wife's decease, or of my decease in case of my surviving her." Accordingly we find that the Court, in deciding *M'Call's* case, dealt with it as relating to a specific legacy, bequeathed conditionally upon the legatee's survivance of a certain event. Thus, the Lord President expressly says that he held the application of the maxim *si sine liberis decesserit* was excluded, in respect the legacy was made conditional on each child surviving a certain term; and the other Judges appear to have adopted the same view. But in none of the opinions—and they are reported at considerable length—do I find any observation to the effect that the decisions in the previous cases of *Wallace v. Wallaces*, *Christie v. Paterson and Thomson's Trustees v. Robb*, although all of them are referred to as having been cited in the argument, were to be held as impinged on as authorities in the circumstances in which they occurred.

I am, therefore, for the reasons I have now stated, of opinion that the question submitted to the Court in the present case ought to be answered in the affirmative.

LORD GIFFORD.—I am of the same opinion. In the present case all the arguments combine and coincide which favour the natural and implied construction of the maxim *si sine liberis decesserit* in family settlements, a condition under which if an immediate legatee predeceases the term of vesting leaving lawful issue such issue will take their parent's share. No such presumption applies in the case of a stranger legatee; but here the legatees are the whole nephews and nieces of the testator, described as "the lawful children of my living and deceased sisters." The testator then, in order to avoid any possible mistake, proceeds to enumerate these children by families, as the children of Mrs Peterkin, the children of Mrs Gauld, the children of Mrs Duncan, the children of Mrs George, and the children of Mrs Carmichael. This last child is named, as he happened to be the only child of Mrs Carmichael, who was then deceased; but this does not derogate from the generality of the class who are all called equally, share and share alike, to the legation. Then the bequest is one of residue, which is to be divided equally among all the members of the class called, and it is distinguished in this respect from the case of a simple fixed and pecuniary legacy to a nephew or a niece by will, with a condition making the legatee's survivance of a particular date a condition of the legacy. Yet, again, the expression used is, "the whole children of my living and deceased sisters," and the word "children" where it is not limited or qualified as by the word "immediate" or otherwise is very easily held to include all children where immediate children have deceased and where the provision is made from an ascendant or from one *in loco parentis* to the legatees. An uncle occupying the position which this testator did to all his sisters' children has always

held as in *loco parentis*, and unless the case of Wallace and a considerable number of cases following it are now to be overruled I think that the implied condition *si sine liberis* must be given effect to in the present case, and the question answered in the affirmative.

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The LORD JUSTICE-CLERK concurred.

THIS interlocutor was pronounced:—"Find that the third parties named in the case, being the children of William Duncan and the children of Alexander Carmichael, are objects of the residuary bequest by the testator, George Gauld, in favour of the lawful children of his living and deceased sisters who might be alive at the period there designated: Allow the expenses of all the parties to be paid out of the trust-funds, and remit," &c.

RHIND & LINDSAY, W.S.—JOHN CARMENT, S.S.C.—Agents.

THE STANDARD PROPERTY INVESTMENT COMPANY (LIMITED), Pursuers.—
Kinnear—Guthrie. No. 106.

MRS PATRICIA CHALMERS HUNTER OR COWE, AND C. B. LOGAN,
(her Curator *ad litem*), Defenders.—*McLaren—Blair*.

HENRY COWE, Defender.

DAVID KINNEAR (Henry Cowe's Trustee in Bankruptcy), Defender.
JOHN ALEXANDER BRODIE, Defender.

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Provisions to Wives and Children—Wife's Liferent unprotected by Trust—
renunciation.—Held that it was competent for a wife infert in a liferent of her husband's heritage, conferred upon her by antenuptial marriage-contract, to consent to an alienation by the husband, for onerous causes, of the liferent subjects, that such consent, judicially ratified, was not revocable by her as a donation *in vim et uzorem*.

HENRY COWE, and his wife Patricia Hunter or Cowe, on the occasion of their marriage in 1869, entered into an antenuptial marriage-contract, which Mr Cowe disposed "to and in favour of the said Patricia Hunter, the event of her surviving him, in liferent, for her liferent use alienably, so long as she shall remain his widow,—declaring that in the event he said Patricia Hunter entering into a second marriage then the liferent right hereby conveyed shall *eo ipso* cease and determine,—heritably irredeemably, All and Whole" certain subjects at Bonnington, near Edinburgh. Under this marriage-contract Mr Cowe conveyed other property to trustees for behoof of Mrs Cowe and the children of the marriage, and Mrs Cowe conveyed her whole property to the same trustees for like purposes. These trustees were not, however, interposed for protection of the liferent right over the Bonnington subjects conferred Mrs Cowe. Mrs Cowe was infert in the subjects for her liferent right 2ND DIVISION.
Ld. Curriehill.
I.
18th May 1872.

The provisions in Mrs Cowe's favour in the marriage-contract were acted by her as in full satisfaction of all her legal rights.

In June 1872 Mr Cowe borrowed from a Mr Hunter the sum of £1025, granted a bond and disposition in security therefor over the Bonnington subjects, with consent and concurrence of Mrs Cowe, for all her right interest under the antenuptial marriage-contract between herself and Cowe. This bond and disposition in security was judicially ratified Mrs Cowe, and was registered in the General Register of Sasines on July 1872. The advance of £1025 made by Mr Hunter in respect

No. 106. of which this security was granted was applied entirely in payment of Mr Cowe's debts, and not to any extent paid to or applied for behoof of Mrs Cowe individually.

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To this bond and disposition in security over the Bonnington subject the Standard Property Investment Company obtained right by assignation dated 13th August 1874.

In the beginning of 1875 the estates of Mr Cowe were sequestrated and David Kinnear, accountant, Edinburgh, was appointed trustee.

The interest on the debt for which the Standard Property Investment Company held the Bonnington subjects in security falling into arrears they brought the subjects to sale, in virtue of the powers in their bond and they were purchased, on 23d March 1876, by John Alexander Brodie at the price of £1150. A protest was taken against the sale by Mrs Cowe, and Mr Brodie was afterwards interpellated by her from paying the price, on the ground that her consent to the bond and disposition in security of 1872 was a gratuitous donation *inter virum et uxorem*, and revocable and that the sale to Mr Brodie could not be implemented except under reservation of her liferent right.

The Standard Property Investment Company accordingly raised the action, in which they called Mrs Cowe and her husband, and the trustee in his sequestration, and also Mr Brodie, as defenders. They concluded for declarator (1) that under and by virtue of the bond and disposition in security over the Bonnington subjects, and judicial ratification thereof by Mrs Cowe, and their assignation to the same, they had full power to buy and dispose of these subjects, and that free and disencumbered of all right which might be pretended by the defender Mrs Cowe under her marriage contract with the other defender, her husband, Henry Cowe, to the liferent of these subjects in the event of her surviving him; (2) for interdict against Brodie of the contract of sale.

Defences were lodged only for Mrs Cowe, to whom, as her husband and his creditors had an adverse interest, Mr C. B. Logan, W.S., was appointed *curator ad litem*.

Mrs Cowe pleaded;—(1) The liferent right in favour of the present defender contained in the said antenuptial contract of marriage being onerous and reasonable provision, created for her behoof after her husband's death, could not be discharged by her during his life, and the pursuers are only entitled to sell the said subjects under burden of the liferent. (2) The deeds founded on by the pursuers, in so far as they import a discharge of the defender's liferent right in the said subjects, have been granted by her without consideration, and for her husband's behoof are revocable by her as donations *inter virum et uxorem*. (3) The pursuers being only entitled to convey the subjects in question subject to the present defender's liferent right, the conclusions of the summons so far as directed against her, are incompetent, and she should be absolved, with expenses.

The Lord Ordinary, on 5th December 1876, pronounced this interdictor:—"Finds, decerns, and declares against the defender, Patricia Chalmers Hunter or Cowe, and, in absence, against the other defenders, in terms of the whole conclusions of the summons, and decerns, reserving to the defender, Mrs Cowe, all claims competent to her under and in virtue of the marriage-contract mentioned in the summons against her husband, Henry Cowe, and the trustee on his sequestrated estate, and against the pursuers, the subjects mentioned in the summons, in so far as any free balance thereof may remain after satisfying the debt due to the pursuers, and arrears of interest and instalments thereof, and the expenses of the action of said subjects, and the answers of all concerned as accords of law: F.

defenders, other than the defender John Alexander Brodie, liable to No. 106.
pursuers in expenses : Appoints an account thereof," &c.*

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"NOTE.—The question raised in the present action is whether it is competent for a married woman who has been infest in a liferent or other provision of her husband's estate, in virtue of her antenuptial marriage-contract, to renounce or discharge such provision *stante matrimonio*, by consenting for her part to the alienation of the estate by her husband to a third party for other considerations. I had occasion to consider this question, and I decided in the affirmative, in March last, in an action between the widow of the late Falconer of Carlowrie and the trustees of Mr Hutchison, who had purchased from her husband, with her consent, the estate of Carlowrie, in which had been infest in security of an annuity provided to her by her antenuptial marriage-contract. And as the question was then discussed as being one of great interest and importance, I thought it right, in the note appended to my judgment, to trace the history of this law, and exhibit the leading authorities applicable to the question. The parties having acquiesced in that judgment the case has not been reported, and I regret that I am thus unable to refer to it (as I could have wished to do) for the grounds upon which I have pronounced the foregoing judgment in the present case. I must, therefore, once more express my reasons for the judgment in detail."

After stating the facts—"Notwithstanding a very able argument by the defender's counsel, I retain the views which I held in the Carlowrie case, and I am of opinion that the defences in the present case are ill-founded, and that the pursuers are entitled to the decree which they ask.

The defender does not allege that the price of £1150 to be paid by the defender, Mr Brodie, for the property is not a full and fair price, nor does she say the sum of £1025, in consideration of which the bond and disposition in her favour was originally granted, was not paid by Mr Hunter to her husband, or that the like sum was not truly advanced by the pursuers as the consideration for their obtaining the assignation to the said bond and disposition in security. Nor does she say that her consent to the deeds, by which she virtually renounced her liferent over the subjects, was extorted from her *vi aut metu* by the force or fraud of her husband. Indeed her judicial ratification of the bond and disposition in security would exclude any such ground of challenge. Her main ground of defence is that her consent to the sale of the property and her renunciation of her liferent are not now binding upon her, in respect that she could not, *stante matrimonio*, lawfully renounce the provision made for her in the antenuptial contract of marriage. The question is a material one for both the pursuers and the defender, and it is also of much importance in its general legal aspect. The defender relies upon which the defender mainly relies are the judgments in a series of well-known cases, beginning with the case of Anderson v. Buchanan, June 2, 1855, 15 S. 1073 (9 Scot. Jur. 509), and ending with the recent case of Fletcher v. Murray, March 5, 1875, 2 Rettie, 507, in all of which it was held that a married woman could not, during the life of her husband, effectually re-constitute a trust constituted in her antenuptial contract of marriage for the purpose of securing the provision thereby made in her favour, or rather of protecting her separate estate; and if the present defender had been in the position which a married woman occupied in each of these cases judgment must have been pronounced in her favour. But it appears to me, after careful consideration of the whole case, that the circumstances are essentially different from those which obtained in the cases referred to, and that the principle which guided the Court in these cases is not applicable to the present case. The principle I understand to be that where in an antenuptial contract of marriage the provisions in favour of the wife or her own separate estate are vested in trustees for her benefit the law holds that this is done for the express purpose, not only of securing her life against the risk of loss from the acts and deeds of her husband, or from subsequent insolvency, but of protecting her against all influence and interference on his part, and against her being induced by her desire unto her husband to renounce or alienate her provisions or estate. In short, the trust is regarded

No. 106. The defenders, Mrs Cowe and her curator *ad litem*, reclaimed.¹
At advising,—

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LORD JUSTICE-CLERK.—The question between the parties is, whether the defender, Mrs Cowe, is entitled to interfere with the sale of the subjects referred

as a means, if not the only effectual means, of protecting the wife's marriage contract provisions and her separate estate, not merely against her husband, quite as much against herself and her own acts, and it is now settled that such trust is irrevocable *stante matrimonio*, whether it is declared in the marriage contract to be so or not. But I am not aware of any case in which it has been held that a married woman has not power effectually to renounce, alienate, or charge during the marriage a provision in her favour contained in her marriage contract not secured by a trust but merely constituted by an infestment in her own name, without any restriction against alienation or renunciation, or without any declaration that it shall be irrevocable. There are, on the other hand, many cases in the books in which such renunciations and alienations have been expressly sustained as competent and lawful, and as binding upon her if judicially ratified, and in some instances even where not ratified such deeds are regarded in the same light as alienations of the wife's separate heritable estate, where that estate has not been vested in trustees by the antenuptial contract, which are undoubtedly lawful if consented to by her husband and ratified by her *coram iudice* with the presence of her husband.

"And here it may be observed, that so far from the alienation or discharge by a wife of her marriage-contract annuity or jointure being regarded by the law as *ultra vires* of her, and inept if granted by her own voluntary act, the system of judicial ratification which has now prevailed for nearly four centuries proves very clearly that the fact of coverture will not entitle a married woman to challenge such a deed where there has been no such ratification, unless she can establish that it has been extorted by her husband *vi aut metu*. As the defender contends, the fact of the discharge of her jointure having been granted by her, a married woman, *stante matrimonio*, is sufficient to entitle her to resist the deed,—a judicial ratification, which merely bars her from challenging on the ground of force and fear could afford no security to parties contracting with her. Now, it is worthy of notice that the first case in which such ratification was held sufficient to bar a married woman from revoking an alienation granted by her during marriage had reference to an alienation of jointure. 'This doctrine,' Erskine says (i. 6; 34), 'was established by a judgment in a private cause pronounced by the Lords of Council 6th March 1481, which caused it to be engrossed in the body of our statute 1481, c. 84, it became part of our written law.' The title of the Act, as printed in the duodecimo edition of 1682, is—'Ane woman, conjunct fear, makand faith that scho sall never challenge against the alienation theriof sall nocht be hearde afterwarde to impugn the said alienation;' and the words of the judgment are as follows:—'Mandatum.—The sext day of March, the zeir of God 1481 zeirs. Robert Daniel was perswede by a woman called Glen before the Lordes of Council, and would have cummin against her with that scho maid in judgment before the official of Glasgow, and there was schawin ane instrument under the seale of the said official that scho consented to the alienation of sik landes, and swore that scho suld never come in the contrair hereof, and would have the saidis landes allegand that it was her conjunct feftment, and maid revocation after the decease of her husband, sayand that he compelled her thereto. The action was delivered against this woman.'

"The following references to some of the institutional writers and decisions suffice, in my opinion, to shew that coverture, apart from force and fraud by the husband, does not disable a married woman from discharging or renouncing a liferent of lands or jointure, even when constituted by antenuptial contract, in cases in which third parties have onerously contracted with her husband.

¹ The authorities referred to will be found in the Lord Ordinary's notes.

in the summons, in respect that she was infest in a contingent liferent of them the event of her surviving her husband, under an obligation contained in her

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faith of her consent. Thus Erskine, in further treating of the subject, says (i. 6, 33)—‘In like manner, if the husband had, with the wife’s consent, made a deed to a stranger any part of the lands settled on her in liferent, action was competent to her for setting aside the alienation, upon the ground that the contract given by her to the deed had been extorted from her by her husband. To prevent the grantees against the consequences of such actions, when they were sued vexatiously, ratifications have been introduced into our practice, by which the wife, appearing before a Judge, declares upon oath that her husband has induced her by force nor fear to grant the deed or give her consent, but that she did it freely and for her own utility, and that she shall never afterwards call it in question.’ And again (i. 6, 35)—‘Every deed by which any interest accrues to a third party may be thus secured by the wife’s ratification, though a consequential benefit should arise to the husband; for the aforesaid Act of 1481, which establishes the law of ratifications, and fixes their extent, applies expressly to the case of a wife whose husband was pressed by debt to sell his estate, and to have renounced her interest in her jointure lands that the husband might be disencumbered, and had judicially ratified her renunciation.’

So also Craig, lib. i. d. 15, sec. 20, writing long before the time of Erskine, says—‘*Quomodo autem in alienatione per maritum facta, illius proedii, cujus fructum mulier habet, uxoris consensus interponi debeat, multi questionem sent. Antiquitus coram iudice tantum et extra presentiam mariti interhebatur; hodie si subscripserit instrumento alienationis coram testibus sufficit, post, se ad subscribendum coactam vi et metu probare poterit; tutius tamen fit, qui in iudicio ejus consensum extra mariti presentiam obtinuerit.*’

The cases now to be noticed shew that, where force and fear are not alleged, such deeds are, as Craig indicated, sustained even without ratification. Thus, in the case of Hepburn v. Naismith, 16th June 1613, M. 16,482, a woman having consented to an alienation made by her husband of lands wherein she was infest in liferent before her marriage in liferent or conjunct fee *intuitu matrimonii*, for an annual rent of 400 merks yearly during her lifetime, the alienation was held effectual without her judicial ratification, ‘unless she had libelled *verum pressum metum* by relevant circumstances and deeds, and proved the same lawful and ordinary means.’ In the case of Grant, 8th July 1642, M. 83, a married woman having consented to and judicially ratified a disposition made by her husband of a tenement in Perth provided to her in conjunct with her contract of marriage, she was held not entitled to set it aside. And a similar decision was pronounced in the case of Hay v. Cumming, 28th June 1656, M. 16,506, in which the question was distinctly raised and decided that a married woman, if not coerced *vi aut metu*, might effectually discharge her *jure stante matrimonio* by consenting to the alienation of the subjects over which it was secured to a third party for a fair price. The case of Lockhart, November 1762, M. 5994, is another decision to the like effect. The other case of the kind to which I will refer is the case of Arnold v. Scott, June 1673, M. 6091, where the widow of William Baxter having raised a claim for maills and duties of her liferent lands, wherein she was infest on a deed of marriage, the defence was that she was denuded by her consent to a deed of the lands granted by her husband to the defender, and judicially admitted—‘Wherein, albeit there be a back-tack, yet it is set to the husband, his assigns, and was apprised from him, to which apprising the defender is right.’ The Court, drawing the distinction between the wadset to the husband and the back-tack to the husband, held that the judicial ratification of the wife could only be extended to the interest of the wadsetter, and that the back-tack, being only in favour of the husband, a donation revocable, bound the wife to have the right to the maills and duties more than the wadsetter’s annual rent.

In contrast to these cases reference may be made to the cases of Cassie, 27th June 1632, M. 10,279, and Woodhead, 24th June 1662, M. 10,281, in both

No. 106. antenuptial contract of marriage, and that the bond and disposition to which she was a party was gratuitous on her part, and is revocable by her, having been granted solely for her husband's behoof.

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of which a married woman's consent to a wadset granted by her husband of jointure lands was held to be revocable, and was set aside even against an onerous wadsetter, because she alleged and proved that it had been extorted from her by her husband by violence, and she had not ratified the deed.

"An authority which at first sight appears to be counter to these is the case of *Scott v. Cranstoun*, Aug. 10, 1776, M. 6108, reversed by the House of Lords April 21, 1777, 2 Pat. App. 425. The rubric of the case is, as reported by Paton,—'A husband procured a renunciation from his wife of her property secured preferably over his estates, in order to allow them to be sold and the price paid to his creditors. Held the wife not bound by the renunciation although third parties were interested, and had agreed to abate claims on granting it.' This rubric does not correctly state the import of the decision of the House of Lords, which, it is evident from the report, proceeded upon the grounds (1) that the renunciation had been granted by Lady Cranstoun under an essential error on her part; (2) that although the creditors had agreed to certain abatements in respect of that renunciation, nothing was done by them to implement the agreement, and nothing followed upon it; and (3) that there was a final judgment of the Court of Session pronounced years before the ultimate judgment appealed against, to the effect that there was no evidence that the transaction between the creditors and Lady Cranstoun was ever concluded, so that the creditors were therefore not bound to give an abatement from their debts. It also appeared from documents produced in the House of Lords that negotiations had been renewed, although never completed, for a new deed of renunciation being granted by Lady Cranstoun. This case, therefore, is no authority for holding that a married woman cannot effectually renounce during marriage an antenuptial marriage-contract provision made directly in her favour."

"These cases, which, as I think, must be taken as establishing the law, show that a married woman may effectually alienate or renounce a security held by her directly over her husband's estate for her marriage-contract provisions, and she cannot competently challenge her renunciation as being a donation *inter vivos* or *virum et uxorem* in a question with a third party, who, on the faith of it, has onerously contracted with her husband, do not appear to me to be in any way affected, or to have their authority lessened, by the judgments in the recent cases already referred to, viz., *Anderson v. Buchanan*, June 2, 1837, 15 Sh. 10 (40 Scot. Jur. 509); *Pringle v. Anderson*, July 3, 1868, 6 Macph. 982 (40 Scot. Jur. 563); *Hope v. Hope's Trustees*, March 15, 1870, 8 Macph. 699 (42 Scot. Jur. 362); *Ramsay v. Ramsay's Trustees*, Nov. 24, 1871, 10 Macph. 120 (44 Scot. Jur. 77); and *Fletcher Menzies v. Murray*, March 5, 1875, 2 Rettie, 507. In all of these cases a trust was interposed for the express purpose of protecting the wife's interest. Such trusts are of comparatively recent introduction, and are obvious that they enable parties to secure the provisions in favour of a married woman, and to protect her own separate estate in a much more effectual manner than by taking infestment on the contract in her own name, or by allowing her separate estate to remain under the original infestments in her own name. Now, if I have not entirely misinterpreted the judgments in these recent cases, the existence of the trust was in each case the ground on which the Court set aside the wife's estate and the provisions in her favour to be effectually protected against the acts of the spouses *stans matrimonio*, and a provision not so protected must, in my opinion, be dealt with as the provisions were dealt with in the earlier decisions to which I have adverted. In the present case it was intended to give the defender the security of a trust with reference to her life-rent. This is shewn by the circumstance that the funds coming from her husband were all carefully vested in trustees for her behoof, but no such precaution was taken with reference to her life-rent. I am therefore of opinion that the defender is not entitled to be reinstated in the full right of her life-rent as against the parties who lent money onerously and *in bona fide* over the property."

The pursuers are onerous holders of this bond, for full value advanced, and before if Mrs Cowe had the power to burden the property to the exclusion of her life-rent right she is clearly bound to the creditors whatever may be her claims against her husband's estate. The only question is, whether she had power so to bind herself.

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It is maintained on the part of Mrs Cowe, 1st, that as the life-rent right being to her in this property was conferred in an antenuptial contract of marriage she had no power to deal with it, burden it, or renounce it *stante matrimonio*, even with her husband's consent; and 2dly, that by the terms of the marriage-contract the property was vested in the marriage trustees for her behoof, so, under the authority of the cases of Torry Anderson, Pringle, and Menzies, removed beyond the reach of the deeds of the wife.

It may as well clear the ground by disposing of the second of these pleas, which is clearly untenable. The life-rent right did not belong to Mrs Cowe at the marriage-contract was executed, neither did she acquire it after marriage. The deed was a contract, in which the husband provides contingent life-rent to his promised wife, and the lady on her part, and for the corresponding consideration, conveys all her own property which she then possessed, and which she might acquire after the marriage, to trustees for her behoof. The consideration given by the husband cannot be part of the consideration given by the wife, which would appear quite distinctly if the conveyance had been, not to trustees, but to the husband direct. With-
 going farther into details it is clear from the trust purposes that this life-rent was meant to fall under the trust, and, as the Lord Ordinary observes, *us mariti* is excluded as regards the funds and property conveyed in trust, there is no restriction on the life-rent right. But what is quite conclusive on the head is, that if it had been intended that the trustees should hold the life-rent right, it would have been conveyed to them directly, while the obligation of the contract is to invest the wife in it without burden or condition of any kind. The proposition maintained for Mrs Cowe is the very general, and, as I think, a very novel one, that an heritable estate acquired by a married woman in virtue of an obligation in an antenuptial contract cannot be the subject of conveyance by her *ante matrimonium*, although the right is not burdened by a trust, or any qualification or condition. The general law as to real property vested in a married woman is exactly the reverse. Erskine says (i. 6, 27)—“All obligations granted

to her we now brought the property to sale under the powers which she, and her husband with her consent, conferred upon them.

In the case of *Rae v. Neilson*, May 14, 1875, 2 Rettie, 676, was referred to the defender as virtually superseding the earlier decisions which I have mentioned, and as establishing the broad general proposition that a married woman *stante matrimonio*, renounce any provision made in her favour by her marriage-contract, whether secured by the interposition of a trust or not. But the case does not in the slightest degree support such a contention, for the fact which the widow was there found entitled to revoke after her husband's death was a mutual settlement executed by her and her husband, by which her marriage-contract provisions were materially reduced, and the estates of herself and her husband were settled gratuitously upon relatives of the husband and to whom she had given no onerous consideration for the deed, and the judgment of the court proceeded on the ground that none of these beneficiaries could plead *in solutum tertio*.

On the whole matter I have come to be of opinion that the pursuers are entitled to decree in terms of the conclusions of the summons, with expenses.”

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by the wife, either charging or even alienating any estate or subject of which she retains the property exclusive of the *jus mariti*, whether proper heritable bonds bearing interest, are effectual, provided the husband, as curator, consent to them." I am not aware that this rule of law has ever been questioned, although many cases have arisen in regard to the voluntary nature of such deeds by a wife or the necessity of judicial ratification. Lord Moncreiff, in the well known case of *Buchan v. Risk* (12 Sh. 511), stated the law thus: "Though the pursuer, as a married woman, could not grant any personal obligation on which diligence could proceed, she had power, with her husband's consent, and in a sound mind, and not induced thereto by force, fear, or fraud, to dispose of her heritable estate effectually to a third party absolutely, or under reversion, and that such a disposition requires no separate ratification, unless it can be shown by the wife that she acted under undue influence. This judgment was affirmed by the Court, after taking the opinion of all the Judges on the last point. The first seems to have been thought to be beyond controversy. The authorities will be found collected in the last edition of Mr Fraser's work, p. 805, and the general point requires no farther demonstration.

But it is said that because this *lifereit* right was acquired in virtue of an antenuptial marriage-contract there is a special restriction attaching to it, though none is expressed. I can see no principle on which this proposition can be supported, nor do I know any authority for it. An antenuptial marriage contract is an onerous deed, but it is neither more or less, so far as such a question as this is concerned. The betrothed wife, being free to contract, contracts with her intended husband as she would with any other third party, and if she stipulates for and obtains a conveyance it is as valid to her and comprehends all the same rights and powers as if it flowed from any one else, unless the contract limits it.

The cases of intervening trusts constituted by antenuptial contract which have been referred to really illustrate this by contrast. A direct title taken to the wife means that she and she alone is proprietor. A title taken to trustees means that the wife, although a beneficiary, is so only through the sides of the trustee's title, and subject to all the restrictions, expressed and implied, in the trust deed. The recent case of *Menzies*¹ illustrates this very forcibly. There it was necessary to break down the trust right in order to reach the desired result—to vest the title on the terms of the title. The Court in effect held that this direct title, intervening between the wife and the property, could not be overpassed during the *lifereit*, because the barrier had been intentionally erected for that very end. The intention was logically deduced from the act done. It is hard to see how it can be deduced from the granter of the conveyance having done exactly the reverse.

The fact that this *lifereit* was not vested in trustees, but taken directly by the promised spouse, indicates, as I think, as clear an intention not to limit the wife's power over her own property as the interposition of a trust title would have indicated the reverse.

The cases of *Anderson* and *Pringle* were entirely out of the category of this belongs. The case of *Hope* was strongly founded on; but, rightly understood, it really confirms instead of weakening the views I have expressed. The case was this: Mr Hope, in his son's antenuptial marriage-contract, became bound to the lady, in the event of her widowhood, to pay her an annuity of £1000 per annum.

¹ Cited in the Lord Ordinary's note *supra*, p. 700.

ar. On his death his widow, as his executrix, became liable in this obligation, and she, her son, and her son's wife, came to an arrangement, *stante matrimonio*, by which the son's wife renounced the obligation contained in the marriage contract, and, on the other hand, the widow conveyed to her son certain parts of the father's property, and stipulated that she should be discharged of obligation for the annuity, and that it should be secured over part of the property conveyed. These things were all done, and the Court found they should not be undone by the son and his wife, for they were parts of an onerous contract with a third party. But the case shews that a wife and her husband deal with rights secured to the former even by a contract of marriage.

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ORD ORMDALE.—I entirely concur with your Lordship, as well in the result which you have come as the grounds on which you have proceeded.

Early the assignation challenged is not revocable on the principle of *donatio virum et uxorem*. And it is also clear that it cannot be challenged as having been granted gratuitously and without consideration, for it involves the interests of *bona fide* onerous third parties.

Neither can it be said that the wife's life interest right in question, although proper for her by her husband in their antenuptial contract of marriage, has the sanction of a trust or any other protection. It is not declared inalienable, or alimentary. Nor is it said that in assigning it as she did the wife was induced by force, fear, or fraud, or was actuated by any undue influence whatever. It is therefore unable to see any reason for holding that the Lord Ordinary's decision is erroneous. On the contrary, it appears to be supported by ample authority, by the institutional writers, as well as by a whole series of decided cases.

ORD GIFFORD.—I concur in the views now expressed by your Lordships, and in the views so fully and ably enforced by the Lord Ordinary.

It is now quite fixed that by antenuptial contract of marriage or by separate agreement entered into before marriage a bride may place her own property, or a part of her marriage provisions, or part of them, so completely out of her own power while the marriage subsists that she shall be unable, however much she may wish it, and however much she may think it for her husband's interests to ask to herself or to hand over to her husband any part of the property or provisions which she so secured to herself before the marriage was entered into, and they should certainly be available for her in case of her widowhood. The illustration of this rule is the case of *Fletcher Menzies v. Murray*, 2 Rettie. In most of the cases which have occurred this object—I mean the object of placing a wife's provisions beyond her own power of defeating them *stante matrimonio*—has been accomplished by entirely divesting herself in favour of a third party, so that the property was not vested in the wife at all but in third parties, for certain trust purposes, which were only to emerge on the wife's death, and which trust, either by express words or by implication, the wife while she was under coverture, disabled herself from recalling. Possibly the object might be accomplished by a sort of interdiction making the consent of certain parties named indispensable to the validity of any deed affecting the property secured provisions, but certainly the object is best and most completely accomplished by means of an irrevocable trust.

And the wife, however, or her parents or advisers, do not resort to any such means for placing the wife's property or provisions out of her own power and beyond her own control, however much she may desire to affect them, and

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however much her husband may consent that she should do so, and where the contrary, the wife herself retains in her own hands alone the full and absolute control of her property or provisions, and does not give anybody else power of any kind to interfere therewith or to restrain or prevent her dealing with them as she pleases, then I do not see how such restraint or of power is to be inferred from the mere fact that the property is reserved provided to the wife in an antenuptial contract of marriage. It may be the *jus mariti* of the husband is well and effectually excluded. It may be also the husband's curatorial power, or right of administration as it is sometimes called, is also well and effectually excluded. The effect of such clauses is just to leave the property or the provision more absolutely, more exclusively and more uncontrolledly in the possession of the wife herself and at her command and disposal. All these clauses simply keep out the husband, but do not keep out or fetter the wife herself. On the contrary, they only enlarge the wife's rights; they leave her free to do as she pleases without requiring the husband's consent, or even against his wishes; but they do not prevent her selling her separate property to a third party, or from disposing of it at pleasure. It may be very important that a wife should have this power, and she often most naturally refuse to give it up, and refuse to put herself under restraints, which, whatever be the emergency, she cannot remove.

Accordingly, where there are no restrictions on the power of the wife herself where she is not fettered by a trust or by some other device which directly disables her, she remains her own mistress, and free to do as she pleases for her own. She is free even to give her separate property to her husband, and his creditors *stante matrimonio*, he consenting where his curatorial power is excluded; for a married woman with her husband's consent may do all the acts affecting her property as she could have done by herself alone before marriage, or which she could do if she had become a widow. In such cases, however, the law still gives a remedy to the wife who is induced, it may be by the love of her husband, to give to him or his creditors, for all such gifts, donations *inter virum et uxorem*, and the wife may revoke them at pleasure only in a question with her husband. The sale or the pledge will stand only to a third party, but the husband must, when required, restore the value of the amount. All this is fully illustrated by the cases referred to by the Court of Ordinary, and I am unable to distinguish so as to make a different rule in the case of an antenuptial marriage-contract provision to the wife when it is stipulated for out of the wife's own estate, and when it is stipulated for out of the husband's estate, or when it is given from the property or funds of the parents or friends of either of the spouses. In all cases I think the general rule is that if the wife wishes in antenuptial settlements to be absolutely secured against her own acts she can only be so by disabling herself from acting, and this she can only do by means of a trust or by making effectual conditions duly made real and published, making the consent of third parties or some equivalent indispensable. If she does not do this, the remedy seems to be revocation of a donation and a claim against the husband.

Of course I am not now dealing with cases where the wife's act has been obtained by force or by fraud, or where there are grounds for challenging the act as not her own act and deed. These cases have their own appropriate remedies.

THE COURT adhered.

J. DUNCAN SMITH, S.S.C.—JOHN LATTA, S.S.C.—Agents.

JOHN BOYD KINNEAR, Pursuer.—*M'Laren*.
CHARLES G. H. KINNEAR AND OTHERS, Defenders.—*Murray*.

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Entail—Moveables.—*Held*, by Lord Shand (Ordinary), that an entail of moveables is ineffectual even *inter hæredes*.

(SEE special case Kinnear, June 5, 1875, *ante*, vol. ii. p. 765.)

Outer-House.
Lord Shand.

The question for decision in this case was, whether a deed of entail duly recorded in the Register of Entails, executed by the trustees of the late Charles Kinnear, of the lands and estate of Kinloch, and the furniture, plate, paintings, and plenishing in the mansion-house, was an effectual entail so far as regarded the moveable property which it included. This question was presented in the form of an action at the instance of the heir of entail in possession of the estate and moveable property conveyed by the deed, directed against the whole succeeding heirs of entail, and including for decree of declarator, *inter alia*, that the deed, in so far as affected the conveyance of furniture and others, with the prohibitions and other clauses of a strict entail, was inoperative and ineffectual to strain the pursuer from altering the order of succession, selling or disposing of the said furniture and others, or contracting debt whereby the same might be evicted, and that the pursuer had right to the furniture and others, and was possessed thereof in fee-simple.

The Lord Ordinary pronounced this interlocutor:—"Finds, decerns, and declares that the disposition and deed of entail described in the conclusions of the summons, in so far as regards the furniture and other moveable effects therein conveyed, is inoperative and ineffectual to restrain the pursuer and his successors under the destination from altering the order of succession, selling or disposing of the said furniture and others, or contracting debt whereby the same may be evicted; and that the pursuer has right to the said furniture and others, and is possessed thereof in fee-simple; and as regards the remaining conclusion, dismisses the same, and decerns; and finds no expenses due."†

† "NOTE.—The general question as to the power of making an effectual entail of moveables is one of much importance, and has not, I think, formed the subject of previous decision in a question *inter hæredes*. In a special case between the pursuer and the late Mr Kinnear's trustees the opinion of the Court was asked as to whether the directions in the late Mr Kinnear's trust-deed to include the moveables in the entail of the estates ought to receive effect. The Court in disposing of that case held that the trustees were bound, as directed by the truster, to include the moveable subjects in the entail, but as the proper parties interested in the question, viz., the succeeding heirs of entail, were not parties to the proceedings, the Court expressly refrained from expressing any opinion as to whether the direction when so carried out would constitute an effectual entail of the moveable property.—Special Case Kinnear, 5th June 1875, 2 Rettie, 765.

The disposition and deed of entail has now been executed, and the proper parties are in Court to try its effect. On the narrative of the testator's instructions, contained in his deed of settlement and codicils, his trustees by the deed were granted, and disposed to and in favour of the pursuer and the heirs-male of his body, whom failing, the other heirs-substitutes therein mentioned, the lands and estate of Kinloch, as therein described, 'together also with the furniture, silver plate, paintings, bed and table linen, and other plenishing in the mansion-house of Kinloch, conform to inventory thereof' appended to the deed, subscribed as relative to it. The deed contains prohibitions against alteration of the order of succession thereby established, against sales of 'the lands and estate and others' thereby conveyed, or any part or portion thereof, and

* Decided Feb. 17, 1876.

- No. 107. against the contraction of debt which might be the ground of any adjudication, eviction, or forfeiture of the 'lands and others,' or any part or portion thereof.
- Mar. 20, 1877. It does not contain irritant or resolute clauses with reference to these prohibitions, but contains a clause declaring that the heir of entail who shall permit adjudication or other real diligence to affect the lands entailed for upwards of three years shall forfeit his right to the 'lands and others' thereby conveyed. The inventory appended to the deed embraces in detail the ordinary articles of furniture of a mansion-house, including plenishing of the different rooms, bed and table linen, and silver plate, paintings, and books. The deed also contains authority for registration in the Register of Tailies, which, by the statute of 1868 (31 and 32 Vict., cap. 101, sec. 14), is equivalent to the insertion of an effectual prohibitory, irritant, and resolute clauses, so far as regards the heritable estate. As regards the moveable subjects conveyed the deed contains prohibitions only. And it is important to observe that, in dealing with the heritable estate, there is no clause of forfeiture applicable to the event of the donee, or any heir, disposing of the moveables, either gratuitously or for onerous considerations, though the heritage, by force of the clause authorizing registration in the Register of Tailies, is the subject of prohibitions and irritant and resolute clauses. The moveables are the subject of the express prohibitions contained in the deed, but of no other clauses of a restraining nature—and the heritable and moveable property are not tied together by any penalty of forfeiture of right to the heritage, should the donee or a succeeding heir after the order of succession to the moveables, or gratuitously dispose of them. The case is thus substantially the same as if the deed were a conveyance of moveables only with the prohibitions already mentioned, and no other clauses of a restraining nature; and the question raised is, whether a deed conveying moveable property, of the nature now mentioned, to a series of heirs and beneficiaries in succession with prohibitions against alienation, burdening, or altering the order of succession but without irritant or resolute clauses, constitutes an effectual entail of the moveable subjects, so as to make it unlawful for the donee, in a question with the persons substituted to him, to dispose of the subjects at his own pleasure.
- "It is maintained by the heirs of entail that, in a question with them, the pursuer is not entitled to dispose of the moveable subjects included in the conveyance as an ordinary fee-simple proprietor might do. It is not disputed that third parties could effectually purchase the articles, and that they might be carried off by diligence for payment of the pursuer's debts. But it is maintained that the pursuer has no right to defeat the substitution by voluntary or gratuitous acts or deeds. The pursuer, on the other hand, maintains that he is heir of the moveable property, and as such entitled to dispose of it as a fee-simple proprietor notwithstanding the prohibitions contained in the deed.
- "1. In determining the question raised, it must be observed at the outset that if the defenders' pleas be well founded, the remarkable result must follow that an entail of moveable subjects effectual *inter hæredes* may be constituted by deeds which would have no such effect in reference to heritable estate, which has always hitherto been regarded as the proper subject of entail. It is true that after the decision in the case of Carrick v. Buchanan, 1844, 3 Bell's App. 36, it was no longer doubtful that even where an entail contained prohibitions unfenced by irritant and resolute clauses, a gratuitous deed altering the order of succession prescribed by the entail was ineffectual. But after the Entail Act of 1848, 11 and 12 Vict., cap. 36 (sec. 43), this was no longer the law, and it is quite settled that mere prohibitions will not constitute an effectual entail in question *inter hæredes* any more than in a question with onerous third parties. See Duke of Hamilton, 8 Macph., H. L., 48; Dempster, 3 Macqueen's App. 6. Again, it is to be observed that even in regard to moveable property a very important limitation has also been imposed on the power of testators in the case of liferents, for by the Entail Amendment Statute of 1868 (31 and 32 Vict., cap. 84, sec. 17), it is provided that a liferent of moveable estate can be constituted only in favour of a party in life at the death of the granter of the deed, and that where such estate shall be held in liferent by or for behoof of a party born after the date of the deed the estate conveyed shall belong to him absolutely.

"In this state of the law as to heritable estate and liferents of moveable property the defenders are certainly not in a favourable position for maintaining that the Court should now for the first time decide that a conveyance and destination of moveables containing prohibitions against selling or altering the order of succession is effectual as an entail *inter hæredes*, so as to prevent a donee from gratuitously disposing of the subjects.

"2. There is no dictum or authority to be found in the institutional writers in favour of an entail of moveables. The subject of entail is invariably treated as having reference to heritable property, and under the head of heritable rights; and there are strong reasons of public policy and expediency against the view that moveable subjects, the property of which passes by mere delivery, without any written title, may be tied up either by a *de presenti* conveyance or *mortis causa* settlement for all time, to descend in property from one person to another in a specified line.

"3. The only case in which the effect of an entail of moveable articles came directly before the Court for decision was that of *Baillie v. Grant*, 21st May 1859, 21 D. 838. The deed in that case contained prohibitory, irritant, and resolutive clauses applicable to the moveable property conveyed, and the question arose in a process of suspension and interdict at the instance of the heir of entail in possession against a creditor of his own about to do diligence against the moveable property. The Lord Ordinary passed the note to try the question; the creditor reclaimed, but his counsel was stopped in the course of his argument, on which the suspender's counsel stated that he could not support the suspension, and the note was accordingly refused. The defenders distinguished the case from the present on the ground that this is a question *inter hæredes*. They do not dispute that purchasers from the pursuer could acquire an undoubted right to the moveable articles conveyed, and that creditors of the pursuer or any succeeding heir of entail, could by diligence affect these subjects.

"4. It is stated, however, that there are earlier authorities which support the view that prohibitions in an entail of moveables are effectual. The cases referred are those of *Leven v. Montgomerie*, 1683, M. 3217, reported also at pages 153 to 5819; and *Veitch v. Young*, May 25, 1808, M. *voce* Service and affirmation, Appendix No. 4. The former of these cases has been referred from the bench as deciding that an entail of a moveable subject is effectual *inter hæredes*. On consideration of the various reports, however, I do not think it can be properly regarded as a decision to that effect. The question which arose in that case between the Earl of Leven and Mr Francis Montgomerie had reference to certain alienations which the Countess of Leven had made on her dower, and which were challenged by the Earl of Leven as in prejudice of rights as heir-at-law. These acts included a deed of discharge in favour of the Countess, and a conveyance in favour of Mr Montgomerie, her husband, of her share of the goods in communion of the marriage, and the delivery to him of her jewels, including a particular jewel which had been gifted to her grandfather, the first Earl of Leven, by the King of Sweden, and which the Earl had provided by his testament should remain in the family, and should not be alienated. It was decided that all of these acts of alienation were reducible as in prejudice of the heir's right of relief of moveable debts, excepting the gift of the jewel, in which the Court held was paraphernal, and as such not subject to the heir's relief, as other moveables were. It was held that the King of Sweden's jewel was not of this class, and the alienation or gift of it was set aside in the same manner as the conveyance and discharge which had been granted by the Countess. None of the various reports of the case occur under the head of entail.

The decision is classed amongst these relating to husband and wife, or law of deathbed. There are no doubt passages in certain of the reports which indicate that it was pleaded that the King of Sweden's jewel was 'inalienable' or 'inalienable,' in respect of the provision to that effect in Lord Leven's deed. It may be inferred that opinions to that effect may have been expressed, although it rather appears from the terms of the interlocutor dictated by the clerk (M. 5806) that the jewel was regarded as within the class of 'heir-moveables' rather than an inalienable subject. But the general ground of

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No. 107. decision appears to me to have been, that the alienation of moveable property was, in the circumstances, liable to challenge, and that this ground applied to the important jewel, which was not within the lady's paraphernalia, in the same way as to the other moveable estate not in that position.

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"The case of Veitch certainly does not favour the view maintained by the defenders. The deed of entail conveyed to the heirs called the grantor's household furniture or plenishing of whatever kind within his house at the time of his death, together with his whole library and books of every kind. It was maintained that the right to this property having been rendered heritable *destination* could not be taken up by mere possession, so as to render the subjects liable to the diligence of the creditors of the heir; but the Court rejected this view, and found that the property was effectually vested, and subject to the diligence of arrestment.

"The case of Leven v. Montgomerie thus stands alone as the sole authority by way of decision in favour of the defenders' contention. That case is in doubt referred to in the opinion of Lord Balgray in the case of Maule v. Maule, 4th March 1829, F.C. 4, p. 689, and 7 Shaw, Appendix, page 6, in support of the general statement that 'even moveables can be protected by an entail and may be transferred from heir to heir under what limitations and conditions the original proprietor thinks proper,' but, for the reason already stated, I do not think the case (the only authority referred to) can be regarded as an authority to that effect. The passage in Sandford on Entails, p. 251, to a somewhat similar effect, is also founded on the case of Leven, and on the opinion of Lord Balgray in the case of Maule, and a similar expression of opinion by Lord Craig at an earlier stage of the same case. The statement by Mr Sandford 'that prohibitions in a deed of entail entitle the heirs to prevent the alienation of entailed moveables, or renders the heir who breaks the prohibition liable in damages,' is inconsistent with the decisions of the House of Lords in the *Ascare*, *Tillicoultry*, and *Queensberry* cases, 4 Wilson and Shaw, pp. 196, 240, and 254. These cases make it clear that even if an entail of moveables should be regarded as of the same force as prior to the statute of 1848 an entail of land had, the heir in possession could dispose of the moveables by sale, or by pledge, with power to sell, and that no claim of any kind could be made against him 'as compensation or damages, as for a wrong done to the future heirs. It is very difficult in these circumstances, and with reference to moveable subjects, the property of which passes by delivery without any written title, to find a good reason for holding that there is a restraint throughout a long course of succession against gratuitous alienations.

"5. Holding, then, on the grounds now stated, that the question is open, and that the Court is now asked for the first time to decide that an effectual entail of moveables may be made by a simple conveyance subject to conditions and prohibitions, I am of opinion that an entail of moveables cannot be effectually made. Having in view the nature of the property and the fact that a right of fee is given to the donee and his successors, it appears to me to follow that the right must be absolute, and that it is incompetent to limit or control the disposal of the moveables, though it might cause a forfeiture of right to the land. In that view it would only give a strong, and it may be, overwhelming reason against such an act, and so might indirectly secure the descent in one line of certain moveable articles with the heritable estate. The two determining elements against a valid entail of moveables are the direct fee given, and the nature of the subjects. In the present instance many articles which would perish in a short time by mere use are included in the entail, as e.g., tapestries and curtains, bed and table linen, bedding, fire irons, washing tubs, and the like. It appears to be out of the question to suppose that an effectual entail

articles like these can be effected. A more plausible argument can be urged in regard to such articles as paintings, family portraits, articles of plate, and books, which may be preserved, and often are, for many generations, in a family. Yet it is to these it is clear that no prohibitions can prevent the fiar from disposing of them for onerous consideration, and their very nature as moveables renders them unsuitable as the subject of an entail. Again, what is the meaning and effect of giving them over in fee? A limited right may be given by creating a trust and conveying the property to trustees, to be held in trust for a particular purpose, as paintings or articles of interest and value are frequently given over to such bodies as the trustees for the National Gallery or for the Society of Antiquaries. In these cases, the right of fee is limited at once by the trust character of the disponees and the trust purpose expressed in the deed of gift. Too, limited rights may be given to beneficiaries, through the interposition of a trust, or by giving a liferent to one person and the fee to another. But if the fee be given so as to vest a full right of property in moveable subjects, I think the result is that the disponee becomes fee-simple proprietor, and that conditions to the effect that the property must descend through a defined series of heirs are ineffectual. They are so because they are inconsistent with the nature of the property and the right of fee given.

"In this case the full right of fee is given to the pursuer by the deed of conveyance. I think he is not affected by the prohibitions, and that he is therefore entitled to decree of declarator in terms of the preceding interlocutor. The necessity of reduction of the deed, even to the limited effect craved, is, I think, applicable, for the decision gives to the deed its legal effect. The conclusion in the direction in the trust-deed to entail the moveable property is inoperative, I think, also unsuitable, for the Court has already held that the direction would so far receive effect that the trustees should execute the deed of entail, which they have accordingly done. The matter for determination is what is the effect of the deed, and the judgment disposes of that question."

MELVILLE & LINDSAY, W.S.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

MATTHEW FAIRLEY AND OTHERS (Snell's Trustees), Pursuers and Real Raisers.—*M'Laren—Lang.* No. 108.

JAMES MORRISON AND OTHERS, Claimants.—*M'Laren—Lang.*
MRS JESSIE SNELL OR ANDERSON AND OTHERS, Claimants.—*Gloag.*
JOHN MILLER AND OTHERS, Claimants.—*Balfour.*

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Testing.—A testator directed his trustees, upon the death of his widow, to set in their own names three-fifths of the residue of his estate for behoof of laughter and her husband in liferent, for their liferent use alienably, and for that of their children, in such proportions as their parents, or the survivor of them, should appoint by writing; "and failing both of them without having executed such writing, then for behoof of their said children equally, share and share alike, in fee," declaring that in the event of any grandchild dying without having received payment of his share and leaving issue such share should fall to the issue. The testator was survived by his widow, and also by his daughter and her husband, and by several of the daughter's children, three of whom predeceased their mother and the truster's widow without leaving issue.

Held by Lord Shand (Ordinary) that a right to a share of residue vested in the grandchildren at the date of the testator's death, subject only to the condition that in the event of any grandchild dying before the term of payment of the share of such child should belong to such issue.

WILLIAM SNELL died in 1849 survived by his widow, and a daughter, the wife of Alexander Morrison. A son had predeceased him, leaving a wife and children. Mrs Morrison had ten children alive at the date of William Snell's death. Mr Snell left a deed of settlement, executed a few

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Lord Shand.

No. 108. months before his death, by which he conveyed his property to trustees. After certain provisions in favour of his widow he appointed his trustees to hold his estates undivided during the lifetime of his wife, and to pay three-fifths of the proceeds, in so far as not required to meet the provisions in favour of his widow, to his daughter, Mrs Morrison, and failing her, to her husband, and the remaining two-fifths to his son's widow and her three daughters named in the deed in certain proportions. The clause as to residue then proceeded as follows:—"And upon the decease of my said spouse I appoint my said trustees and their aforesaid to divide the residue and remainder of my said estates and effects into five equal parts or shares, and to lend out on personal security, or to invest in their own names as trustees foresaid, three of the said shares for behoof of my said daughter in liferent for her liferent use allanarly, and, in the event of her decease, survived by the said Alexander Morrison, also in liferent for his liferent use allanarly, and for behoof of the children of my said daughter in said proportions, and subject to such restrictions as she and her said husband or the survivor of them, may appoint by any writing under their, his, or her hands, and failing both of them without having executed such writing, then for behoof of their said children, equally, share and share alike in fee." This clause was followed by certain special provisions in regard to the shares of his estate given to his son's family, after which the deed proceeded:—"And further, I declare that in case of any grandchild having died without having received payment of his or her share, leaving lawful issue, such share shall fall to such issue, if more than one equally among them, share and share alike."

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Mr Morrison died in 1860, Mrs Morrison in 1861, and the truster's widow in 1874. She was predeceased by three of Mrs Morrison's children, two of whom were unmarried, but the third left a widow, who claimed her share of Snell's succession effecting to her husband as his executrix. It was maintained by certain of the claimants that, on a sound construction of Mr Snell's deed of settlement, no right of any kind vested in his grandchildren, the children of his daughter Mrs Morrison, prior to the death of Mrs Snell, the truster's widow, in 1874, or, alternatively, prior to the death of Mrs Morrison in 1861.

The trustees raised a multipoleinding.

The Lord Ordinary pronounced this interlocutor:—"Finds that a share of three-fifths of the residue of the trust-estate vested *a morte testatoris* each of the children of the marriage between the truster's daughter Mrs Snell and Alexander Morrison, writer in Glasgow, alive at that time, subject to the condition only that in the event of any such children predeceasing the term of payment of residue, leaving issue, the share of such children shall belong to such issue."*

* "NOTE.—The question whether any right to a share of the fund vested in the children of the late Mr and Mrs Morrison at the death of their grandfather Mr Snell, in 1849, is not free from difficulty. . . .

"The claimants, who maintain that no vesting to any extent took place at the death of Mrs Snell, rest their argument on three considerations:—

"1. That the fee is destined to children as a class, and not to individual children."
"2. That the right to a share of the residue is given in the form only of a direction to divide and invest the residue on the death of Mrs Snell, and not in words of gift as at an earlier date; and

"3. Much reliance is placed on the provision that in case of a grandchild dying before the term of payment of the residue, leaving issue, such issue should take the parent's share.

"The authorities on which they mainly relied were the cases of *Leitch v. Barclay*, 20th July 1865, 3 Macph. 1143; and *Young v. Robertson*, 4 Macph. H. L., 314. The settled rule recognised both in this country and in Eng-

that effect should be given to the testator's intention as it is to be gathered from the terms of the deed, and it appears to me in this case that it was not the intention of the testator to postpone the vesting of all right in his grandchildren an interest in his trust-estate until the expiry of the annuity or the liferents which he provided. Had the deed contained a clause of survivorship or destination over in favour of those grandchildren who should survive Mrs Snell, the tenant, or Mr and Mrs Morrison, the liferenters, the case of Young v. Robertson and earlier cases would have applied, and the fee in this case would have longed exclusively to the survivors. The absence of such a clause is in my opinion a material circumstance in favour of the view which, after full consideration, I have adopted, viz., that vesting took place *a morte testatoris*.

"It should be kept in view that when Mr Snell executed his deed Mrs Morrison's ten children were all in life, and the youngest of them apparently were the age of childhood. It was obviously his intention, subject to the annuity in favour of his widow and the liferent to his daughter and her husband, to give the fee of three-fifths of his estate to his grandchildren in equal shares. Laying out of view for the moment the clause in favour of the issue of any grandchild who might predecease the term of payment, it is, I think, clear, that vesting in the grandchildren must have taken place immediately on the death of the testator. The only circumstance which can be suggested as preventing this was the existence of the provisions of annuity and rent, and it is quite settled that the existence of such rights, while postponing the term of payment, does not affect the vesting of the fee. The general principle has been strongly stated in cases of recent date. In the House of Lords, *Watson v. Thomson*, 1867, 1 Law Rep. (Scotch Apps.) 235, and *multiplepoint-Miller v. Finlay's Trustees*, Feb. 25, 1875, ante, vol. ii. H. L., 1. In the series of these cases Lord Colonsay referred with approval to the case of *Forbes v. Fisher*, Jan. 26, 1838, 16 S. 374, in which the rule was clearly laid down. In the case of *Carlton* the rule was thus stated,—'The general rule of law as to testaments is that the right of fee given vests *a morte testatoris*. That rule holds, though a right of liferent is at the same time given to another, and although it is done through the instrumentality of a trust, and whether the fee be given to an individual *nominatim* or to a class.' In the case of *Maxwell v. Macleod*, May 25, 1837, 15 S. 1006, which was brought under the notice of the House in the case of *Forbes v. Luckie*, Lord Corehouse thus stated the law,—'In a legacy is left to one person in liferent and another in fee the substance of the liferent does not prevent the fee from vesting at the death of the donor, and the rule appears to be the same when a fund is conveyed by the donor to trustees, with directions to pay the interest to one person during his life and the capital to another at the liferenter's decease—(See the case of *Macdonald v. Macdonald*, Jan. 28, 1808, Dic. voce Clause, App. No. 6, which is the leading one on the subject)—at least this is the rule when there is a destination of the fee to an individual simply, and no ulterior substitutions which require the trust to be kept up for the benefit of those substitutions.' The reason of the rule, as has often been explained, is the presumed intention of the truster to give to the children or other legatees all the benefits that a right of fee can give consistent with the securing of the life-interests provided, and such benefits are often of the most importance, though the term of payment be deferred, in enabling the beneficiaries to enter into business or to contract obligations in a marriage-settlement. The rule to which I have thus referred, and the authorities now mentioned, I think, effectually of the argument for postponed vesting, except in so far as it is founded on the special clause which brings in the issue of a grandchild preceding the term of payment in place of their parent. There is, I think, no distinction to be made between the case of a bequest to children as a class and individuals named, and if such a distinction existed I think it would not place here, having regard to the state of Mrs Morrison's family at the time of the settlement. Again, in my opinion, it makes no difference that the fee is given in the form of a direction to pay or to invest at the death of the testator. The result is that the fee is given at the death of the testator, though the payment is postponed so long as the liferenter lives. This was the rule in the leading cases of *Wallace*, 1808, and in the cases of

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No. 108. Maxwell v. Wylie (the first branch of the case), and Forbes v. Luckie, as many others. The provision of residue was in that form in the case of Young v. Robertson, but it was not suggested in the opinions of the learned Judges of the House of Lords that this was at all material, or that vesting would not have been held to have taken place had there been no clause of survivorship. In the case of Miller v. Finlay's Trustees also, where the fund was held to have vested *a morte testatoris*, the declaration of trust in regard to the fee was introduced by the words, 'after the determination of the foresaid liferents.'

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"The question remains whether the clause in regard to the issue of grandchildren taking their parents' share entirely suspended vesting of the whole provisions. It was argued that, looking to the place which this clause holds in the deed, its application was confined to the family of William Snell, and that it had no reference to Mrs Morrison's children, but having regard to the general and comprehensive terms in which it is expressed, and to the circumstance that the reason for such a provision in the mind of the testator would naturally be the same as to both families, I am of opinion the clause must be held to apply to both. On the other hand I cannot think it was the intention of the testator that the clause should suspend vesting of all right, as contended for, nor that a sound construction of the deed it had this effect.

"The claimants, who maintain otherwise, must take the clause as producing the result either of intestacy in regard to the share of any grandchild predeceasing the term of payment without issue, or giving a right of survivorship in favour of the grandchildren then in life. The first of these views, if maintained, goes far to shew that the general contention is unsound, and, in my opinion, shews that the general rule in favour of vesting should receive effect. The clause refers to the term of payment. Although the words used are 'having received payment,' this cannot, I think, be construed so strictly as to require actual payment, but as referring merely to what the trusters regarded as the term of payment. It is not necessary to determine whether this was the death of the longest liver of Mrs Snell and Mrs Morrison and her husband, for Mrs Snell was the survivor, and it was not until her death that the estate was divided, and three-fifths of it invested for behoof of Mr and Mrs Morrison and their children in fee.

"Having provided that the fee should belong to the grandchildren equally, what the testator by the special clause farther provided was, that if, at the time of payment, which may be taken as the death of Mrs Snell, any grandchild died leaving issue, such issue should have right to their parents' share.

"One view which may be taken of this clause is that it strengthens the effect of vesting *a morte testatoris*, because it shews the intention of the trusters to give each grandchild and his family his own share, and that the true meaning of the clause is that if any grandchild should die without otherwise disposing of his share and leave issue his issue should be substituted to him. That view is taken of a somewhat similar provision by certain of the Judges in the case of Foulis, Feb. 3, 1857, 19 D. 362. I am not, however, disposed so to construe the clause in the present case, for it appears to me to involve the necessity of supplying of words by implication after the words 'without having received payment of his or her share,' such as 'and without having otherwise disposed of such share;' and I do not think there is any warrant for implying such words. On the other hand, if the natural meaning be given to the words actually used, and no more, viz., that in the case of any particular grandchild dying before the term of payment, leaving issue, the issue of such child shall take, this will not affect the case of children predeceasing the term of payment but dying out issue, and the representatives of such children, either legally or by the deeds of conveyance, would take the shares of such children, and there would be no intestacy. This was the view which received effect in the case of Maxwell v. Wylie, where legacies were left subject to a liferent to nephews of the testator, or 'to the child or children of such of them as may have deceased at that time.' In that case, which I regard as a direct authority on the question, it was held that the legacy had vested in Adam Wylie, one of the nephews who predeceased the liferenters leaving no issue. The view that the bequests would lapse in the case of children dying before the term of payment

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About leaving issue might, without any extravagant supposition, have involved intestacy as to the whole residue; for it is quite conceivable that, in the interval between 1848 and 1874, when Mrs Snell died, the grandchildren might have died without issue. If the ordinary rule received effect this possible result was excluded, and in determining what was the true intention of the testator that consideration is, in my opinion, of considerable importance.

If, on the other hand, it be maintained not only that no vesting took place at Mrs Snell's death, but that the right to the fee of the whole residue then vested in the children who survived that event, I think the language of the deed does not support this view. There is no clause of survivorship directly implying such a right; there are no words to the same effect, such as have occurred in many cases, as where the direction to pay at the expiry of a life interest is in favour of the then surviving children or grandchildren. The case of *Laing v. Barclay*, July 20, 1865, 3 Macph. 1143 (38 Scot. Jur. 95), was obviously of this kind. It was clear, taking the deed as a whole, that the provision which was the subject of the decision was in favour of children surviving the death of the life-tenant. It was substantially so expressed in the deed, and this was the ground of judgment. The parties here propose in effect to insert similar words; but their ground for this is the provision in favour of the children of a grandchild who might predecease the term of payment. I cannot give to that clause any such effect. I am of opinion that by the earlier clauses of the deed the testator gave the right of fee to each of the children of Mrs Morrison in life at his death, subject to the annuity and life interests, the term of payment being therefore postponed; but the right so given was not an absolute fee, but was a right which might be defeated in one event, but in one event only, viz. the death of the grandchild before the term of payment, leaving issue. That event did not occur in the case of any of the children, and I therefore hold that the right of fee, although for a time defeasible in the case of each child, in the result became absolute.

This conclusion is, I think, the result of giving to the language of the deed its fair and natural meaning. I see no reason against holding a fee to vest, not an absolute and indefeasible, but subject to the contingency of its being defeated in favour of issue by death before a certain date. A similar result occurs in the case of vesting in children as a class, where it is provided that the first born children shall have a share. A right of fee in the whole provision is in the child first born, subject only to its being partially defeated by the birth of future children, and as each child comes into existence there is a corresponding restriction of the extent of the fee which was previously vested in the first child. So, where it is provided that if any one of a set of beneficiaries should succeed to a certain fortune or estate during the subsistence of a life interest he should lose his right to a testamentary provision, the right which had vested absolutely, but defeasible, and on the event occurring is defeated in favour of others. It has been repeatedly said in the judgments on questions of construction in Scotch cases in the House of Lords that as the expressed intention of the testator is the determining element, where the language used is not technical, the decisions in one part of the kingdom on such questions may often be equally referred to in another. In this view, it is not unimportant to observe that in cases where questions similar to the present have arisen in England, vesting has been held to take place subject only to the right being defeated on the occurrence of the event fixed by the testator—See *Gray v. Garman*, 2 Hare, 268, and other cases cited in note (m) on p. 1259 of *Williams on Executors*, 7th ed.; and in *re Wilmott's Trusts*, 1869, L. R. Equity Cases, vol. vii. p. 532. Indeed, even where a bequest to persons at the expiry of a life interest is preceded by a clause of survivorship or gift over, if there be no person in life at the term of distribution or payment to whom the clause of survivorship or gift applies, the representatives of the original legatees take the legacy on the same principle, and there is nothing in the *dicta* of the Judges in the case of *Roberts v. Robertson* which conflicts with this view, which has, in my opinion, been resumed or implied intention of the testator to support it."

SUMMER SESSION.

No. 109. ANTHONY HARRIS AND OTHERS, Pursuers.—*Guthrie Smith—Kirkpatrick*.
HAYWOOD GAS COAL COMPANY, Defenders.—*Pearson*.

May 12, 1877.
Harris, &c. v.
Haywood Gas
Coal Co.

2D DIVISION.
Lord Ruther-
furd Clerk.
I.

Process—Reclaiming Note—Lodging in Process.—Harris and others, having reclaimed against an interlocutor of a Lord Ordinary, duly boxed their reclaiming note upon the box-day, but owing to a misunderstanding on the part of their agents' clerk the principal copy of the reclaiming note was not lodged in process at the Register House until the day after the box-day.

These facts having been stated to the Court in the Single Bills, and the respondents not objecting, the cause was sent to the roll in the ordinary course.

T. & W. A. M'LAREN, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 110. HELEN DUNN WALKER, Pursuer and Appellant.—*Mair*.
JOHN REID, Respondent.—*Lang*.

May 12, 1877.
Walker v.
Reid.

Process—Appeal—Court of Session Act, 1868, sec. 71—A. S. 10th March 1870—Omission to lodge Prints in time.—In an appeal from the Sheriff Court the appellant omitted to lodge prints within fourteen days after the process had been received by the Clerk of Court, as required by sec. 3, sub-sec. 1, of A. S. March 10, 1870, the agent having by mistake, as the day for lodging fell in vacation, lodged them on the box-day instead. An objection having been taken by the respondent to the competency, the Court, in the circumstances, overruled the objection, and sent the case to the roll.

2D DIVISION.
Sheriff of
Lanarkshire.
I.

HELEN DUNN WALKER appealed against an interlocutor of the Sheriff of Lanarkshire on 8th March 1877, and the process was transmitted to the Clerk of Court on 12th March.

The prints, which, under the provisions of the Act of Sederunt of 16th March 1870,* were due upon 26th March, were not lodged until 5th April, being the first box-day in the spring vacation. When the case appeared in the Single Bills the respondent objected to the appeal being sent to the roll, upon the ground that as the prints were not lodged in time the appellant must, in terms of the 1st sub-section of section 3 of the Act of Sederunt be held "to have abandoned his appeal." It was contended that the 3d sub-section of section 3 of the Act of Sederunt† provided

* "III. That the course of proceeding prescribed by the 71st section of said statute shall be altered to the following extent and effect:—(1) The appellant shall, during session, within fourteen days after the process has been received by the clerk of Court, print and box the note of appeal, record, interlocutors, and proof, if any, unless, within eight days after the process has been received by the clerk, he shall have obtained an interlocutor of the Court dispensing with printing in whole or in part; in which case the appellant shall only print and box, as aforesaid, those papers, the printing of which has been dispensed with; and, if printing has been in whole dispensed with, shall lodge with the Clerk of Court a manuscript copy of the note of appeal, furnishing another copy to the clerk of the Lord President of the Division: And if the appellant shall fail, within the said period of fourteen days, to print and box, and lodge and furnish the papers required as aforesaid, he shall be held to have abandoned his appeal and shall not be entitled to insist therein, except as hereinafter provided."

† "(3) It shall be lawful for the appellant, within eight days after the ap-

ans of remedying any mistake which might have been committed in No. 110.
 ing the prints, and the appellant having failed to take advantage of
 s was precluded from any other recourse. Reference was made to the ^{May 12, 1877.}
 e of *Park v. Weir*, in the First Division.¹ ^{Walker v.}
^{Reid.}

It was stated for the appellant that as the day for lodging the prints
 in vacation the appellant's agent had concluded that the box-day was
 proper day for lodging, and he had acted accordingly.

ORD GIFFORD.—I am always inclined to give the fullest effect to an Act of
 erunt, and to carry it out and enforce it according to its terms, but its true
 et must always be looked to. The object of this Act of Sederunt, and of
 provisions which are now in question, was to put an end in a summary
 to appeals taken merely for the purpose of delay, and intended only to hang
 ases, without any intention of seriously trying the questions raised. Accord-
 y, when it appears that an appeal has been taken not merely to gain time
 with the true object of obtaining the judgment of this Court on a serious
 tion, I should be very loath to let a mere accident—the omission of a for-
 ty only, through mistake—prevent that judgment being obtained. The
 er also at stake might be of great value; and it is most undesirable that
 w should be excluded by an accidental failure to comply with a mere

ordinary actions in this Court if a reclaiming note is by some accident not
 ously lodged a remedy is provided for interlocutors which have become final
 mistake, and the party is not deprived of his legal right of review. I think
 ower of giving such relief in cases of accidental failure to comply with the
 of Sederunt must always inhere in the Court.

um therefore disposed, in this case, to depart from the exact terms of the
 of Sederunt in order to get at its spirit, and to hold that this appellant has
 et all right to get this judgment reviewed.

ee a distinction between the case of *Park v. Weir*, quoted to us, and this

There the process had been retransmitted to the Sheriff Court. It was
 lly and altogether at an end, and could not well be brought back, and the
 ly, if any, would probably be by a reduction; but here the case is still
 e us, though the paper was boxed on the box-day, and it is in consequence
 it that this question now arises. The case is clearly a special one, and as
 I think we may exercise our discretion and send it to the roll.

RD YOUNG.—I am of the same opinion, and very clearly so. In the case
 ich we were referred—*Park v. Weir*, in the First Division—the Court did
 e fit in the circumstances, which were no doubt fully before them, to allow
 arty to proceed with his appeal, and one feature which, I should think, pro-
 contributed to that result, was the fact that the clerk had retransmitted

een held to be abandoned as aforesaid, to move the Court during session,
 e Lord Ordinary officiating on the Bills during vacation, to repon him, to
 ffect of entitling him to insist in the appeal; which motion shall not be
 ed by the Court or the Lord Ordinary except upon cause shewn, and upon
 conditions as to printing, and payment of expenses to the respondent, or
 wise, as to the Court or the Lord Ordinary shall seem just."

Park v. Weir, Oct. 15, 1874, reported only in 12 Scot. Law Rep. 11; but
 bservations of the Lord President upon this report in *Young v. Brown*, Feb.
 875, *ante*, vol. ii. 456.

No. 110. the process to the inferior Court on the footing that the appeal had been ad-
 — doned and fallen, and that he had done so in time to enable the appellant
 May 12, 1877. take his remedy on that footing. The exact stage of the cause in which
 Walker v. Reid. appeal was taken I do not know.

It must always be in the power of the Court to do justice in any case of
 kind, and relieve a party of so severe a penalty, following on so critical
 instruction of what, after all, is only a rule of Court laid down by the Court
 its own guidance, with notice to parties and practitioners. We may, as
 tateously and wholesomely, make stern regulations in order to check any
 taken merely for delay or other improper purpose, but it is a strong thing to
 that, by any words of ours in an Act of Sederunt, we preclude ourselves
 doing what we think justice in any particular case, and that the accidental
 harmless delay, it may be of a day or an hour, will make a judgment final
 is by the law of the land subject to review. The enactment that any
 however inconsiderable, and unattended with harm or inconvenience, shall
 deprive a party of the review to which he is entitled by law, and without
 power in the Court to grant him relief, is legislation as distinguished from
 rule of Court to govern procedure. I do not so construe this Act of Sederunt.

In this case, where the appeal was lodged and boxed on the box-day, and
 harm has been done to any one, I think it would be oppressive to throw the
 appeal on the construction of the Act of Sederunt for which the respondent
 contends.

If it could be shewn that there was anything wrong behind the omission of
 this formality I might be prepared to give effect to the penalty. As it
 have not yet held the appeal to have been departed from, and being now
 to do so I am not, in the exercise of my discretion, prepared to assent to
 motion. On the contrary, I agree with Lord Gifford, and think the case
 be sent to the roll on the appellant's motion.

LORD ORMDALE.—I am not dissatisfied with the result your Lordships
 arrived at, but, at the same time, I must take leave to say I am not prepared
 to concur in all the views which have been expressed by Lord Young. On
 the contrary, I am now, and will always be, ready to give effect to the Act of
 Sederunt passed by all the Judges in conformity with powers conferred on
 them by Acts of Parliament. Apart from this, however, I am disposed to think
 there is sufficient in the circumstances of this case to enable me to get over
 precedent of *Park v. Weir*, and the terms of the Act of Sederunt. The present
 is a peculiar case; the fourteen days allowed for lodging the paper ran past
 session and partly in vacation, and that circumstance appears to have given
 not unnaturally, to some misapprehension. Therefore, and as it has not
 suggested that anything improper was intended, and as the process is now
 this Court, in place of having been sent back to the Sheriff Court, as it
 to have been done in *Park v. Weir*, I feel myself able to concur in the
 decision at which your Lordships have arrived. The objection to the competency
 the appeal will therefore be repelled, and the case sent to the roll.

The LORD JUSTICE-CLERK was absent.

The case was sent to the roll.

JAMES WILSON, Solicitor.—MACRAE & FLETT, W.S.—Agents.

JOHN FARQUHAR DICKSON AND LORD DALHOUSIE, Petitioners and
Appellants.—*Kinnear—Mackintosh.*

ROBERT GRAHAM, Respondent.—*Balfour—J. P. B. Robertson.*

No. 111.

May 12, 1877.
Dickson, &c. v.
Graham.

Case—Sheriff—Summary Petition—A. S. July 10, 1839, sec. 137.—A tenant bound by his lease to leave his farm buildings, &c. in good repair, or to pay their being put in repair at the sight of a person to be appointed by the sheriff. Three months and a-half after Martinmas 1875, when the lease expired, the landlord presented a petition in the Sheriff Court praying for authority to execute the necessary repairs at the sight of a person to be appointed by the Court. *Held* that the petition was not incompetent by reason of the delay otherwise.

JOHN FARQUHAR DICKSON as tenant and Lord Dalhousie as proprietor of the farm of Pitskelly, in Forfarshire, presented upon 8th March 1876 a petition in the Sheriff Court against Robert Graham, formerly tenant of the farm of Pitskelly under a lease which expired at Martinmas 1875. The petition set forth that Graham was bound in terms of his lease "to maintain and uphold the whole buildings, fences, gates, and drains on the farm in good order and complete repair during the currency of the lease, and to leave them in that state at the expiry thereof; and if he should fail or delay to do so, then the proprietor should be entitled to execute the necessary repairs himself at the sight of any party to be appointed by the Sheriff. The petition further set forth that Graham had failed to put the house, &c. in repair when he left, and they therefore requested the Sheriff to "authorise the petitioners to execute the work necessary for putting the said buildings, fences, gates, and drains in good order and complete repair, as required by the said lease, at the sight of some person to be appointed by your Lordship, and to decern against the respondent for the expense thereof, together with the expense of this petition, &c.

Graham lodged answers, and a record was made up.

The petitioners stated that upon 5th November 1875 Lord Dalhousie's agents had procured a report from a Mr Maclaren, architect in Dundee, as to the state of the house and other buildings, &c. at that date, and that a copy of this report (which brought out "the total estimated cost of carrying out the stipulations of the lease" as £66) was on 9th November sent to Graham by Lord Dalhousie's agents, with a request that the work should be proceeded with at once; that to this communication Graham had made no reply, and the work was not done.

Graham averred that he had left the farm in a good state of repair, and that any dilapidations now apparent had been caused by the petitioner's neglect in the course of his tenancy. He pleaded, *inter alia*;—1. The respondent not having been brought *tempestivè*, it is now incompetent, and ought to be dismissed. 1/2. The petition is incompetent, and ought to be dismissed. 2. The action is incompetent, in respect (1) the respondent has fulfilled all obligations incumbent on him; (2) the petitioner's possession of the farm, and the buildings and fences thereon, without objection, and used, and has continued to use, the same without making complaint until nearly four months after he took possession; and (3) the objects referred to in the petition have been dilapidated by the petitioner's neglect since he took possession.

On 5th May 1876 the Sheriff-substitute (Cheyne) pronounced this interlocutor:—"Refuses the petition, and decerns, reserving to the petitioner, or either of them, to take such other action in the premises as

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Sheriff of For-
farshire.
R.

No. 111. may be competent, and to the respondent his defences thereto as cords," &c.*

May 12, 1877.
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The petitioners appealed to the Sheriff (Maitland-Heriot), who, on 1 June, recalled his Substitute's interlocutor, reserving all pleas of part and allowed, "before answer, the petitioners to execute the works necessary for putting the buildings, fences (excluding hedges), and gates in good order and complete repair at the sight of Robert Blackadder, architect, Dundee."

Mr Blackadder reported first on 18th September, and finally on 1 November 1876, when the work was completed. The total expenditure was £122, 7s.

The Sheriff-substitute made avizandum with the reports and with process to the Sheriff, who, on 4th December 1876, dismissed the petition, reserving to the petitioners any other action which might be competent, and finding no expenses due.†

The petitioners appealed to the Court of Session, and argued:—The landlord's agents having given the outgoing tenant notice of the repairs had procured, and having called upon him to execute the necessary work, were, in the absence of any intimation from him, entitled to expect he would proceed with the repairs, and were bound to give him a reasonable time to complete them. This accounted for the delay in presenting the petition. The farm having been regularly inspected before the tenant left, it would be easy now to ascertain the state it was in then—in very little more than Mr Maclaren's report was required.

* "NOTE.—Of the competency of this summary application, had it been presented at or within a few days after Martinmas, at which term the respondent gave up, and Mr Dickson entered into possession, and by the state of matters which the respondent's liabilities fall of course to be determined, there could not, I think, have been no question, but I am very clearly of opinion that, precisely as it was three and a half months after Martinmas, it came too late, and now the landlord's only remedy is an action of damages. Observe what I am asked to do? I am asked to decern against the respondent for the cost of putting the buildings, &c., as they stand now, in complete repair. *quomodo constat* that the buildings, &c., are in the same condition now as they were at Martinmas. Unless that could be assumed, or was proved, my decree would obviously be an unjust one; but no such assumption can fairly be made, and, as for proof, it is only necessary to look at the petition to see that the repairs contemplated is of the most summary character, and that my decree, if made, its disposal were intended to be purely ministerial, confined to nominating an inspector and giving decree for the cost of the repairs as reported by him. On this short ground, viz., that in the circumstances it has ceased to be an appropriate remedy, I must dismiss the petition."

† "NOTE.—The Sheriff can find no materials in process for coming to a summary or summary decision. Mr Maclaren reckoned at Martinmas that it would take time to fulfil the respondent's obligations under the tack.

"In August following it has cost double that amount, or upwards of £120, to put things to rights. In such circumstances the Sheriff finds it impossible to decern against the respondent for payment of this £120, when the petitioner's own valuator estimated in November that £66 only would be needed to put the farm in good order, standing, &c. in order. It would rather appear that between November and August about £66 of further damage had been done by the petitioner. But then, it may be said, why not give decree for the £66 as fixed by Mr Maclaren? The petitioners have since departed from part of their demand so far as the fences and ditches were concerned, and the respondent, since Mr Maclaren's report was made up, had executed some repairs. The Sheriff therefore finds it impossible in this process to determine what precise amount should be paid by the respondent."

argued for Graham ;—Although the application was a competent one it is clear that it had been too long delayed, and it was no longer possible to ascertain the true state of the buildings, &c. as at Martinmas 1875.¹

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—
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ORD ORMDALE.—I must say I see no difficulty in giving the required ass in the present process. It is true there was a delay of three or four days after the termination of the respondent's lease before the landlord presented his petition, and that may have given rise to some difficulty in ascertaining what the respondent, as outgoing tenant, was to be answerable for in regard to repairs. But I do not think that for this or any other reason legitimately urged in the case we are called on to dismiss a petition which has been dependent for many months in the Sheriff Court. It would be very unfortunate if we were obliged to do so after all the time which has been lost, and the expense which has been incurred.

The delay in presenting the petition should in reality have caused the respondent as outgoing tenant little or no inconvenience, because on the 9th of November, a couple of days before the term of Martinmas 1875, the report by Mr Maclaren was sent to him. No doubt that was an *ex parte* inquiry on behalf of the landlord and by his man of skill, but the tenant neither objected to it at the time, or, so far as is shewn, took the precaution of employing a man of skill to examine the premises for himself. In these circumstances the tenant was no more to blame than any one else. He had been put upon his inquiry, and he ought to have brought the matter at once to a conclusion, if that in itself had been his object. I can therefore have no sympathy with the tenant in this case, for if he has to suffer he has himself wholly and solely to blame.

It has, however, been argued that it is impossible now to give the necessary ass under the prayer of this petition, as it merely asks for an inspection and by a man of skill. But that is a mistake; the prayer of the petition is to the effect that what may be found requiring repair may be put right at the time by a man of skill, as stipulated in the lease, but it must, of course, be first ascertained whether anything and what, requires repair, a matter which is apparently left to the Court to be done in any way the Court might consider proper. I should think, therefore, very little more will be necessary than the ass of Mr Maclaren, supplemented by his evidence and the evidence of the persons who executed the repairs, and any others who knew the condition of the premises at the term of Martinmas 1875. All this may surely be easily obtained, and will be sufficient to enable the Sheriff to arrive at a satisfactory result. The conclusion, therefore, I have arrived at is, that the interlocutors complained of ought to be recalled, and a remit made to the Sheriff to proceed with a necessary inquiry, failing the parties themselves coming to a settlement without more litigation,—a course I have strongly to recommend them to adopt.

GIFFORD.—I think the Sheriff-principal's first interlocutor is right, inasmuch as he holds that the original application was not incompetent. In other respects he is held, and I think quite rightly held, that the lapse of time after the application did not make the petition to get the houses and fences put in a proper repair too late, and therefore incompetent. Now, if the original petition was proper and competent at the time when it was presented I do not

¹ Baird v. Mount, July 3, 1874, *ante*, vol. i., 1119.

No. 111. think that anything has happened since that date to make the proceeding incompetent now. It must be competent still. Of course some inquiry may be required to ascertain and fix the state of matters at the date of removal. But this inquiry may be made perfectly well in this process, as well as in any other or any new process, and justice can easily be done in the present action.

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LORD YOUNG.—I am of the same opinion, and if I add a few words it is only to express my surprise and regret that a very simple matter should have met with such obstruction in the Sheriff Court.

The respondent was a tenant for nineteen years of a farm on the Panmure estate. The lease terminated at Martinmas 1875, and contained provisions that the tenant should leave the buildings, fences, gates, and drains, in good repair, and that if he failed to do so the proprietor should be entitled to execute the necessary repairs at his expense at the sight of any one appointed by the Sheriff.

On 5th November preceding the term of expiry of the lease the landlord, with foresight and propriety sent a man of skill to inspect the buildings, fences, gates, and report on their condition. He did so, and specified minutely all that was wrong in house, fences, gates, and drains. The landlord sent that report on 9th November to the tenant, who, in answer, simply denied all liability. The matter was then allowed to lie over for three months, which was not a great delay in the circumstances, and then this application was made to the Sheriff.

The Sheriff-substitute, on a view with which I have no sympathy, dismissed the petition, saying that in his opinion an action of damages would have been preferable to a petition to enforce the provisions of the lease.

The Sheriff on appeal sustained the competency of the petition, and allowed the repairs to be executed at the sight of a person named by himself.

The repairs were executed, and cost upwards of £120, a sum, no doubt, greatly in excess of the approximate estimate supplied to the landlord by the man sent to the tenant. Then the Sheriff finds he can do nothing in the process to determine how much of this the tenant is to pay, and dismisses the petition. I cannot appreciate the difficulty. If the petition could be sustained at all, and I think it was properly entertained, it could be ascertained the process following on it how much the tenant was to pay, as well as the process following on a new action.

I am surprised that an application by a landlord to have repairs executed should be the subject of such legal difficulty. It seems to me such an application might be presented, investigated, and concluded in, at longest, a few days and at inconsiderable cost to the parties. I entirely concur in the Sheriff's judgment finding the procedure competent, and recalling the last interlocutor and remitting to the Sheriff to proceed.

The LORD JUSTICE-CLERK was absent.

THIS interlocutor was pronounced:—"Repel the first and second pleas for the respondent in the inferior Court: Remit the Sheriff to direct such inquiry as may be necessary to enable him to ascertain to decern for the expense of the repairs which have been executed, so far as the same were rendered necessary by the state of the buildings at the time of repair in which they were left by the respondent at Martinmas 1875, and to proceed in the case as shall be just: Find the respondent liable in the expenses," &c.

MACKENZIE & KERMACK, W.S.—MACLACHLAN & RODGER, W.S.—Agents.

WILLIAM JOHNSTON AND ANOTHER, Petitioners and Appellants.—

No. 112.

*Asher—J. P. B. Robertson.*JOHN WHITE, Respondent.—*Moncreiff.*May 18, 1877.
Johnston, &c.

v. White.

Property—Common Property—Common Interest.—The proprietor of a dwelling-house consisting of four stories, one of which was a sunk story with area in front, converted the street flat into a shop and the two flats above into separate dwelling-houses. He sold the upper flats to one person, giving right in common with the other proprietors to the area on which the same stands. He afterwards sold to a different person the street and area flats "with right in common with the other proprietors of the tenement, of which the subjects hereby disposed form part, to the *solum* of the ground on which the same built." *Held* that the area in front of the shop belonged to the proprietor of the shop, and that the upper proprietor had only a right of common interest in the area, and could not prevent buildings being erected thereon except on the ground of injury to his property.

A dwelling-house bounded on the east by Nicolson Street and on the north by Nicolson Square, Edinburgh, consisting of four stories, one of which was a sunk story with an area in front, was altered by the proprietor about the year 1843 by converting the street flat into a shop and the two upper flats into separate dwelling-houses. The whole tenement continued to be treated as one property till it was acquired by the trustees of William Darling. Darling's trustees, by disposition dated 12th and recorded in the Register of Sasines 15th May 1871, conveyed the two upper flats which had been converted into separate dwelling-houses, "and also a right in common with the other proprietors to the area on which the same stands," to John White. By disposition, dated 24th May and recorded in the Register of Sasines 7th July 1871, Darling's trustees conveyed the shop, &c., to D. S. Reddie (who was the author of William and John Johnston) under the following description:—"All and Whole that shop No. 47 Nicolson Street, Edinburgh, in the parish of Saint Cuthberts and county of Edinburgh, containing of a front shop having an entrance from Nicolson Street and an access from Nicolson Square, with the cellarage below and in the area, other premises attached, presently used as saloons and stores, and all presently occupied by Stephenson Reid, spirit merchant, with right in common with the other proprietors of the tenement of which the subjects hereby disposed form part, to the *solum* of the ground on which the same built, and whole rights, pertinents, and privileges belonging to the subjects hereby disposed."

William and John Johnston presented a petition to the Magistrates (exercising the jurisdiction of Dean of Guild beyond the royalty) for authority to cover the area by extending their shop as far as the north side of the area, calling as respondents John White, the proprietor of the three stories, and the City Chamberlain, for the public interest. The City Chamberlain did not appear. John White opposed the prayer of the petition, on the ground that he had a right of common property in the area, and was entitled to prevent any building being placed upon it.

The Bailie (Muirhead) pronounced this interlocutor:—"Finds that, according to the titles of the two parties, the area in question is common property, and that the petitioners are not entitled to build over it without respondent's consent: Therefore dismisses the petition," &c.

The petitioners appealed.

It was admitted by both parties in the argument that there was a gate or railing of the area from the street, but that the only access to the area was obtained through the kitchen flat, as there was no stair leading from the door in the railing. The petitioners maintained that at

No. 112. one time there had been a stair. The respondent maintained that no such stair ever existed.

May 18, 1877.
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Argued for the petitioners ;—The right of the petitioners to the area was an absolute right. At all events the right of the respondent was only one of common interest, and in order to prohibit the petitioners' alteration he must prove injury to his property, and no injury was averred¹.

Argued for the respondent ;—He had obtained his disposition from the common author before the disposition of the petitioners, and was entitled to all that the common author had not reserved. In the disposition granted to the respondent a right of common property was given to him in the area, and this referred not only to the ground on which the house was built but to the area in front of it. The rights given were similar, whatever the one had the other had. Therefore the rights were both common property. But even if the respondent's right was only one of common interest the petitioners were not entitled to injure his property by building on the area.

LORD PRESIDENT.—The tenement to which this question refers was originally built as a dwelling-house, and was at the south-east corner of Nicolson Square fronting both Nicolson Square and Nicolson Street. It was converted to other purposes some time ago—at what time does not precisely appear—and the ground floor and the sunk flat came to be occupied as a shop with storage and cellars, and the upper floors as separate dwelling-houses. The petitioners here are proprietors of the shop and sunk floor along with the area and cellars, and the respondent is proprietor of the upper floors. The proposal of the petitioners is to project the shop-front outwards to the wall of the area. To this the respondent objects, and his objection in the Magistrates' Court was based on this, that he was the common proprietor of the area over which the petitioners proposed to build. The magistrates have sustained that plea, and have found that, "according to the titles of the two parties, the area in question is common property, and that the petitioners are not entitled to build over it without the respondent's consent." The question raised before us is whether this is correct in law, or whether the right that the respondent has is a right of common interest and not a common property. I am of opinion that, on the authorities, the decided cases, the respondent has not a right of common property, but merely a common interest. The right of property in this story and the area is in the petitioners, subject to the common interest of the respondent. The question of that will be to recall the operative part of the Magistrates' order dismissing the petition, and it will then be for the Magistrates to proceed on the ground that the right is a right of common interest, and they will still have to determine whether the proposed operations are injurious to the respondent's interest. It is to be ascertained that there must be an investigation, which must be made by the Magistrates, and as there is no averment of injury to the respondent's property, the plea to that effect, in order to lead to investigation the record must be set up and some such averment and plea introduced. That may be done in this Court or it may be remitted to the Magistrates to do so.

LORD DEAS.—The property in dispute is admittedly situated in a town.

¹ Bell's Prin. secs. 1071, 1075, 1086; Ersk. 2, 9, 11; Anderson v. Duff, June 20, 1799, M. 12,831; Murray v. Gullan, March 10, 1825, 3 M. 100; Stewart v. Blackwood, Feb. 3, 1829, 7 S. 362, 1 Scot. Jur. 55; G. Arrol, March 13, 1863, 1 Macph. 592, 35 Scot. Jur. 360; Urquhart v. Macph. 1853, 16 D. 307, 26 Scot. Jur. 137; Taylor v. Dunlop, Nov. 11 Macph. 25, 45 Scot. Jur. 24; Brown v. Boyd, July 13, 1841, 3 D.

the burgh in which there is no Dean of Guild, and in which, consequently, the Magistrates are entitled to exercise the jurisdiction of that officer. It is unfortunate that in the Court below the attention of the Magistrates in exercising that jurisdiction was confined to the question whether the right of the upper proprietor in the front area was one of *pro indiviso* property without entering into the alternative question whether it was a right of common interest. I think the point at issue, properly speaking, did not relate to the front area separately, but to the area of the whole tenement. Before considering that point, however, it is necessary to attend to the history of that tenement.

It consisted originally from top to bottom of a dwelling-house. Some thirty more years ago the proprietor of the dwelling-house converted the street floor to a shop, and the sunk floor, which had been the kitchen story, into a store for goods. In the course of that occupation, although he left the area gate and ling, he took away the area stair, so that entrance to the area and cellars under pavement could only be got from the interior of what had been the kitchen flat. This state of occupancy still continued when on 12th May 1871 the proprietor of the whole tenement conveyed the two flats or stories above the shop to the author of the respondent, White, who formed an access to them by a common stair in the usual manner. Infestment followed on this conveyance, and was registered 15th May same year. On 24th May 1871 the same proprietor conveyed the shop and sunk story (which he had retained) to the author of the petitioners Johnston, who recorded their conveyance by way of infestment on the 1st of July following. There was nothing special in either conveyance to affect the question as to the front area.

The respondent White's titles convey to him the two upper stories of the tenement, being the corner house on the south-east side of said square, high and back and fore, "and also a right in common with the other proprietors to the area on which the same stands." I do not think it matters much whether we take this to mean the whole area or the front area only. The words do not necessarily nor even *prima facie* imply a *pro indiviso* right of property, and there is nothing in the context to authorise us to put upon them that construction as the Magistrates have done. The terms of the respondent's titles are such, I think, as to confer upon him a common interest in the whole area (front area included) along with the other proprietors of the tenement, but nothing more. This, however, does not bring us to the end of the case, for a common interest of a proprietor of one floor of a tenement may be such as to entitle him to oblige alterations materially injurious to him in another floor of the tenement. The question to be decided on the merits will be whether that is so here? We have a full discussion, recently, on a question of this sort in the case of *Kemys v. White*, where it was proposed to build on the front area of the house No. 9 Castle Street. It appeared to have been by no means unusual for such things to be done in Edinburgh, but no instance was referred to where the party making the alteration had not either been proprietor of the whole tenement or had secured the acquiescence of the proprietors of the upper floors. We remitted twice to the Mr Bryce, architect. He reported, in the first instance, that the proposed alterations of executing the alterations would be attended with danger, and that, when completed, they would deteriorate the value of the upper floors. Under the second remission he reported that various suggestions had been assented to which would mitigate the risk of danger—but he indicated no change of opinion as to the deteriorating effect of the change upon the value of the upper floors. In that state of matters I do not think any of us were prepared to sanction the alteration

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No. 112. without further consideration, and my own impression certainly was against doing so. The parties, however, settled the case before judgment, and on 13th March last the case was taken out of Court by an interlocutor concerted between them. In that case there was to be a substantial building capable of being continued upwards by the proprietor of the floors above if so inclined. Here the proposed erection is to be chiefly of wood and glass, over which it has not been shewn that any substantial building could be carried up. Such an alteration as this, it is obvious may materially affect the value of the upper flats. I agree with your Lordship that the record as framed does not properly raise the question of deterioration. But I agree at the sametime that the respondent White has a right of common interest in the whole area which entitles him to raise that question, and that the case should therefore be remitted to the Magistrates to deal with it on that footing after the record has been amended either here or in the inferior Court.

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LORD MURE.—I concur. I am not surprised that the Magistrates should have come to the conclusion that the right of the proprietor of the upper flat was one of common property, as the titles seem to give more than a right of common interest. But I have come to think that their right is only one of common interest, and not of common property.

LORD SHAND.—The result of the authorities is that unless there be something special in the title-deeds the proprietor of the ground story has a right of property in the *solum*, while the right of the other proprietors of the tenement in the *solum* is one of common interest. But assuming that to be so it has been intended that the titles of the upper floors here gave a right in the *solum* of common interest only but of common property. I concur with Lord Macdonald thinking that there was considerable ground for maintaining that the very terms of the deeds gave the upper proprietors the higher right. But I have come to the conclusion that the titles have not the effect of altering the common law rights of the parties. No doubt you have the words "a right in common with the other proprietors to the area on which the same stands." The "right in common" here mentioned is not in terms described as a right of property, and must, I think, be held to refer only to that interest which the upper proprietors usually have in the *solum* in common with the right of property in the owner of the ground floor.

If the right had been one of common property the appellants would have been precluded from making the proposed alterations on the area without the respondent's consent, on the ground that these involved a direct interference with the right of common property. It does not follow, even though the right of the upper proprietor be one of common interest only, that the appellants cannot make these alterations. It remains to be seen whether the operations would injure the property above, or would materially interfere with its comfort or use. I should be disposed to hold that there would be injury such as will entitle the upper proprietor to prevent what is proposed to be done. I concur in the view that it is desirable to have an amendment in order to bring out this point, and that a plea founded on the common interest of the upper proprietor, and the injury to that right.

The respondent was allowed to put in an amendment to the effect that the proposed alterations would injure his property, and a plea that the parties having a common interest in the area the petitioners should not be allowed to execute operations which would be injurious to the upper

THE COURT then pronounced this interlocutor:—"Recall the interlocutor of the Magistrates of 25th August 1876: Find that the area in question is not the common property of the petitioners and the respondent, but that it is the property of the petitioners, subject to a right of common interest in the respondent: Allow the respondent to add to the record the averment and plea in law now proposed; and the same having been made at the bar, hold the same as part of the record, and remit to the Magistrates to proceed farther in the matter of the petition as shall be just and consistent with the above finding: Find the appellants entitled to the expenses incurred by them in this Court; allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

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KEEGAN & WELSH, S.S.C.—JAMES W. MONCREIFF, W.S.—Agents.

JAMES RANKINE AND OTHERS, Petitioners.—*Asher—Keir.*
RASCHEN AND OTHERS, Respondents.—*Scott—Strachan.*

No. 113.

May 19, 1877.
Rankine, &c.
v. Raschen, &c.

ip—Reparation—Damages—Limitation of Liability—Collision—Merchant Shipping Act, 1854, sec. 514—Merchant Shipping Act, 1862, sec. 54.—Owner of a vessel who is entitled to have his liability for damage caused by collision of his vessel with another restricted under section 54 of the Merchant Shipping Act, 1862, after presenting a petition for such restriction under section 514 of the Merchant Shipping Act, 1854, is entitled to state a claim as to parties whose claims he has settled extrajudicially before presenting petition, and so limit the ranking of the other claimants.

On 2d November 1874 the steamship "Albicore"—the gross register tonnage of which was 365.20 tons, without deduction on account of crew-room—then on a voyage from Grangemouth to Rotterdam, came in collision with the steamship "Aurora," whereby considerable damage was caused to the "Aurora," and to certain portions of her cargo. No loss was occasioned, and the collision occurred without the actual fault or negligence of the owners of the "Albicore."

Some time after a claim was made upon the owners of the "Albicore" by Anthony George Robinson, as representing the owners of the "Aurora," for a large sum in respect of damage sustained by the steamship "Aurora," and to have been caused by the collision. The owners of the "Albicore," Mr Robinson, by an agreement entered into between them on 30th November 1874, referred the question of liability for the sum claimed to Sir John Dick Arrow. The arbiter, on 17th March 1875, issued his award, by which he decided that the steamship "Albicore" was solely in fault for the collision, and awarded the sum of £2115, 15s. 10d. in full discharge of the damage sustained by the owners of the "Aurora." The owners of "Albicore," on the 22d April, thereafter paid to Mr Robinson the sum of £15, 15s. 10d. in settlement of the damage to the "Aurora." Messrs Rankine and others, Glasgow, owners of the "Albicore," presented a petition for the purpose of restricting their liability in respect of damage caused by the collision to £8 per ton of gross tonnage under the Merchant Shipping Act, 1854, sec. 514, and the Merchant Shipping Act, 1862, sec. 54. The sections are quoted in the opinion of the Lord President.

The petitioners stated—No claim for damage to cargo was made until nine months after the collision, when claims amounting in all to £10s. 10d. were intimated. Messrs Raschen and Company gave in a claim for £1580, 5s. 7d. for damage to cargo, and they raised action in

No. 113. the Court of Session for payment. The amount already paid, £2115, 15s. 10d., by the petitioners to the owners of the "Aurora," with the claims intimated for damage to cargo, amounted to £4535, 16s. 8d. which exceeded the sum the petitioners were liable for at the rate of £8 per registered ton.

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On 17th June 1876 the Court pronounced this interlocutor:—"Appoint the respondents and all others having or pretending to have any interest in the matter of the petition to lodge claims within eight days from the date of the last advertisement in the newspapers after mentioned, under certification that if they fail to do so they will be excluded from participation in the fund for division; and appoint this deliverance to be advertised once in the 'Scotsman,' 'Glasgow Herald,' 'Times,' 'Daily Telegraph,' and the 'Shipping and Mercantile Gazette' newspapers."

Messrs Raschen and Company lodged a claim for £1580, 5s. 7d. as damage to part of the cargo of the "Aurora," which belonged to them, and they maintained that the amount of damage done to the "Aurora," which had been fixed by arbitration and paid to the owners, should not be taken into account in distributing the amount of damage as ascertained by the 54th section of the Merchant Shipping Act of 1862. Several other persons who had raised actions against the petitioners as owners lodged similar claims.

The petitioners also lodged a claim to be ranked on the fund along with the owners of cargo for £2115, 15s. 10d., being the amount they had paid to the owners of the "Aurora" under the award, with five per cent interest.

Argued for the petitioners;—(1) The statute was intended to favour the wrongdoing ship, and fixed a sum beyond which no damage was recoverable. The petitioners' claim was good in equity, because they had paid to the owners of the "Aurora" the amount of damage due to that ship and were entitled to deduct that in settling with the owners of cargo. At the time they settled with the owners of the "Aurora" there were no claims "apprehended" from owners of cargo. The owners of cargo could not benefit by their delay in intimating their claims. If the claims for damage done to cargo had been intimated at the proper time the petitioners would not have settled with the owners of the "Aurora," and their claim would have gone to diminish the amount of the fund to be divided. (2) The petitioners were entitled to get the benefit of the restriction of liability given to them by the 54th section of the Act of 1862, although they had not adopted the procedure prescribed by the 514th section of the Act of 1854.¹

Argued for Raschen and Company;—(1) The claim of the petitioners was not good, as they had already settled it by paying the amount to the owners of the "Aurora." The statute merely referred to existing claims while the claim of the petitioners had been extinguished. (2) The money paid under the award in the arbitration could not be taken into account. The 514th section of the Act of 1854 settled a mode of procedure, and in order to get the benefit of the restriction of liability it was necessary to follow that procedure. A petition ought to have been presented for restriction of liability before any payment was made.

LORD PRESIDENT.—The facts of this case are simple. A collision occurred

¹ Miller v. Powell, July 20, 1875, *ante*, vol. ii. p. 976; *Leycester v. Leycester*, Feb. 18, 1857, 26 L. J. Ch. 306; *Burrell v. Simpson and Co.*, Nov. 24, 1857, *supra*, p. 177.

1 November 1874, by which the steamship "Albicare" ran down the steam- No. 113.
 ip "Aurora," and did damage both to the vessel and to the cargo. There
 is no loss of life. There is further no allegation of fault or of privity to the
 ury sustained as against the petitioners, who are the owners of the "Albicare." May 19, 1877.
 erefore the case falls under section 54 of the Merchant Shipping Act of 1862. Rankine, &c.
 e owners of the ship "Aurora" very soon after the collision made a claim v. Raaschen, &c.
 inst the owners of the ship "Albicare," and on 30th December, less than
 months after the collision, this was referred to Sir Frederick Arrow, one of
 Elder Brethren and Deputy-Master of the Trinity Corporation of Deptford.
 17th March 1875 he issued his award, by which he found that the ship
 lbicare" was solely in fault, and he awarded the sum of £2115, 15s. 10d. in
 of all damage sustained by the owners of the "Aurora." No other claimants
 ing appeared, the owners of the "Albicare" forthwith paid the amount of
 award. It was not till the 21st of July 1875 that the owners of the cargo
 e "Aurora" came forward with their present claim, amounting to £2420.
 raised actions against the owners of the "Albicare" for the purpose of
 rering that claim, and this led the owners of the "Albicare" to present the
 ion which is now under consideration.

re question comes to be, whether, in distributing the fund, which has been
 tained under section 54 of the Merchant Shipping Act of 1862 to be
 11, 12s., at the rate of £8 per ton, any effect can be given to the claim of
 wners of the "Aurora," seeing that it has already been paid and ex-
 ished. The owners of the cargo maintain that the claim of the owners of
 "Aurora" is entirely out of the way and cannot be founded on, and that
 fore they are entitled to full payment, which will not extinguish the avail-
 und. This depends on a very narrow view of this case. It rests upon the
 ical plea that the claim being extinguished by payment it cannot now be
 into account in the present case. That plea seems to be inconsistent with
 the spirit and the letter of the Merchant Shipping Acts, particularly with
 ct of 1862, which by section 54 alters the corresponding clause of the Act
 54 by limiting the liability of the owner of the ship to £8 per ton, whereas
 tion 514 of the previous statute the limit of liability was the value of the
 nd freight. In other respects the second statute makes no alteration in
 ovisions which authorise a petition to be presented of the kind now before
 t is obvious therefore that the two sections with which we have to deal,
 e 54th section of the Act of 1862 and the 514th section of the Act of
 must be read together as if they were parts of the same statute. Taking,
 first place, the 54th section of the Act of 1862, we find that its provision
 "the owners of any ship shall not" in certain cases "be answerable in
 es in respect of loss or damage to ships, goods, merchandise, or other
 . . . to an aggregate amount exceeding £8 for each ton of ship's
 e." The words are very precise and strong, omitting the details and
 nces to which the conditions are applicable. That is an absolute and un-
 ed enactment, and it is expressed in negative and imperative words. The
 'the owners of the cargo of the "Aurora" would make the owners of the
 ore" liable to a greater amount than £8 per ton, and if we can avoid
 result we are bound upon a construction of the statute to do so.
 difficulty is raised under section 514 of the Act of 1854, which may be
 a procedure section. I do not think that section creates any real difficulty.
 it provides is—"In cases where any liability has been or is alleged to

No. 113. have been incurred by any owner in respect of loss of life, personal injury, loss of or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, then it shall be lawful in England or Ireland for the High Court of Chancery, and in Scotland for the Court of Session, and in any British possession for any competent Court, to entertain proceedings in the suit of any owner for the purpose of determining the amount of such liability subject as aforesaid, and for the distribution of such amount rateably among the several claimants, with power for any such Court to stop all actions and suits pending in any other Court in relation to the same subject-matter; and any proceedings entertained by such Court of Chancery or Court of Session or other competent Court may be conducted in such manner and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the Court thinks just." This is what may be called a statutory form of procedure, but it is not provided in this clause or anywhere in the statute that the question raised shall not be tried in any other form. The form provided is a simple one and seems to be equivalent to our well-known process of multiplepoinding where there is a competition among claimants to have a fund distributed. The first thing to be ascertained under the statute here is the amount of the fund which the owner is liable. That is what would be called the fund in need of a multiplepoinding. It seems to me that if there had been no such section in the Act the question would have arisen in a multiplepoinding exactly as it does now. The clause is by no means necessary for the administration of the statute. That could have been done quite well without it so far as this case is concerned.

Therefore section 54 of the Act of 1862 remains to be considered independent of section 514 of the Act of 1854. Reverting to that section, as I have already said, it is expressed in negative and imperative words that the owners shall be answerable for more than £8 per ton. Now, it is impossible to give effect to this enactment if we sustain the plea of the owners of the "Aurora's" cargo. The only difficulty they suggest is that the claim of the owners of the "Aurora" is not properly here, and cannot be given effect to. Technically, perhaps, the claim is not here, and cannot be given effect to, as the money has been paid. But if the owner has satisfied and paid the claim, that will not deprive him of the benefit of section 54 of the Act of 1862, and make him liable to a greater extent than £8 per ton. There is nothing in the statute and nothing in common law to lead to such a result.

If the owner holds the fund, which is insufficient to meet the whole claim, and he pays one claimant in full—it may be in ignorance of the other claims—he may be made answerable for the consequences. What are these? Not that a party who makes a claim after such a payment is thereby to get more than he would have got if the holder had raised a multiplepoinding. On the contrary, it is clear to me that the holder of such a fund if he makes a payment in paying one claimant can only be called on afterwards to pay, not the whole amount of the claim, but only to make the balance available after deducting the amount which the claimant whom he has paid in full would have been entitled to receive along with the others. If that is the common law, is not that the position of the owner of the offending ship here? No doubt the fund is provided by himself, and he is not bound to pay it to the claimants, but to

to the hands of the Court for distribution. He is in the position of the holder No. 113.
of a fund or the real raiser in an action of multipointing.

I am therefore of opinion that in the ranking the claimants, the cargo owners, Rankine, &c.
are not entitled to get more than they would have got if the owners of the "Albi-v. Raschen, &c.
re" had not rashly, but still in perfect good faith, paid away the money to the
owners of the "Aurora."

LORD DEAS, LORD MURE, and LORD SHAND concurred.

A SCHEME having been lodged by which the amount of damage due to each of the claimants was settled the Court pronounced this interlocutor:—"Find that the petitioners are liable in respect of the collision mentioned in the petition for the sum of £2921, 12s. sterling, with interest thereon at the rate of four per centum per annum from 2d November 1874, the date of said collision, to 25th July 1876, the date of the consignment, and limit the liability of the petitioners as owners of the steamship 'Albicore' accordingly: Discharge the petitioners of all claims against them in respect of said collision; interdict, prohibit, and discharge the present claimants and all others from following forth or bringing any action or suit against the petitioners, and recall all arrestments used in respect of said collision; rank and prefer the whole claimants *pari passu* on said consigned fund for the respective amounts of their claims, and appoint the petitioners and claimants, Rankine and others, to lodge in process a scheme of division of said fund shewing the amount due to each claimant in respect of the foregoing finding and ranking and preference: Find the claimants, Raschen and Company, &c., liable jointly and severally to the said James Rankine and others in the expenses of this discussion: Modify the same as adjusted by the parties to the sum of £15, 13s. 10d. sterling, and decern."

J. & R. D. ROSS, W.S.—WALLS & SUTHERLAND, S.S.C.—Agents.

THOMAS VICKERS AND SONS AND MANDATARY, Pursuers and Respondents. No. 114.
—*M'Laren.*

WILLIAM ROSE NIBLOE, Defender and Appellant.—*Dickson.*

May 19, 1877.
Vickers & Sons
v. Nibloe.

Sheriff—Decree by Default—Conditions of Reponing.—An action of count
reckoning, failing which, for payment of £90, was raised in the Sheriff
Court in November 1875. After protracted delays the defender twice failed to
appear at diets for his examination as a haver, whereupon decree by default was
nately pronounced in January 1877 for the sum of £90 with expenses.
The defender having appealed to the Court of Session, *held* that the judgment
of the Sheriff was properly pronounced, but the defender reponed upon payment
of all expenses subsequent to the first prorogation of the time for lodging
pleas.

Observations on the delays in Sheriff Court proceedings.

HIS action was raised on 4th November in the Sheriff Court of Wig-
tonshire by Thomas Vickers and Sons, manure manufacturers, Manches-
ter, against William R. Nibloe, formerly their agent in Stranraer. The sum-
mons concluded for count and reckoning, and, in the event of the defender
failing to produce the necessary books and vouchers, for payment of £90.
The defender entered appearance, and on 20th January 1876 the Sheriff-
Substitute (Rhind) prorogated the period for lodging defences for six days.
The prorogation was twice renewed in February in respect of the illness
of the defender's agent.

2D DIVISION.
Sheriff of
Dumfries and
Galloway.
I.

No. 114. On 6th July 1876 the action, which had fallen asleep, was revived on the pursuers' motion, and the parties were appointed to meet next Court day to adjust the record.

May 19, 1877.
Vickers & Sons
v. Nibloe.

On 13th July both parties obtained a diligence for the recovery of writs before closing the record.

On 23d November 1876 a diet for the examination of havers was adjourned till 7th December, in respect that the defender's agent was unable to attend "from family affliction."

No order appeared on the interlocutor sheet of date 7th December.

On 11th January 1877 the Sheriff-substitute pronounced this interlocutor:—"In respect the defender has failed to appear at this diet for examination as a haver *in curia*, in terms of his citation, adjourns the diet for such examination until next Court day, with certification."

On the same day the defender wrote the pursuers' agent:—"Stranraer 11th January 1877.—Dear Sir,—My solicitor being in Edinburgh, it is impossible for me to produce any papers in Vickers' case until he comes home. I need not, therefore, appear as a witness to-day.—Yours," &c.

On 18th January, the defender having again failed to appear at the diet for examination as a haver, the Sheriff-substitute decerned against him by default, for the sum of £90, with expenses.

On appeal the Sheriff (Mark Napier) adhered, adding the subjoined note.*

The defender appealed to the Court of Session.

It was stated for the defender at the bar that he was unable to attend as a haver in consequence of the documents called for being in the hands of his agent, and that he had since employed a new agent.

LORD JUSTICE-CLERK.—There can be no doubt that, while the Sheriff Court confer important benefits on the country, the continual delays which occur to them detract much from their usefulness. We have had occasion again and again to remark on these delays, and this case is only a sample of what we have often seen. The action was brought in November 1875. It drags its slow length along until it reaches what is practically the first stage of the inquiry after the lapse of about a year. The pursuers, who sue for the balance of an account, seems to have no vouchers of their own, and accordingly seek to compel the defender to produce certain books and documents. They obtain a diligence against the defender on the 13th July 1876. Nothing seems to have been done until the 23d November, when the defender's agent was unable to appear "from family affliction," and the diet was adjourned. On 11th January 1877 the defender fails to appear at the adjourned diet, and he evidently thinks it quite enough to write on that day to the pursuers' agent—"My solicitor being in Edinburgh, it is impossible for me to produce any papers in Vickers' case until he comes home. I need not, therefore, appear as a witness to-day." On the 11th January, accordingly, the Sheriff-substitute adjourns the diet till the 18th, under certification. The defender again fails to appear on the 18th, and then, with great propriety, the Sheriff-substitute decerns against the defender for the sum sued for, and the Sheriff adheres. I am clearly of opinion that neither the one nor the other could have acted otherwise than he did. But when the case comes here, and we are not so much reviewing the Sheriff's decision

* "NOTE.—This is a gross case of professional delays and continued disobedience of the orders of the Court, and the Sheriff can see no reason for differing from his Substitute in his treatment of the *laches*."

considering whether we should repon the defender, and if so, on what conditions. If the pursuers had done all they could to secure despatch I should have been very slow to allow the defender, who occasioned the default by his own personal act, to open up the decree. But when laxity has been once introduced into a case we know that it is likely to infect the other party. When nothing was done between July and November the defender naturally thought that he would be allowed to go on in the same way. In the whole circumstances, I am disposed to shut out the defender from maintaining this defence, but this must be on condition that he pays the whole expenses from the date of his default.

No. 114.
May 19, 1877.
Vickers & Sons
v. Nibloe.

LORD ORMDALE.—I concur, and hope that your Lordship's remarks will be recorded, in order that litigants in all parts of the country may know that this Court is determined to do everything in its power to put an end to unwarrantable delays in Sheriff Courts. The only doubt which has occurred to me is whether we should not *simpliciter* adhere to the Sheriff's judgment. The Sheriff-substitute could not well have acted otherwise than he did, and I am not surprised that the Sheriff should have adhered to his Substitute's interlocutor. In fact I think he was quite right in doing so; and it ought to be understood that we are not now recalling the Sheriff's judgment as in an ordinary process of law. We are merely reponing the defender upon a certain condition as to expenses against the decree by default which has been pronounced against him. The conditions as to expenses suggested by your Lordship may perhaps be sufficient; but I would suggest that the defender should be made liable in expenses from the 20th January 1876, when his intolerable delay commenced, and that our judgment should be so expressed as to make payment of the expenses subsequently incurred by the pursuers, as well in the Sheriff Court as under the present appeal, the condition of the defender being reponed.

LORD JUSTICE-CLERK.—I adopt Lord Ormidale's suggestion as to the date from which the defender should be found liable in expenses.

LORD GIFFORD.—I concur with your Lordships, and with Lord Ormidale's suggestion as to the terms upon which the defender may be reponed against the decree which has been pronounced against him. I wish to say, as strongly as I can, that we do not recall the Sheriffs' interlocutors because we think them wrong. They were perfectly right, and I should not have been surprised if the Sheriff-substitute had taken the step earlier than he did. We recall the interlocutors, not as reviewing them on the merits, but, on the contrary, assuming them to be right and necessarily pronounced, just like decrees in law. We in the circumstances repon the defender, in the exercise of our discretion, against a decree properly and in due course pronounced. I cannot say whether the defender is right or wrong in blaming his agent. If he is right, he will have a claim of relief against him. The Sheriff-substitute certainly did not err on the side of over strictness, but on the side of indulgence.

His interlocutor was pronounced:—"Sustain the appeal, and repon the appellant against the judgment appealed against, but that only upon payment by the appellant to the respondents of the whole expenses incurred in the Sheriff Court since the 20th of January 1876, together with the expenses of the appeal, and remit," &c.

No. 115.

WILLIAM RAIN, Pursuer and Respondent.—*Scott.*WILLIAM GIBB, Defender and Appellant.—*R. Johnstone—Goudy.*May 19, 1877.
Rain v. Gibb.

Process—Appeal for Jury Trial under 6 Geo. IV. c. 120, sec. 40—*Follow Cause*—A. S. 11th July 1828, sec. 5—*Leave of Sheriff*.—Held that an action a Sheriff Court praying for interdict and £5 of damages was one to which the 5th section of the A. S. 11th July 1828 applied, and could not be appealed to jury trial under 6 Geo. IV. c. 120, sec. 40, without leave of the Sheriff.

Observations (per Lord Ormidale) as to the form of declaration contemplated by A. S. 11th July 1828, sec. 5.

2D DIVISION.
Sheriff of
Dumfries and
Galloway.
1.

WILLIAM RAIN, tenant of the farm of Corbieton, presented a petition to the Sheriff Court of Kirkcudbrightshire against William Gibb, tenant of the adjoining farm of Milton Park, praying the Court "to interdict the defender from flooding or otherwise damaging the pursuer's fields," and for decree for £5 as damage sustained. The flooding was stated by the pursuer to be caused by the overflow of the defender's dam.

The Sheriff-substitute (Nicolson) allowed a proof, upon which the defender, being desirous to appeal to the Court of Session in virtue of the Act 6 Geo. IV. c. 120, sec. 40, and the Court of Session Act, 1868, sec. 7, presented a petition to the Sheriff under A. S. 11th July 1828, sec. 5,* leave to appeal, in respect that the value of the cause did not appear the face of the original petition, stating that he verily believed that the value to him of the cause was more than £40.

The Sheriff-substitute appointed the defender to appear and make solemn declaration as to the value of the matter in dispute.

The defender was put on oath, examined, cross-examined, and re-examined.

The Sheriff-substitute on considering the declaration refused leave to appeal,† to which deliverance the Sheriff (Mark Napier) adhered.

The defender minuted two notes of appeal, one against the Sheriff's judgment refusing leave, and the other in terms of 6 Geo. IV. c. 120, sec. 40, and Court of Session Act, 1868, sec. 73, on the footing that the Sheriff's leave was not necessary.

The pursuer objected that the appeals were incompetent.

The defender argued that the Act of Sederunt did not apply to actions *ad factum præstandum*.¹ Besides, the declaration was not properly taken, the defender having been put on oath, and subjected to an insidious examination by his opponent.

* Quoted by the Lord Justice-Clerk.

† "NOTE.—The deposition of the petitioner is so distinct and candid as to the subject and the value of the cause in question as to render any cross-examination unnecessary. That action is brought to recover the sum of £5 claimed as damages done by overflow of water from this petitioner's dam last winter. The petitioner admits that the remedy asked for to prevent the recurrence of damage could be effected without the removal of the dam; and he also admits that the removal of the dam, and his loss thereby of his water supply, is the only thing that would cause damage to him. That damage is not only positive, but depends on something being done which the original petition does not ask for, and the petitioner says is not required. To say, therefore, that the value of the cause is above the £5 claimed is an insult to common sense, and to allow the cause to go to the Supreme Court on the ground of its being worth £40 in value might justly be looked on as an unparalleled absurdity."

¹ Cases cited at the debate.—*Learmonth v. Morton*, Jan. 17, 1829, 7 S. 290; *Sands v. Meffan*, Jan. 20, 1829, 7 S. 290; *Hamilton v. Hamilton*, March 1877, *supra*, p. 688.

LORD JUSTICE-CLERK.—I am of opinion that this appeal is not competent. No. 115.
 The application is a petition for interdict, with a conclusion for a specific sum of money. The prayer for interdict is in very general terms, "to interdict the defender from flooding or otherwise damaging the pursuer's fields." As far as the petition has a pecuniary value on the face of it that value is £5. What value of the interdict does not appear. Accordingly, the right to appeal must be regulated by sec. 5 of A. S. 11th July 1828, which enacts,—“That if in such cases the claim shall not be simply pecuniary, so that it cannot appear on the face of the bill that it is above £40 in amount, the party intending to sue shall previously apply, by petition, to the Judge in the inferior Court, for leave to that effect, which application shall be intimated to the opposite party or his agent; and the petitioner shall be bound, if required by the Judge, to give his solemn declaration that the claim is of the true value of £40 and upwards; and on such petition being presented, and on such declaration, if required, being made to the satisfaction of the Judge, leave shall be granted to sue.” That was the course which the appellant took in this case. He gave a declaration. He stated the grounds on which he held that his interest in the action was above £40. The Sheriff is dissatisfied with these grounds, and gives the reasons for his dissatisfaction. Now, in the first place, I think the Sheriff had a good deal to say for his refusal of leave. The value of the cause to the appellant is only above £40 on the assumption that there is no remedy for the flooding except the removal of the dam. In the next place, the Sheriff has refused leave to appeal, and therefore a condition of the right to appeal has not been fulfilled.

I do not think that the provisions of the Act of Sederunt apply only to cases where there is a pecuniary demand, and something more. I think they apply to all cases in which the pecuniary value does not appear on the face of the cause, and I do not think that there is any great hardship in requiring a party who wishes to appeal at this stage to satisfy the Sheriff that the cause is of the value of £40.

LORD ORMIDALE.—I have come to the same conclusion. I observe that in the case of *Hamilton v. Hamilton*, to which we were referred, the value of the claim was ascertainable *ex facie* of the proceeding to be above £40. But here the nature or conclusion of the action is not simply pecuniary, and it is impossible to ascertain *ex facie* of the proceeding the value of the cause. The appellant was fully and sensibly aware that he could not appeal without leave of the Sheriff, and, in terms of the Act of Sederunt, for such leave, but it was refused.

As I am satisfied that leave of the Sheriff was indispensable as a condition precedent of the right to appeal, and as it has not been obtained, there is no objection, in my opinion, but to dismiss the appeal as incompetent.

It was argued, however, that this Court might review the judgment of the Sheriff refusing leave to appeal and finding that leave ought to have been given, and I cannot think we can do so. Although the procedure under the application was before the Sheriff-substitute was not altogether regular—for example, in putting the appellant under oath and allowing him to be cross-examined in the case of merely receiving his declaration—it must be observed that Mr Gibb in objecting to taking any objection to that mode of procedure was himself a party to it. I do not think, therefore, his objections, which are entirely technical, are competent to be reviewed.

May 19, 1877.
Rain v. Gibb.

No. 115. LORD GIFFORD concurred.

May 19, 1877.
Rain v. Gibb.

THIS interlocutor was pronounced:—"Find that the appeal is incompetent, in respect it is not shewn that the value of the call amounts to the sum of £40: Therefore dismiss the appeal and remit to the Sheriff to proceed farther in the cause: Find the appellant liable in expenses to the respondent, and modify same to £8, 8s., and decern."

W. S. STUART, S.S.C.—SCOTT, BRUCE, & GLOVER, W.S.—Agents.

No. 116.

May 23, 1877.
Grant v.
Macqueen, &c.

SIR JOHN PETER GRANT, K.C.B., First Party.—*Rutherford*.
REV. HUGH D. MACQUEEN AND ANOTHER (Caw's Trustees), Second Parties.—*Lee*.

Testament—Lapsed Legacy—Charity.—A testator bequeathed a sum to trustees, directing them to pay the "clear annual interest or produce to the person officiating for the time as schoolmaster in connection with the Established Church in said parish." Some years after the testator's death there ceased to be a schoolmaster answering the description. *Held* that the legacy had not lapsed.

Nobile officium—Charity.—*Observed* that there would not be any difficulty in framing a scheme for applying the fund for some useful and beneficial purpose within the intention of the trustor.

1ST DIVISION.
B.

THE late John Caw, Edinburgh, died without issue on or about the day of May 1870, leaving a trust-disposition and settlement dated June 1867, by which he disposed of his whole estate, heritable and moveable, to trustees, and which contained, *inter alia*, the following bequest:—"I direct and appoint my said trustees to pay and make over the sum of £2000 sterling to the clerk of the presbytery of Abernethy for the behoof of the said parish, and to the minister of the Established Church at Rothiemurchus to be invested at the sight and under the direction of my said trustees and to be held by the said clerk and minister, and their respective successors in office, in all time thereafter, in trust, for the purposes following, viz.:—For payment of one-half of the clear annual interest or produce of the said sum to the person officiating for the time as schoolmaster in connection with the Established Church in said parish; . . . and I direct and authorize my trustees to make and execute, at the expense of my estate, any and all deeds which they may consider necessary for giving permanency to the said investment, and full effect to the three several purposes above expressed in all time coming."

At the time Mr Caw made his settlement there was no parochial school in the parish, but several years before Mr Grant, the late proprietor of Rothiemurchus, had built a schoolhouse and schoolmaster's house in the parish, and paid the teacher's salary himself. The school had been maintained in connection with the Established Church, the proprietor having been a member of that Church, and had been under the supervision and dependence of the presbytery until the passing of the Education (Scotland) Act, 1872.

On the death of Mr Caw his trustees made over the legacy of £2000 (under deduction of legacy-duty) to the minister of the Established Church of Rothiemurchus and the clerk of the presbytery of Abernethy, and regularly paid one-fourth of the income to the teacher of the school as mentioned.

Upon the passing of the Education (Scotland) Act, 1872, the school ceased to be supported by the proprietor of Rothiemurchus.

school buildings were leased by the school board of Duthill and Rothiemurchus from him, and the school was wholly supported from the rates. No. 116.
 The former teacher was, however, continued as teacher in the school until May 23, 1877.
 Martinmas 1873, when he left on being informed by the late proprietor Grant v.
 his commissioner that his services were no longer required, and a new Macqueen, &c.
 teacher was appointed by the school board, who paid him his salary. A
 successor to this teacher had recently been appointed by the board, and
 in like manner received his salary from the board. He was a member
 of the Established Church.

There was no other school in the parish of Rothiemurchus in any way
 connection with the Established Church except a Sunday school under
 the charge of the minister and kirk-session of the parish.

This special case was presented by Sir John Peter Grant of Rothiemurchus, K.C.B., as residuary legatee named in the trust-disposition of Mr
 Caw, of the first part, and the Rev. H. D. Macqueen, clerk of the presby-
 terian congregation of Abernethy, and the Rev. Donald M'Dougall, minister of the *quoad*
sacra parish of Rothiemurchus, the trustees under the bequest contained
 in the trust-disposition of Mr Caw, of the second part. The school board
 of the schoolmaster of the united parishes declined to become parties to
 the special case.

The following were the questions:—" (1) Whether the bequest in favour
 of the person officiating for the time as schoolmaster in connection with
 the Established Church in the parish of Rothiemurchus has lapsed, and
 if not, whether the first party hereto, as residuary legatee, has thus right to one-fourth
 of the said sum of £1800? (2) Whether the said second parties
 are entitled to retain the administration of said fourth part, and to
 continue to pay the clear annual interest thereof to the person officiat-
 ing as schoolmaster of the united parishes of Duthill and Rothiemurchus,
 under the provisions of the ' Education (Scotland) Act, 1872,' so long as
 the church continues to belong to the Established Church?"

It was argued for the first party;—There was no one now answering to the
 description of the person officiating for the time as schoolmaster in con-
 nection with the Established Church, and therefore the bequest fell into
 abeyance.

It was argued for the second parties;—A school in connection with the
 Established Church might be instituted at any time in the parish, and
 there would be a schoolmaster entitled to payment of the bequest.
 The Court might frame a scheme for the application of the bequest to
 the purpose within the intention of the trust.¹
 The parties withdrew the second question.

ORD PRESIDENT.—I do not entertain any difficulty. The residuary legatee
 of Mr Caw's settlement claims one-fourth of the fund of £2000 as having
 fallen into residue, on the ground that the object of the bequest which the testator
 had in view has failed. The way in which the trustees are to dispose of
 part of the fund is to pay " one-fourth part of the clear annual interest or
 income to the person officiating for the time as schoolmaster in connection with
 the Established Church in said parish," by which I understand the *quoad sacra*
 parish of Rothiemurchus. The person who answered to that description at the

¹ Incorporated Trades of Edinburgh v. Governors of Heriot's Hospital, June 1836, 14 S. 873, 8 Scot. Jur. 384; Burnett v. King's College, Aberdeen, 23, 1844, 6 D. 731, 16 Scot. Jur. 349, Aug. 28, 1846, 5 Bell's Appeals, 18 Scot. Jur. 637; 1 M'Laren on Trusts, 457 and 462; Murdoch v. Magistrates of Glasgow, Nov. 30, 1827, 6 S. 186.

No. 116. time Mr Caw made his settlement, and also at the time of Mr Caw's death, was the teacher of a private school voluntarily established by the late Mr Grant Rothiemurchus in connection with the Established Church. Subsequent to the time Mr Grant thought fit to discontinue that school and to dispense with the services of the teacher. It is said that this was done in consequence of the Education Act of 1872, but that point does not appear to me to affect the question. In point of fact he did discontinue the school in the year 1873, as he had a right to do, as he had mortified no buildings or ground for the purpose of keeping it up. In consequence of this there is now no one answering to the precise description of the schoolmaster for whom the benefit was intended. Accordingly the object of the testator has failed, and the consequence is said to be that the legacy lapses into residue. I am not prepared to accept that result, and no authority in the law of Scotland has been quoted in support of it. I think, on a fair consideration of Mr Caw's settlement, the application of the money may be required at some future date when there may be some one answering to the description of a schoolmaster in connection with the Established Church. There is nothing to prevent this, and the schoolmaster may occupy a great variety of positions. The bequest is not confined to the old parish schoolmaster. It is quite clear that it was not the testator's view so to confine it, as there was no parochial school in the parish. Although at present there may be any schoolmaster in connection with the Established Church, I see no reason for supposing that the object of the charity has permanently failed, and if it has there is no ground for the contention of the first party. I am therefore answering the first question in the negative.

I only desire to add, that if any application be made to us in a different case for power to appropriate the income of the fund it will call for the exercise of a different species of jurisdiction. We should then be exercising that species of jurisdiction which we exercise in framing schemes when a testator has not sufficiently stated his intention in making a charitable bequest. I do not think in existing circumstances, there would be any difficulty in framing such a scheme for applying this fund to some useful and beneficial purpose within the intention of the trustor.

LORD DEAS.—There is no question here raised upon the footing of the bequest being void for uncertainty. There was no uncertainty here at all. The fund was to be put in the hands of trustees, and the manner in which it is to be applied is distinctly stated. One-fourth of the income is to go to the schoolmaster in connection with the Established Church of the parish, and that for all time coming. From the bequest taking effect the money was handed over to the trustees, and invested apparently without any difficulty.

But afterwards the late Mr Grant, who had built the schoolhouse and tenement house, determined to give up the school. It would be very odd if the result should be to put the money into the pocket of his successor. I know of no authority, and none was quoted, which countenances such a contention. It is posing that the money could no longer be applied to the trustor's purpose, and that the trustee has a desiderate authority for the proposition that it must in that case go to the residuary legatee.

But there is no reason for saying that the purpose has failed, even taking the deed in its literal construction. There are many ways in which there might be a schoolmaster "in connection with the Established Church." I do not

suggest what these are, but if an application is made to us to prepare a scheme No. 116.
 carrying out this bequest I do not see that our duty would be to do anything
 give effect to it. Whatever may be the law when the purpose has failed I
 our in holding that the money cannot here be paid over to the residuary
 atee.

May 23, 1877.
 Grant v.
 Macqueen, &c.

LORD MURE concurred.

LORD SHAND.—I am of the same opinion. Even if it could be shewn that
 particular purpose of the truster in making the bequest had absolutely failed
 n not prepared to say that the residuary legatee would be entitled to obtain
 funds. On the contrary, I think that the fund having been placed under a
 ial trust in official persons, for a particular purpose, tending to the general object
 promoting education, the trustees might, in that event, obtain the authority
 he Court to apply the funds in some other way towards the same general
 ct, in terms of a scheme presented and approved of.

ut here it cannot be said that the purpose of the truster has failed. If the
 ose has failed it is only a failure of a temporary character. There may be
 y time within the parish a person entitled to draw the income of this pro-
 n from year to year. Such a person, if not now in existence, may come
 existence immediately. That being so, the residuary legatee cannot success-
 claim the fund.

THE COURT pronounced this interlocutor :—" Find, decern, and de-
 clare that the bequest in favour of the person officiating for the
 time as schoolmaster in connection with the Established Church
 in the parish of Rothiemurchus, in the trust-disposition and settle-
 ment in the case mentioned, has not lapsed ; and the first party,
 as residuary legatee, has no right to one-fourth part of the sum of
 £1800 in the case mentioned : Find the first party liable in ex-
 penses to the second parties, and remit," &c.

ACKENZIE, INNES, & LOGAN, W.S.—MENZIES, COVENTRY, & SOOTE, W.S.—Agents.

CHIAL BOARD OF GREENOCK, Petitioners and Respondents.—*M' Laren*. No. 117.
 MILLER AND BROWN, Respondents and Appellants.—*Trayner*.

cess—Appeal from Sheriff Court—Whole subject-matter of the Cause—Court
sion Act, 1868, 31 and 32 Vict. c. 100, sec. 53.—*Held* that an appeal
 in interlocutor of a Sheriff was not competent, in respect that the whole
 had not been decided, the question of expenses having been reserved.

May 25, 1877.
 Parochial
 Board of
 Greenock v.
 Miller and
 Brown.

Parochial Board of Greenock presented a petition in the Sheriff
 of Renfrewshire against Miller and Brown, builders, praying that they
 be ordained to execute certain works for which they had contracted,
 n their failing to do so, for authority to employ men to do the work
 ir expense, and in that event to interdict the respondents from in-
 ng with the works.

Sheriff (Fraser) pronounced this interlocutor :—" And in respect
 is admitted by the defenders that they have withdrawn their men
 he works since the 7th instant, the Sheriff authorises the pursuers
 ploy men, and procure additional material and plant, and to carry
 mselves the work contracted for by the defenders, until the work
 npleted, or, in the option of the pursuers, of new to contract for
 id work, or any part of it, with other tradesmen ; and, with a view

1st DIVISION.
 Sheriff of
 Renfrewshire.
 M.

- No. 117. to ascertain the quantity of work already done by the defenders, remit to James Barr, measurer in Glasgow, to measure the said work, and report; meantime reserves all questions of accounting and damages between the parties; and reserves the question of expenses; and decerns."
- May 25, 1877.
Parochial Board of Greenock v. Miller and Brown.

When the case was called in the Single Bills no objection was taken by the respondents, but the Court directed attention to the question of the competency of the appeal under section 53 of the Court of Session Act, 1868, which enacts that "it shall be held that the whole cause has been decided in the Sheriff Court when an interlocutor has been pronounced by the Sheriff which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all questions of law or fact raised in the cause; but it shall not prevent the cause from being held as so decided that the expenses if found due shall not be taxed, modified, or decerned for."

The appellants maintained (1) that practically the whole question raised by the prayer of the petition was decided by the Sheriff's interlocutor (2) that a finding of expenses was no part of the subject-matter of the cause.¹

THE COURT dismissed the appeal as incompetent, on the ground that the Sheriff's interlocutor did not dispose of the question of expenses.

DUNCAN & BLACK, W.S.—WILLIAM ARCHIBALD, S.S.C.—Agents.

- No. 118. HENRIETTA GORDON OR FERRIER AND ANOTHER (Walter Ferrier's Trustees) Pursuers.—*D.-F. Horn—Campbell Smith.*
GEORGE BAYLEY, Defender.—*Fraser—Balfour.*
- May 26, 1877.
Ferrier's Trustees v. Bayley.

Superior and Vassal—Non-entry—Casualty.—Conveyancing Act, 1874.—*Held (diss. Lord Gifford)* that the implied entry given by sec. 4 of the Conveyancing Act, 1874, to a person holding an infestment on an *a me vel de me* precept unconfirmed, had the feudal effect of extinguishing the mid-superior so that it was no longer competent for him to demand an entry in the charter (which he possessed) of heir to the mid-superior, although this resulted in the heir being subjected in a higher casualty than if the Act had not been passed.

- 2D DIVISION.
Ld. Curriehill.
I.
- THE late Walter Ferrier, W.S., in the year 1811, became proprietor of the superiority of the lands of Manuel Mill, in which he stood in the date of his death in 1856. He was succeeded in the superiority of these lands by his testamentary trustees.

Prior to 1832 the Very Reverend Principal Baird was proprietor of the *dominium utile* of the lands of Manuel Mill, and was infeft therein as superior to the late Walter Ferrier as his superior. In 1832 Principal Baird disposed of the lands of Manuel Mill to his son-in-law, the late Isaac Bayley, by disposition, containing an obligation to infeft *a me vel de me*, and a procuratory of resignation and precept of sasine. Upon this precept Isaac Bayley was infeft on 18th May 1832.

Isaac Bayley never entered with Walter Ferrier or his trustees as superiors of the lands of Manuel Mill. When the lands became vacant by the death of Principal Baird, Isaac Bayley, instead of taking entry himself, offered as vassal Mr Thomas Elder Baird, Principal Baird's eldest son and heir-at-law, and accordingly Mr Thomas Elder Baird

¹ Duke of Roxburghe, May 26, 1875, *ante*, vol. ii. p. 715.

n 1868 entered by Walter Ferrier's trustees, by writ of *clare constat*, as their vassal in the lands, on which writ Mr Thomas Elder Baird was infeft. No. 118.

May 26, 1877.

Isaac Bayley died in 1873, and his trustees completed a title to the lands of Manuel Mill by notarial instrument in their favour, dated 15th December 1873. They thereafter disposed the lands to George Bayley, Esq., Isaac Bayley's son and heir-at-law. George Bayley was infeft by recording the disposition on 19th January 1874. *Ferrier's Trustees v. Bayley.*

Thomas Elder Baird died in 1876, when the lands fell again in non-entry.

George Bayley, who had been base infeft in 1874, was heir-at-law of his uncle, Thomas Elder Baird.

On the death of Thomas Elder Baird, Walter Ferrier's trustees demanded from Mr George Bayley a composition of one year's rent, on the ground that, under the "Conveyancing Act, 1874" * (which came into operation on 1st October 1874), he became, as of the date of his infeftment, by implied entry, the vassal of the said trustees as the nearest lawfully superiors, whose estate of superiority was, prior to the 1st October 1874, not defeasible at his will, and so became liable to pay to them a composition of one year's rent upon the death of Mr Thomas Elder Baird, the last vassal who was entered under the law as it stood prior to the passing of the "Conveyancing Act, 1874."

This demand Mr George Bayley answered by offering himself for an entry as heir-at-law of his uncle, Mr Thomas Elder Baird, the last entered vassal, and requiring Walter Ferrier's trustees to grant a writ of *clare constat* in his favour on his paying the duty exigible on the entry of an entry.

Walter Ferrier's trustees accordingly raised an action of declarator and payment of composition against Mr George Bayley.

On 21st November 1876 the Lord Ordinary pronounced this interdictor:—" Finds, decerns, and declares that, in consequence of the death

The Conveyancing Act, 1874, 37 and 38 Vict. c. 94, enacts, sec. 4:—" When lands have been feued, whether before or after the commencement of this

. . . (2) every proprietor who is at the commencement of this Act or after shall be duly infeft in the lands, shall be deemed and held to be as at date of the registration of such infeftment in the appropriate register of deeds, duly entered with the nearest superior whose estate of superiority in the lands would, according to the law existing prior to the commencement of the Act, have been not defeasible at the will of the proprietor so infeft, to the effect as if such superior had granted a writ of confirmation according to existing law and practice. . . . (3) Such implied entry shall not pre-

judice or affect the right or title of any superior to any casualties, feu-duties, or rents of feu-duties, which may be due or exigible in respect of the lands at or to the date of such entry; . . . but provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could, by the law prior to this Act, or by the conditions of the feu-right, have demanded the vassal to enter or to pay such casualty irrespective of his entering. Lands shall after the commencement of this Act be deemed to be in non-entry, but a superior who would but for this Act be entitled to sue an action of declarator or payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action, . . . and the provisions in such action may be in or as nearly as may be in the form of schedule A. to annexed."

No. 118. of Thomas Elder Baird, Esquire, who was the vassal last entered and infeft under the operation of the law as it stood prior to the passing of the May 26, 1877. 'Conveyancing Act, 1874,' in All and Whole the mill of Manuel,
 Ferrier's casualty, being one year's rent, became due to the pursuers, as the late Mr Walter Ferrier's trustees, as superiors of the said lands, upon the 18th day of January in the year 1876, being the date of the death of the said Thomas Elder Baird, and that the said casualty is still unpaid and that the full rents, mails, and duties of the said lands of Manuel Mill, and others above described, after the date of this interlocutor, do belong to the pursuers, as superiors thereof, until the said casualty and the expenses of this process be otherwise paid to the pursuers, and decerns; and before farther answer as to the petitory conclusions of the summons appoints the cause to be enrolled, that the amount of one year's rent of said lands may be ascertained, reserving in the meantime all questions of expenses."*

* "NOTE.—This action raises a question of very general interest and importance as to the construction of the 4th section of the Conveyancing (Scotland) Act, 1874. The question is whether a proprietor of lands, who is a singular successor of a former vassal, and who was infeft in the lands, but not entered with the superior at the commencement of the Act, such infeftment being declared by the statute to be equivalent to an entry with the superior by confirmation, can defeat the demand of the superior for payment of the casualty composition due by a singular successor by offering the heir of the original vassal for entry by writ of *clare constat*, or by infeftment on a special service heir, on payment of the relief-duty alone. There are some specialties in the case which may require particular consideration, but I think that the general question, as I have stated it, is fairly raised, and must be decided."

(After stating the circumstances under which the question arose)—"On the death of Thomas Elder Baird, which took place in January 1876, his nephew, Mr George Bayley, the defender, who, as has been mentioned, had been infeft in January 1874 in the *dominium utile* of the lands as the singular successor of Principal Baird, his grandfather, happened also to be the heir-at-law of his uncle, Mr Thomas E. Baird, *i.e.*, heir under the original investiture in favour of Principal Baird. But I do not think that the accident by which the defender held this double character at all affects the position of the parties; because the estates to which he would (prior to the commencement of the Conveyancing Act of 1874) have had a right in these two characters would have been entirely different. As to the estate to which he has right as the singular successor of Principal Baird in the *dominium utile* or the true property of the lands which he holds in virtue of the settlement of his father, who purchased them from Principal Baird, whereas the only estate which he could have taken as heir of his uncle, T. E. Baird, was a barren unsubstantial estate of mid-superiority created by Mr Isaac Bayley on the disposition from Principal Baird, which contained a double manner of holding, and a procuratory of resignation, and a procuration of sasine, which infeftment had never been confirmed. The defender's position as regards the pursuers' demand that he should enter with them as their singular successor of Principal Baird, would have been substantially the same if, instead of the defender himself, a third party had been the heir of T. E. Baird.

"Now, if the Conveyancing Act of 1874 had not passed, the following would have been the position of the rights and liabilities of the pursuers and defender. In the first place, the barren estate of mid-superiority, which remained in Principal Baird after the sale to Mr Isaac Bayley, and which was taken by Thomas Elder Baird as heir of his father in 1868, would have been defeated at any time at the pleasure of Mr Isaac Bayley, or his trustees, or the defender, and might have been evacuated by any of them obtaining their respective infeftments confirmed by the pursuers as the proper superiors, or by their reliance on the procuratory in Principal Baird's conveyance, notwithstanding

The defender reclaimed.

At advising,—

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LORD ORMTDALE.—The Lord Ordinary has correctly stated that the question

intermediate entry given by the pursuers to Mr T. E. Baird as heir of his father.—(Fullarton, Nov. 22, 1833, 12 S. 117).

“In the second place, the pursuers, as superiors, would now have been entitled to call upon the defender to enter with them as their vassal, and to pay the composition of a year's rent, as being the singular successor of Principal laird, and to enforce that claim by a declarator of non-entry against him; and this is the fair and necessary deduction from the case of Fullarton, that the intermediate entry of T. E. Baird would have formed no bar against such an action.

“But, in the third place, so long as the estate of mid-superiority referred to was not evacuated, the defender would have been entitled to meet the superior's demand by putting forward the heir of the original disponer, that is, the heir of the original investiture, to enter in that character, although the superiors would not have compelled the heir to enter. It is hardly necessary to refer to authorities in support of these propositions; but as this case may go elsewhere think it right to notice that they are distinctly affirmed as being the recognised rules of law by Professor Bell in his Principles on the authority of the cases of The Magistrates of Musselburgh, Feb. 21, 1804, Mor., p. 15,038; Hill Mackay, Feb. 5, 1824, 2 Sh. 681; Piggot v. Colville, Dec. 9, 1829, 8 Sh. 3, 2 Scot. Jur. 93; and Dundas v. Drummond, Feb. 10, 1769, Mor., p. 1035. Professor Menzies, p. 814, and Professor Montgomerie Bell, 1st ed., 1055, state the law in similar terms; and although Mr Duff, p. 217 (who, however, does not notice the cases of Hill or of Piggot), indicates a somewhat different opinion, the law as stated by Professor Bell was fully recognised in the case of Hyslop v. Shaw, May 13, 1863, 1 Macph. 535, 35 Scot. Jur. 326, which was decided by the whole Court. For, although the point there decided was a majority of nine to four of the whole Judges was, that where a party had conveyed lands to a purchaser by a conveyance, with an *a me vel de me* holding, which the purchaser was infeft, who, without being confirmed, paid the feu-ties for some years to the superior, the disponer was not by that unconfirmed interference of the feu liberated from liability for the prestations of the feu-tie, and that the superior was not, by accepting payment from the purchaser, precluded from claiming against the disponer. Six of the Judges in the majority, the Lord Justice-Clerk (Inglis), and Lords Cowan, Deas, Benholme, James, and Mackenzie, and one of the Judges in the minority, viz., Lord Riehill, expressly stated the law applicable to the point now under discussion to be, that the heir of a disponer who had granted a disposition with a double manner of holding was entitled to enter with the superior so as to save the disponee from the payment of the composition of a year's rent. None of the other Judges indicated any dissent from the proposition so laid down; and the majority of the Court plainly considered that state of the law to be an important element in their judgment. It is thus quite clear that if an action of declarator of non-entry had been now brought against him by the pursuers, the defender, George Bayley, but for the provisions of the Conveyancing Act of 1861, would have obtained absolvitor from the conclusions of such action, by being entitled to enter as heir of his uncle Thomas Elder Baird, and the pursuers did not have insisted upon his entering as a singular successor, or paying the composition of a year's rent.

This being so, the general question to be solved is, whether the Act of 1861 has made any, and if so, what alteration upon the respective rights and liabilities of parties in the position of the present pursuers and defender? The question turns entirely upon the construction of sec. 4 of the statute, and of Rule B appended to the statute. Section 4 is divided into four sub-sections. Sub-section (1) abolishes renewal of investiture, and declares it to be incompetent for the superior to grant any writ by progress, with an exception in favour of certain writs, and, *inter alia*, writs of *clare constat*. Sub-section (2) provides

No. 118. to be determined in this case is whether, having regard to the provisions of the "Conveyancing (Scotland) Act, 1874," the demand of a superior for the casualty

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that 'every proprietor who is at the commencement of this Act or thereafter shall be duly infeft in the lands, shall be deemed and held to be as at the date of the registration of such infeftment in the appropriate register of sasines duly entered with the nearest superior whose estate of superiority in such land would, according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice.'

"Now, before considering the remainder of this enactment, it is desirable to see what the effect would have been according to the then existing law and practice, if on the 1st of October 1874 the pursuers had granted in favour of the defender, George Bayley, a writ of confirmation of his infeftment which had been recorded in January 1874. That confirmation would, in the first place, have confirmed the defender's own base infeftment, and all the prior base infeftments in the property of the lands up to and including the infeftment taken by Mr Isaac Bayley on the precept in Principal Baird's disposition. In the second place, it would farther have evacuated the estate of barren mid-superiority, which had remained with Principal Baird after his sale of the lands to Mr Isaac Bayley, and which was afterwards taken up by Mr T. E. Baird, virtue of his entry in 1868, but which had all along been defeasible at the will of Mr Isaac Bayley, afterwards of his trustees, and finally of the defender, George Bayley. In the third place, it would have entirely liberated and absolved Principal Baird and his heirs from all liability for the feu-duties and prestations contained in the original feu-right, and would have transferred to Mr George Bayley the sole and undivided liability for these feu-duties and prestations. And, in the fourth place, it would have operated as a complete discharge of all casualties and arrears of feu-duties and other prestations due and payable at and prior to the date of the confirmation, unless in so far as they were expressly reserved in the charter.

"In so far as regards the first and second of these effects, viz., the confirmation of all the base infeftments and the evacuation of the defeasible estate of mid-superiority which then existed in the person of Thomas Elder Baird, I think there is nothing in any part of the statute to prevent these effects from following the confirmation which the statute implies in every registered infeftment. But as regards the other two effects of confirmation the statute contains express provisions and qualifications. Thus in a subsequent part of sub-section (2) it is provided 'that notwithstanding such implied entry the proprietor entered in the lands and his heirs and representatives shall continue personally liable to the superior for payment of the whole duties affecting the said lands and for performance of the whole obligations of the feu, until notice of change of ownership of the feu shall be given to the superior.' And in sub-section (3) it is enacted that 'the implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of duties which may be exigible from the lands at and prior to the date of entry . . . but provided always that such implied entry shall not entitle the superior to demand any casualty sooner than he could by the law prior to the Act or by the conditions of the feu-right have required the vassal to enter and pay such casualty irrespective of his entry.' And in sub-section (4) it is declared that such implied entry shall not be pleadable in defence against the superior's action for a casualty. The meaning of these sub-sections, when taken together, is, in my opinion, that the entry by confirmation which the statute declares shall be implied in the infeftment of every proprietor infeft in lands after the commencement of the Act, shall have the effect of for ever extinguishing the defeasible estate of mid-superiority created by the original conveyance from the former vassal with a double manner of holding, that notwithstanding the implied entry the superior is not to be deprived of his right to the casualty which he would have been entitled to demand had he actually granted

of composition from a singular successor, infest in lands as proprietor at the commencement of the Act, can be defeated by his offering for an entry the heir of

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rit of confirmation, but that in the event of any person holding the position of an entered vassal, being in life, whether he were the original disponee, or his heir, or a liferenter, or in any other position, the superior's right to demand payment of a casualty should be postponed until the death of such entered vassal.

Now, had the Act stopped there I should have had little hesitation in holding that the defeasible estate of mid-superiority which stood in the person of T. E. Baird was, from and after 1st October 1874, so completely evacuated at, on his death in 1876, nothing remained in his person which could be taken up by his heir, either by service or by precept of *clare constat*, from the superior, and that the defender, George Bayley, would have had no good defence against the pursuers' demand for payment of a casualty as the singular successor of the original vassal in the lands. The defender, however, maintains that in the present case this result is excluded by the language of sub-section (4), which must therefore be carefully and critically examined.

"That sub-section provides that 'no lands shall, after the commencement of the Act, be deemed to be in the non-entry; but a superior who would, but for the Act, be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, may raise in the Court of Session, against such successor, whether he shall infest or not, an action of declarator, and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence of such action.' . . . 'And the summons in such action may be in as nearly as may be in the form of schedule B hereto annexed.' In the schedule the person who stands as pursuer is 'A (design him), immediate lawful superior of the lands (or subjects) afterwards described (or referred to), and duly infest therein;' and the defender is simply mentioned as 'B (design him), defender.' From the terms of sub-section (4), already cited, it is clear that the defender 'B' is to be the 'successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance,' against whom the pursuer, as superior, would, but for the Act, have been entitled to sue an action of declarator of non-entry. The conclusions, as given in the schedule, are, first, for declarator 'that, in consequence of the death of C (or otherwise, as the case may be), who was vassal last vest and seised in All and Whole the lands of X,' . . . 'a casualty, being one year's rent of the lands, became due to the said A, as superior of the said lands, upon the day of . . . , being the date of the death of the said C (or) the date of the infestment of the said B in the lands of X (or otherwise, as the case may be), and that the said casualty is unpaid,' and then follow conclusions as to the rents during non-payment of casualty, and a petitory conclusion for payment of a year's rent.

Now, the first observation which occurs upon the language of the schedule, the enacting words of sub-section (4), after the declaration that no lands, after the commencement of the Act, be in non-entry, is that the person is to be entitled to raise an action of declarator, and for payment of the casualty, is a superior who would but for the Act be entitled to sue an action of declarator of non-entry against the successor of the 'vassal in the lands, whether by succession, bequest, gift, or conveyance.' But if the explanation which I have given in a former part of this note as to the relative positions and rights of the pursuers and defender, according to the law and practice prior to 1st October 1874, be correct, it does not admit of doubt that the pursuers, but for the passing of the Act, would have been entitled, on the death of Thomas Elder, to sue an action of declarator of non-entry against the 'successor of the vassal in the lands,' i.e. against the defender as the singular successor of Pringle Baird, the former vassal. The defender, however, maintains that, according to the sound construction of sub-section (4), read in connection with the words of schedule B, the person there referred to as 'the vassal in the lands,' the successor might have been sued in a declarator of non-entry, and who is the defender in the new action, substituted therefor by the statute, is the

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"On the whole matter, then, I am of opinion that the effect of the said reference to the present case is—(1) That the defeasible mid-superiority held by Mr T. E. Baird was absolutely and for ever extinguished; (2) that from and after 1st October 1874 the lands were held by Mr George Bayley, the defendant, as the pursuers as his immediate lawful superiors, as the singular successor of the Principal Baird, the former vassal, in virtue of the implied confirmation by him of his infestment, which flowed from the precept of sasine contained in the original disposition granted by Principal Baird; (3) that owing to an intervening entry having been given by the pursuers in 1868 to T. E. Baird, as heir of Principal Baird, the said entry was null and void, and the said lands remained in the hands of the defendant as the singular successor of the Principal Baird, the former vassal, in virtue of the implied confirmation by him of his infestment, which flowed from the precept of sasine contained in the original disposition granted by Principal Baird."

ning Act was passed for the purpose of dispensing with much useless procedure which was previously necessary, and thereby simplifying and facilitating the transfer of the land. No. 118.

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It is unnecessary to enter into a review of the state of the law and practice relating to the disputed question prior to the passing of the recent Act, as it was acknowledged by both parties at the debate that the Lord Ordinary has done so satisfactorily and correctly in the note to his interlocutor. I assume, therefore, with the Lord Ordinary, that prior to the passing of the recent Act the offer which the defender in this case has made, in order to meet the pursuers' demand for payment of the casualty of composition as on the entry of a singular successor in the lands in question, would have been sufficient. At the same time, however, it can scarcely be denied, I think, that in truth such an offer would have been more of the nature of a technical manoeuvre or device than anything else, resorted to for no other purpose than to evade payment of a casualty otherwise lawfully due to the superior. Neither can it, I think, be disputed that such a mode of meeting the superior's claim was calculated in its results to complicate and obstruct rather than facilitate the transfer of land. But although all this may be so, it does not necessarily follow that the defender may not be right in holding the pursuers wrong in the present controversy. This depends upon what ought to be held to be the true import and effect of the recent Conveyancing Act, and particularly of the provisions in its 4th section.

In examining the terms of that section of the Act, including its sub-divisions, bearing on the present case, it is important to keep in view that the mid-superiority left with Principal Baird when he disposed the lands in question to the defender's father, the late Mr Isaac Bayley, was such as might be put an end at any time by the party in right of the *dominium directum*, or, in other words, at the will of the defender, as now the proprietor of the lands. The defender's father, in the first instance, became proprietor by disposition from Principal Baird, containing a double or alternative manner of holding—a holding *à vel de me*. So long as this was allowed to continue unchanged the holding was to be considered a base one, that is, a holding of the mid-superior, Principal Baird, and after his death of his son and heir, Mr Thomas Elder Baird. Such was the state of matters at and prior to the Conveyancing Act of 1874 coming into operation. But it is undoubted, and was not questioned at the debate, that the vassal or proprietor of the lands, that is, Mr Isaac Bayley, who was

Principal Baird, by precept of *clare constat*, their right as superiors to demand a casualty of a year's rent from the defender, as singular successor of the Principal, postponed until the death of T. E. Baird; and (4) that the pursuers, who, in accordance with the law as it existed prior to 1874, would have been entitled to sue a declarator of non-entry against the present defender, as the singular successor of the vassal in the lands, are now entitled to raise against him the same action of declarator and for payment of the casualty due by a singular successor, and to prevail. But as the question is a novel one, and has not been previously litigated by the defender, I think that the rents should not be held to belong to the pursuers from the date of citation, but only from the date of this interlocutor.

It will be observed that my opinion has been very much influenced by the consideration that in consequence of Mr Bayley being infeft in the lands, the right of redemption implied in his infeftment extinguished the mid-superiority which existed in Mr T. E. Baird. Whether I might have arrived at the same result if Mr Bayley had not been infeft is a question on which I express no opinion."

No. 118. Principal Baird's dispoonee in the first instance, and on his death the defender.

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Mr George Bayley, his son and heir, in the second instance, would, according to the general rule, and supposing there was no interposed bar, have been entitled to put an end to the mid-superiority, which was successively in Principal Baird and his son, at any time he pleased, by entering with the over-superior, who in the present case was Mr Ferrier, and after him his trustees, the pursuers. And whether this has not been done by the operation of the Conveyancing Act will be immediately seen, and is really the question which has to be decided.

But before taking up that question, it is proper I should notice the defender's argument to the effect that, in the circumstances of the present case, there is an interposed bar, which, before the recent Act came into operation, would have prevented the vassal entering with the over-superior, and therefore must be held also to prevent the implied statutory entry taking effect. It was assumed in the argument for the defender that in consequence of the vassal or proprietor of the lands for the time getting Mr Thomas Elder Baird, after the death of his father, the Principal, to enter with the over-superior, he and his successors were and are barred *ex contractu* from thereafter entering themselves with the over-superior, or, in other words, converting their private or base holding into a public one. It appears to me that there is no foundation for this assumption, and I am the more emboldened to say so, considering that it does not seem to be covered, either in fact or law, by anything in the record. It is not even averred in the record that Mr Thomas Elder Baird, although after his father's death he entered with the over-superior, did so at the request of or in implement of any contract or arrangement with the vassal or proprietor of the lands. I am quite unable, therefore, to see how any bar or impediment was interposed to prevent the true vassal or proprietor himself entering with the over-superior whenever he pleased, seeing that he always continued to have right to his alternative or public manner of holding, and that his changing his base holding into a public one would not possibly prejudice Mr Thomas Elder Baird or any one else. Neither Principal Baird, nor Mr Thomas Elder Baird, nor any other party, had an interest to object to the true vassal or proprietor entering with the over-superior at any time he pleased, and so putting an end to the mid-superiority. Whether this has not been done by operation of the recent Conveyancing Act depends upon the view that may be taken of its provisions, which will now be examined.

Sub-division 2 of section 4 of the Act contains the first provision of any importance touching this matter. It enacts that the proprietor who at the date of the Act is infeft in the lands shall be held to be, as at the date of the registration of his infeftment, duly entered with the nearest superior whose estate of superiority in such lands would, according to the law existing prior to the commencement of the Act, have not been defeasible at the will of the proprietor or infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice. Applying this enactment to the present case, and in particular to the facts (1) that the defender, Mr George Bayley, was the proprietor of the lands, having his infeftment duly registered at and prior to the recent Act coming into operation, and (2) that his nearest superiors, whose estate of superiority would not, according to the law existing prior to the commencement of the Act, have been defeasible by the defender or proprietor infeft, are the pursuers, it necessarily follows that he must be held to be entered with them as the over-superiors, and, consequently, that the mid-superiority was thereby evacuated and put an end to. And if this be so, it will

necessarily follows that there is now no longer any room or opportunity for the defender tendering himself or any one else as heir to a mid-superior whose right and title are entirely gone. Nor am I able to find anything in other parts of the Act repugnant to the views I have now expressed.

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It was no doubt maintained that the pursuers' present claim is inconsistent with the concluding portion of sub-division 3 of section 4 of the Act, whereby it is provided that the implied entry referred to in the preceding sub-division shall not entitle any superior to demand any casualty sooner than he could by law prior to this Act." Founding on this provision it was argued for the defender that because by the law prior to the Act it would have been competent to tender for an entry the heir of the deceased mid-superior, and so meet the pursuers' demand for payment of a composition, to give effect to the demand it would be contrary to that provision. It appears to me that this argument is fallacious, and proceeds on a misapprehension of the true object of the provision, which was not that suggested, but merely to prevent the over-superioring, in virtue of the statutory implied entry, on payment of a composition after the death of the mid-superior, who had, prior to the Act, been held to fill the fee. Accordingly, if the pursuers had, in respect of the implied statutory entry of the defender, Mr George Bayley, on 19th January 1874, the date of the registration of his infeftment, demanded payment of a composition on the passing of the Act, the answer to such a demand that, prior to the Act, it would not be sooner than the death of Mr Thomas Elder Baird, which did not happen till January 1876, would have been irresistible under the provision referred to. Such an answer, it appears to me, was alone the object of the provision referred to, and as it has been duly observed in the present instance the argument of the defender cannot avail him. In any other view, and were the provision interpreted as the defender says it ought, the enactment relating to an implied entry might be in part, at least, in measure, if not entirely, frustrated.

The only other point in the argument for the defender which has not been met and sufficiently met in the note of the Lord Ordinary is the suggestion that I understood his counsel to make, that the implied entry in the present case must be held to relate, not to the true owner of the lands or *dominium utile*, but to the heir succeeding or entitled to succeed to the mid-superiority. But it could not possibly be so, for the statute expressly enacts (sub-division 2 of section 2), that it is the proprietor "who is at the commencement of this Act, or after shall be, duly infeft in the lands," who "shall be deemed and held to be as at the date of the registration of such infeftment in the appropriate register of sasines, duly entered with the nearest superior whose estate of superior in such lands would, according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so infeft, the same effect as if such superior had granted a writ of confirmation according to the existing law and practice." Now, it is too obvious to admit of mistake. I think, that the true owner here referred to is the owner or proprietor duly infeft in the lands, and not any mid-superior having no right at all to the lands, and whose right of superiority is so worthless as to be altogether nugatory. Besides, there are, in the same sub-division of section 2 of the Act, provisions in such a way to "superior" and "over-superior," as to shew, if any were necessary beyond what has been already stated, that by "proprietor" was exclusively meant the *verus dominus* of the lands, or party in right of the *dominium utile*.

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On the whole, and chiefly for the reasons now adverted to, I have no hesitation in concurring with the Lord Ordinary in the result at which he has arrived and am therefore of opinion that his interlocutor should be adhered to.

LORD GIFFORD.—I have found this case to be attended with great difficulty and after the opinion which Lord Ormidale has just delivered, and which is in accordance with the view of the Lord Ordinary, it is with some hesitation that I venture to differ from the conclusion at which the Lord Ordinary and Lord Ormidale have arrived.

I have ultimately come to be of opinion, however, that the mode in which the title of the defender has been made up in the present case does not, under the provisions of the recent statute, render him liable in a greater or different casualty to the superior than would have been legally exigible under the old law, or than would have been exigible had he made up his title under the provisions of any other legal and competent form; and as I think—indeed, I have no doubt whatever—that he could have legally completed his title so as to be only liable to the superior in relief-duty, that is, in a duplicand of the full year's rent, I do not think that the superior is entitled to exact a full year's rent of the subject, being the composition exigible under the old law, on the entry of a singular successor. In a single word, the ground of my opinion is, that the provisions of "The Conveyancing (Scotland) Act, 1874," were only intended to shorten and simplify the modes of making up titles of proprietors, and were not intended in any degree to enlarge the rights of superiors, or to enable superiors to demand from their vassals, in whatever mode the vassal's title was completed, any other or different casualty than such superior could have exacted under the Act in question never been passed. The Act is a mere conveyancing Act, intended only to simplify titles and not to affect the pecuniary rights of superiors or vassals. The only exception is that in certain cases the vassal is empowered to purchase the superior's casualties. In other words, I think the true question in the present case and in all similar cases under these statutes (which mean in questions with superiors) is not in what mode has the vassal completed his title? but what duties or casualties or payments could the superior have exacted under the old law, supposing the vassal to have made up his title at all? It appears to me that the true construction of the statute is, that on the one hand the superior's rights are in no way to be prejudiced or injured by reason of the vassal availing himself of the new statutory facilities for transferring land and of completing titles to land, so, on the other hand, the superior's rights should not be enlarged or the vassal put in a worse condition with the statute than he was by reason of the use of the statutory privileges.

I shall explain in a few words the view which I take of the relative positions and rights of the parties in the present case. The pursuers, Ferrier's Trustees, are the undoubted superiors, proprietors of the permanent *dominium utile* in the land, and the defender and his authors are the proprietors of the *dominium utile*. The subjects are held in feu, the entry of singular successors being tantamount to the property or *dominium utile* belonged prior to 1832 to the Rev. Dr. James Principal of the University of Edinburgh, who was then the entered vassal. In 1832 Principal Baird conveyed the lands to the late Isaac Bayley, who was his son-in-law, having married the daughter of Principal Baird, and Mr. Baird had based infeft in the usual way on a disposition which contained a double bond of holding. Isaac Bayley did not enter in any way with the superior,

al Baird, the disponent, continuing sole entered vassal. On the death of Principal Baird the superior appears to have demanded an entry, and instead of Isaac Bayley entering as vassal a precept of *clare constat* was granted on the 26th December 1868 by the superiors, Ferrier's trustees, in favour of Thomas Elder Baird, advocate, the only son and heir-at-law of Principal Baird, and upon precept Thomas Elder Baird was infeft, and thus became the full entered vassal in the subjects under the present pursuers.

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Now, it is undoubted that this mode of filling the fee was perfectly legal and valid. The superior could ask no more, and although Isaac Bayley and not Thomas Elder Baird was the real proprietor of the *dominium utile*, and Mr Baird only a bare and nominal mid-superiority, with this the superiors had no concern. The fee was full in Mr Baird's person.

When Isaac Bayley died on 17th April 1873, leaving a trust-disposition and settlement conveying, *inter alia*, the subjects in question to his trustees, and the trustees, in terms of the settlement, conveyed the property to the present defender, George Bayley, who is Isaac Bayley's only son and heir-at-law, by disposition dated 27th December 1873. On this deed the defender, George Bayley, was infeft by registration on 19th January 1874. At the date of this infestment the Conveyancing Act of 1874 had not passed, and as the law then in force the infestment in favour of George Bayley was merely a base infestment, nominal superior being Thomas Elder Baird, who was then still alive, and was the only entered vassal with the pursuers. Neither the infestment of George Bayley nor that of the present defender, George Bayley, was ever considered or in any way whatever recognised by the pursuers as superiors. So matters till 1st October 1874, when the Conveyancing Act of that year came into operation, and I think it can hardly be said that at that date, the date of commencement of the Act, any right whatever thereby emerged to the defender. Thomas Elder Baird was then alive, and during his life the fee was

in the hands of Thomas Elder Baird, however, the sole entered vassal, died on 18th January 1874, and thereupon, according to the old law, the subjects would have been demanded on entry, and the pursuers, as superiors, would have been entitled to demand an entry in common form. Now, I think it important to consider what would have been the position and rights of the defender, George Bayley, under the old law, that is, if the Conveyancing Act of 1874 had not passed. George Bayley was not only the son and heir-at-law of Isaac Bayley, but he was also grandson and heir-at-law of Principal Baird, and the nephew and heir-at-law of Thomas Elder Baird, the last entered vassal. What were his rights as

under the old law, it was admitted, and it could not be disputed for a moment, that under the old law the defender, George Bayley, would have been entitled to enter with the pursuers as heir-at-law of his uncle, Thomas Elder Baird, and that upon payment of a simple duplicand of the feu-duty. The form of entry would have been by precept of *clare constat*, which is the usual way, or by special precept, but in either case the superior could have demanded and exacted no more than a duplicand of the feu-duty. All this is too clear for argument, and conceded at the bar. It is also established by many cases, some of which are referred to by the Lord Ordinary. But if this be so, I think it follows that what would have been competent under the old law is competent still under the present existing law. I can see nothing incompetent in Mr George Bayley

No. 118. now obtaining a precept of *clare constat* from the superior as heir-at-law of his uncle, Thomas Elder Baird, in the subjects in question, and infeftment on that precept would make the defender full entered vassal as his uncle's heir, or if the superiors declined to grant such precept George Bayley may now serve his in special to his uncle in the subjects, and infeftment by registration of the decree of service will have the same effect. There is nothing in the statute of 1874 which makes this course unlawful or incompetent, and no ground of incompetency has ever been suggested. No doubt such title would be a double or a cumulative title, but there is nothing incompetent in making up double titles, which are often both necessary and expedient, and it will surely not be maintained that the Conveyancing Act of 1874 prohibits cumulative or corroborative titles. It would be a very serious matter indeed if it were held that the Conveyancing Act of 1874 made it illegal or impossible for a purchaser of land to make up a corroborative title through the heir of the seller. It is out of the question to hold this, and such a view was not even suggested. Now, suppose George Bayley to have made up such title. He offers to do so, and although I think he should have done so by this time it is still competent. In these circumstances, what are the rights of the superiors? I am of opinion that they can only demand from him relief-duty, that is, a duplicand of the feu-duty, and nothing more. For George Bayley is not, either in law, in reason, or in fact, singular successor in the subject. He is the heir of the last entered vassal, and he is entitled to take up the subject as such, and he is also heir-at-law of Prince Baird, the immediately preceding, or, as I may say, without going further back, the original vassal. Isaac Bayley was never an entered vassal at all, never in any way recognised by or known to the superior, and yet it is only by considering him as the vassal that the pursuers have any colour for demanding compensation on the entry of a singular successor. No doubt it is true that Isaac Bayley had a conveyance to the subject, and that the defender mediately has a conveyance from him; but with this separate title the superiors have no concern, and they cannot compel the defender to produce it or to found upon it unless he chooses to do so; and if the defender has another and independent title, which he undoubtedly has, why should he not be allowed to use it. In a question with the superior the defender may plead any legal and sufficient title which he pleases, and which he really possesses. He may if he chooses take his stand upon his title as heir, and if that is a good and sufficient title, which I think it is, the superior cannot compel him to part with it or renounce it, and to set forward some other title of a totally different kind. The very object of double or cumulative titles is to enable the holder of them to plead upon any one of them which may be sufficient for the purpose. Nor do I think it is of any consequence which of two or more independent titles, all equally legal and competent, happen to be made up first.

Supposing that the defender and Isaac Bayley's trustees had not taken infeftment since Isaac Bayley's death, but that their right had remained dependent upon Isaac Bayley's settlement not followed by infeftment of any kind, I suppose it can hardly be doubted that in such a state of matters the pursuers as superiors, could not have succeeded in their present demand. They could not have compelled the defender to take infeftment on his father's deed, or, if he had done so, to register it in the Register of Sasines. Nor could the defender have been compelled to register the trustees' conveyance to him of the present subject. He was entitled to disregard both his father's deed and the disposition

he trustees altogether, and to make up his sole and only title as heir-at-law of his uncle, Thomas Elder Baird. In that case it seems to me clear that the pursuers' present demand would have been absolutely unfounded. The defender would have been the pure heir of the last entered vassal, and nothing else, and as such liable to the superior in relief-duty only. I do not think the case is different from the mere circumstance that a base title was made up through Isaac Bayley's trust-deed. That base title was not made up for behoof of the superiors, and the benefit of it cannot be claimed by them.

No doubt it is true, and of course it is upon this circumstance that the pursuers' whole case rests, that the Conveyancing Act of 1874 declares, sec. 4, subsection 2, that every infeftment, even when expedited before the Act passed, shall imply an entry with the superior to the same effect as if the superior had granted a writ of confirmation; but surely this is a provision for the benefit of the vassal and not for the benefit of the superior. It is to aid the vassal in making up his title, and not in any way to benefit or advantage the superior. Accordingly, the same sub-section reserves the superior's rights notwithstanding the implied entry, and the next sub-section (sub-section 3) expressly declares that "such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands," and by the following sub-section (sub-section 4) the whole superior's rights as on non-entry are reserved and provided for, although the technical state of non-entry is abolished.

I humbly think, in accordance with what seems to me to be both the words and the spirit of the statute, that the superior's rights are neither to be better nor worse by the provision which the statute makes for "implied entry." The implied entry "shall not prejudice or affect" his rights. If it does not prejudice him, neither can it benefit him, for that would be "affecting" his rights. There is a peculiar hardship in the present case, for at the date when the decision in the defender's favour was recorded it could have no effect such as is contended for by the pursuers. The Act of 1874, and its supposed effect, could not have been anticipated, and I really have some confidence in thinking that the effect contended for by the pursuers could not possibly have been contemplated by the Legislature. In future cases it will generally be easy to defeat the pursuers' claims like the present by avoiding infeftment, or by taking infeftment only *base de me*, and thus rendering it incapable of being confirmed or made public, and thus preventing entry from being implied. Of course a base title gives exactly the same security to the purchaser as a public one. But I should deeply regret such a result, for I think it would introduce considerations of difficulties and devices in making up titles which it was the very object of the Conveyancing Act of 1874 to remove for ever from the sphere of conveyancing. I am for giving the superiors in the present case merely the relief-duty of the public and feu, the defender of course instantly completing his title as Thomas Elder Baird's heir, which, as already mentioned, I think he should have already

ORD JUSTICE-CLERK.—My views on this difficult and important question have been expressed, both during the discussion of it and in the course of the consideration which it has since received. But I have ultimately come to coincide in opinion with Lord Ormisdale, and I shall shortly state the reasons which have led me to do so.

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The real question which is presented to us seems to be, whether the provision of the 4th section of the Conveyancing Act, 1874, in the opening enactment of its 2d sub-section, were intended merely to confer a benefit on persons entitled to the *dominium utile* of lands which they might use or not use as they thought fit; or whether they were intended to establish and determine, for all purposes and effects, the feudal relation between superior and vassal, excepting in so far as a special provision is otherwise made in this statute.

I have come to be of opinion that, whatever may be the ulterior or collateral effects of the enactment, this section provides absolutely for the effect which is to be given to any infeftment in lands, proceeding on a disposition containing double or alternative holding, and this not at the will or option of the person infeft, but to all intents and purposes.

The facts to which our opinions apply are, so far as they are material to the present question, simple enough, but they require to be accurately appreciated. The defender is the disponee under a disposition containing a double manner of holding granted by the trustees of the deceased Mr Isaac Bayley, dated the 2d day of December 1873.

He recorded this disposition in the Register of Sasines on the 19th day of January 1874.

Mr Isaac Bayley's author held under the pursuer as his immediate superior, and, of course, prior to the passing of the Conveyancing Act of 1874, his interest created in his person a base fee only, held of the grantor as his superior, and could only become a public holding under the *a me* alternative of the conveyance by the disponee obtaining a charter from the over-superior. In the interval the said mid-superiority remained feudally in full force, and if the vassal had become by inheritance entitled to the said mid-superiority he must have extinguished the base fee created by his recorded disposition, and held the property absolutely under his title as heir of the last entered vassal.

The mid-superior died after the passing of the Conveyancing Act, and but for the provisions of that statute the fee would then have been in non-entry. The defender is not only disponee but is the heir of the party in right of the mid-superiority; and, under the law as it formerly stood, he might either have taken up his title as heir, paying the ordinary duties, or have obtained a charter of confirmation from the superior, in which case he must have paid a composition as a singular successor. He has himself made up no title at all, but the pursuer maintains, in this action, that, by virtue of the sub-section of the statute in question, the defender has already entered as a singular successor, that the mid-superiority has been extinguished ever since the death of the last vassal, that the singular successor must now pay the appropriate composition. I have said, I think this contention is well founded, and a very short comment on the provisions of this 4th section of the statute will indicate the ground on which I come to that conclusion.

There can be no doubt that the primary object of the 4th section of the statute, on which the question turns, was to confer a benefit on persons holding the substantial interest in the property of lands by abolishing some, at all events, of the cumbrous and expensive writs by progress which were previously necessary in the completion of a feudal title. The 1st sub-section of this 4th section abolishes absolutely the necessity for obtaining from any superior a writ by progress; and, excepting charters of novodamus, precepts or writs from Chancery or of *clare constat*, or of acknowledgment, prohibits superiors from granting the

The ground being thus cleared by this very comprehensive enactment, the 2d section proceeds to supply the place of the abolished writs, and the sub-section commences with these words :—"Every proprietor who is at the commencement of this Act, or thereafter shall be duly infeft in the lands, shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate register of sasines, duly entered with the nearest superior whose estate of superiority in such lands would, according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so as to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice."

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It is perhaps to be regretted that the definition of the "superior" in this clause should have been expressed in this negative form. But the meaning is not doubtful; it means, I apprehend, that any infeftment, such as that on which the defender possesses, which previously required, in order to render the right complete and public, confirmation from a superior, shall be held to imply such confirmation without the necessity of any charter or other writ being granted. It is not disputed that the pursuer stands in the position described in the statute, namely that the defender could not have passed him over in completing his title under the law as it previously stood. The defender, therefore, is an entered vassal, as much so as if a charter of confirmation had been granted at the date recording the disposition. Neither the pursuer nor the defender have any objection in the matter, and nothing either of them can do can alter the constitution of this feudal relation.

It is hardly understood that this was disputed by the defender, and if it were I should not have been able to appreciate the counter proposition maintained by him. It is not to be questioned that if the defender had obtained a charter of confirmation he would have been the vassal of the pursuer, liable in all the obligations and entitled to all the privileges of that character from the period at which his right took effect. The fee was not at any time in non-entry, because the superior himself had a vassal in the lands, and the superior had all the rights against the defender as vassal which a charter of confirmation would have given him, except in so far as these are specially provided for in the statute.

The remainder of this sub-section relates to matters which are not material to the present question. But there were two results which might have been considered for had the section not been qualified. On one hand it might have been maintained that as the entry by this implied confirmation required no act of the superior, his right to casualties necessarily fell. On the other hand, it might have been maintained by the superior that he was entitled to his casualty at the time when the confirmation was assumed to have been granted. These two questions are dealt with in the 3d sub-section, in which it is provided in sub-sections, 1st, that the superior should retain all rights to casualties which he formerly had; and 2d, that he shall not claim these sooner than he could have done under the former law. But it is not, I imagine, a logical deduction from these provisions that a vassal whom the statute says is entered with the superior shall be held, in this matter of composition, not to be entered, because, before the statute passed, he would not have been held to be so. The meaning of the provision is, that the superior shall have the same right against his vassal on his death as he would have had if he had granted a charter of confirmation, and the defender being entered as a singular successor must pay as such. No doubt I said that the superior's right to his casualties is not to be "affected" by

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the statute; and it has been urged, with great force, that no greater change could be made on the superior's right than to give him a right to a composition as from a singular successor, when by the former law he would or might have been compelled to accept the heir of the last entered vassal, and could only have recovered the duties payable by an heir. But there seems to be a fallacy in this view. The defender is a singular successor entered with the superior, and the superior must have all the rights which in this respect he would have had against a singular successor entering, or proposing to enter, by obtaining a charter of confirmation. He cannot, however, enforce his right until the period at which the fee would have been vacant under the former law had the statute not passed. The opposite view would lead to very anomalous results, for the defender maintains that he is entitled to all the rights of a singular successor already entered with the superior, without paying any composition, while the superior's claim is said to lie against one who might be a third party, and who is not and never can be the superior's vassal. This would hardly be to leave the law as it was.

The 4th section simply abolishes the declarator of non-entry, and substitutes such an action as the present to enable the superior to recover his casualties.

Such are the provisions of this section of the statute. I am by no means insensible to the many perplexing questions which may arise from holding sasine on an indefinite precept to be equivalent to a charter of confirmation. How far a dispositive so infeft, who succeeds his author by a title of inheritance, can make his right as heir available to any extent, I forbear to inquire. It would certainly seem that a person in the position of the defender could consolidate the property title with the mid-superiority which is extinguished, nor have I been able altogether to appreciate the effect which might be attributed on this head to the 6th clause of the Conveyancing Act, consistent with the construction which I attribute to the 2d sub-section of section 1. But I am of opinion that in this matter of the superior's claim to composition the defender is a singular successor, that he was entered as such at the death of the last entered vassal, and that he became liable to pay composition as such at the death of the last entered vassal.

THE COURT adhered.

T. H. FERRIER, W.S.—MACRITCHIE, BAYLEY, & HENDERSON, W.S.—Agents.

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ISAAC BUCHANAN AND OTHERS (Peter Buchanan's Trustees),
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JANE MILLIGAN BUCHANAN AND OTHERS (Isaac Buchanan's Children),
 ISAAC BUCHANAN, their Father, as their Administrator-at-law,
 Defenders and Claimants.—*McLaren—Jameson.*

CALEDONIAN INSURANCE COMPANY, Defenders and Claimants.—*Kinnear—Mackintosh.*

ISAAC BUCHANAN AND OTHERS (Peter Buchanan's Trustees), Defenders and Claimants.—*Balfour—J. P. B. Robertson.*

Succession—Testament—Vesting—Nati et nascituri.—A testator by his will settled a sum of £20,000 on his wife for life, and upon her death to pay the interest of £20,000 to his daughter during her life, and upon her death to pay over the said interest, to the amount of £300 a-year, to his sister's husband, in the event of his surviving her. Further, upon the decease of his sister (but subject to the annuity of £300 provided to her husband), he directed his trustees "to hold and apply the said

principal sum of £20,000 and the income" thereof, for behoof of the children of his brother B, "procreated or to be procreated," in equal shares, "payable, the several children's shares, to the sons on their attaining twenty-five years of age." Lower was given to the trustees to expend the children's shares of income and to advance part of their shares of capital during minority. There was also a clause substituting the issue of children predeceasing the life-rentrix to their parents, and a survivorship clause.

The truster's sister died in 1875, survived by her husband. At that time the truster's brother B was alive, and two of his children had attained the age of twenty-five.

Held (1) that no right vested in any child of B before the death of the life-rentrix, or until his share became payable by his attaining the age of twenty-five; (2) that on that event the trustees were not entitled to withhold payment on the ground that other children might be born to B; (3) that the subsistence of the annuity of £300 did not prevent a partial payment to account of capital those children whose shares had vested, £10,000 being reserved to secure the annuity; (4) (*diss.* Lord Ormidale) that such interim payment should be made without caution.

Opinion (*per* Lord Ormidale) that though each child's share became vested and payable on his attaining the age fixed by the deed, it was under the condition that children subsequently born would be entitled also to share, and that therefore interim payment could only be made on caution to repeat if necessary.

Opinion (*per* Lord Justice-Clerk and Lord Gifford) that the number of children to participate in the fund was fixed by the vesting of the share of any one of them, and that children subsequently born were excluded.

PETER BUCHANAN, merchant, Glasgow, by his trust-settlement left his whole estate to his brother, Isaac Buchanan, and others, as trustees for the following purposes, *inter alia* :—"In the fourth place, I direct my trustees to set aside, or invest in their own names, the sum of £20,000 sterling, to pay the interest or annual proceeds thereof to the said Jane Buchanan or Douglas" (the truster's sister, wife of Major George Douglas, one of the trustees), . . . "and upon the death of the said Jane Buchanan or Douglas I direct that my trustees shall pay over said interest or annual proceeds to the extent of £300 sterling to the said George Douglas in the event of his surviving his said wife :

Further, upon the decease of the said Jane Buchanan or Douglas subject to the burden of the said annuity provided to her husband if she shall survive her), I direct that the trustees shall hold and apply the principal sum of £20,000, and the income or annual proceeds thereof, for behoof of all the lawful children of my brother, the said Isaac Buchanan, procreated or to be procreated (other than his eldest son, Peter Buchanan, hereinafter provided for), equally among them, share and share alike, payable, the several children's shares, to the sons on their attaining twenty-five years, and to the daughters on their attaining that age or being married, whichever of these events shall first happen, with power to my trustees during the minority of the several children to expend their shares of the annual interest or income of the said principal sum for their behoof, and also to advance a part of the principal of the said shares, in establishing them in a business or profession respectively, and a part of the principal of the daughters' shares in their outfit on the occasion of their being married; . . . declaring that the parts of the principal which may be so advanced to the sons and daughters shall not be repayable from the executors of such of them as may die after receiving the same, but before the term of payment of their provisions; declaring also that in the event of the decease of any one or more of the children, whether before or after their aunt, the said Jane Buchanan

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No. 119. or Douglas, leaving issue, such issue shall receive equally among them the share to which their respective parents would have been entitled had they survived, and that the shares of one or more of the children dying after their said aunt without issue shall accrue to and be equally divided among the survivors."

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Peter Buchanan, the truster, died in 1860.

Mrs Jane Buchanan or Douglas died in May 1875, having, from the date of the truster's death, received the interest of the £20,000 set apart and invested by the trustees under the directions contained in the fourth purpose of the truster's settlement narrated above.

Mrs Douglas was survived by her husband, Major George Douglas, and by her brother, Isaac Buchanan.

At the date of Mrs Douglas' death there were nine children of Isaac Buchanan alive, exclusive of the eldest son, Peter Toronto Buchanan. Of these, two daughters, Jane Milligan and Margaret Douglas Buchanan, had attained the age of twenty-five at the date of the death of the liferentrix, Mrs Douglas, and were unmarried. Two sons, Harris Buchanan, who was twenty-four, and James Isaac Buchanan, who was twenty-two, had assigned their rights under their uncle Peter Buchanan's will to the Caledonian Insurance Company. None of the remaining children of Isaac Buchanan had attained the age of twenty-five.

A demand having been made by Jane and Margaret Buchanan, two unmarried daughters, by the Caledonian Insurance Company, and Isaac Buchanan on behalf of his younger children, on the trustees that they should make a partial division of the £20,000, and accrued interest in their hands, after sufficiently securing Major Douglas' annuity of £300, the trustees raised this multiplepinding, in which they called themselves and those parties as claimants.

Jane Milligan Buchanan and the other younger children of Isaac Buchanan claimed payment to each of them of one-ninth part of the annual income arising from the fund *in medio* after deduction of Major Douglas' annuity of £300.

The Caledonian Insurance Company claimed payment of one-ninth share of the surplus capital of the fund *in medio*, after setting aside sufficient to secure Major Douglas' annuity, on account of each of Harris and James Isaac Buchanan in respect of their assignation so soon as these two beneficiaries should respectively attain the age of twenty-five.

The trustees claimed to hold the fund *in medio* until the death of Major Douglas, or until the death of Isaac Buchanan, whichever of these should last happen, on the ground that they were bound to hold the whole fund *in medio* until the expiry of the annuity to Major Douglas, and until it should be no longer possible that more children of Isaac Buchanan should come into existence.

The Lord Ordinary, on 21st July 1876, pronounced this interlocutor: "Finds that the only persons entitled to participate in the sum of £20,000 settled by the truster are the children of Isaac Buchanan alive at the death of Mrs Jane Buchanan Douglas, other than Peter Toronto Buchanan, but that no right vests in any such child until it reaches the age of twenty-five: Finds that, at the death of the liferenter, a ninth part was vested in each of Jane Milligan Buchanan and Margaret Douglas Buchanan, who were then twenty-five years of age: Finds that one-ninth share vested in Harris Buchanan, when he attained twenty-five, on 10th April 1876: Finds that, after payment of the annual £300 to Major Douglas, each of the said Jane Milligan Buchanan, Margaret Douglas Buchanan, and Harris Buchanan, is entitled to one-ninth part of the surplus interest arising on their respective shares."

the same became vested as aforesaid: Finds that, until their shares rest in them, the other children are not entitled to demand payment of any interest thereon, but, without prejudice to the power of the trustees, to expend the interest of said shares for their behoof, until they attain the age of twenty-five; and with these findings appoints the case to be put to the roll for further procedure.”*

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Peter Buchanan's trustees reclaimed, and argued;—(1) The subsistence of Major Douglas' annuity postponed the date of payment of capital till its expiry by his death. (2) The bequest being to a class payment was postponed until the whole members of the class were ascertained;¹ and therefore (3) if an interim payment was to be made it could only be on

* “NOTE.—The Lord Ordinary has found a good deal of difficulty in construing this deed.

“No right could vest till the death of the liferenter, inasmuch as the trust of the children did not come into existence till that event. But the Lord Ordinary thinks that the annuity does not prevent vesting, and accordingly he is of opinion that on the death of the liferenter each child takes a vested interest as it reaches twenty-five. No right, it is thought, can vest before the occurrence of the events, because there is an express clause in favour of survivors in the case of children dying after the liferenter, without leaving issue; but this clause does not, in the opinion of the Lord Ordinary, apply after the period of payment has arrived. Consequently, he holds that each child takes a vested interest when it reaches twenty-five. It was argued that such children as might be yet unborn to Isaac Buchanan were entitled to participate, but the Lord Ordinary has decided in the negative, because he thinks that the interest of a child reaching twenty-five is definitely ascertained, and that the interest of all is to be equal. Equality could not be preserved, if children subsequently born were held to be beneficiaries, for nothing could be withdrawn from the child who had actually received payment.

“It is true that no final distribution can be made till the death of the annuitant, but, in the view of the Lord Ordinary, that circumstance cannot determine the rights of the beneficiaries. The annuity is a mere burden, and, it may be, is the annuitant a security over the whole fund; but the surplus interest, it is thought, be divided, and it cannot be divided until a share vests, and without the ascertainment of the amount of the share. Further, the trustees are empowered to advance a part of the sons' and daughters' shares to establish them in business or provide an outfit on marriage. This not only enables the trustees to encroach on the capital so as to reduce the security of the annuitant, also assumes that the share is known.

The payment of the capital, except in the exercise of the special power given to the trustees, may be deferred until the death of the annuitant. But there is no direction to accumulate interest; and, in consequence, the Lord Ordinary is of opinion that the children who possess a vested right are entitled to a corresponding proportion of the surplus interest. The remainder is subject to the discretion of the trustees; and with respect to the discretion which is given to them, the Lord Ordinary thinks that the word ‘minority,’ as it occurs in the deed, may be read as equivalent to ‘under 25;’ or, in other words, to the artificial minority created by the deed. It is not easy to see why the powers of the trustees are to cease when there is no direction to accumulate, and when no legal right to interest can arise until vesting.

The interlocutor which the Lord Ordinary has pronounced disposes of all the questions which are raised in this case, other than the immediate payment of the shares which have vested. He doubts whether, without the consent of the annuitant, any payment can be made. But the only reason to the contrary is that the annuitant is entitled to the security of the whole fund.”

Carleton v. Thomson, Feb. 11, 1865, 3 Macph. 514, 37 Scot. Jur. 257; 30, 1867, 5 Macph. (H. L.) 151, 39 Scot. Jur. 640, L. R. 1 Sc. App. 232.

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Argued for Isaac Buchanan's children and for the Caledonian Insurance Company;—(1) The intention of the testator was merely that Major Douglas' annuity should be sufficiently secured by the retention of a portion of the capital, not that the whole £20,000 should be held for an indefinite period to secure an annuity of £300; a partial distribution might therefore be made.² (2) The bequest of capital vested in the children alive at the date of the *liferentrix*, though the term of payment was postponed; children born subsequently to the death of the *liferentrix* would have no right to share.³ (3) There was therefore no ground for requiring caution if an interim payment were to be made.

At advising,—

LORD JUSTICE-CLERK.—There are two questions in this case arising on the interpretation of the fourth purpose of the will of a Mr Peter Buchanan.—1st, whether, supposing the period of division of the trust-funds to have arrived, the division of the surplus capital is to be postponed during the subsistence of an annuity secured upon the annual produce of the funds; 2d, whether the trust-funds being given on the expiry of the intervening *liferent* to the children procreated or to be procreated of the truster's brother, who is still in life, payment of the bequest or of any part of it can be made until it be seen whether other members of the class come into existence. The first of these questions is an important one, and one on which it was said that there is no specific authority for our guidance; but looking to the whole of the settlement I think it is in conformity with the will of the testator that if there is any surplus it should be divided on the arrival of the period of division, after sufficient provision has been made for the payment of the annuity. A sum of £20,000 was to be set aside, and the interest was to be paid during her life to Jane Buchanan Douglas, the truster's sister, and on her death the interest to the extent of £300 was to be paid to her husband, George Douglas. There is no direction that payment should be made over the whole interest, nor to keep up the whole capital as a security for the annuity. I cannot suppose that it was the testator's intention that until the death of the annuitant no part of this fund should be divided. The trustees were to pay over the interest to the extent of £300, and apply the principal in behoof of the beneficiaries on their majority or marriage. I take that to be simply equivalent to this, that so much of the capital as would produce £300 a year was to be retained, and the rest distributed as it vested. I do not think that it was ever intended that the whole £20,000 was to be kept up as a security for £300 a-year. Had the discrepancy been much greater there might have been a doubt as to the testator's intention. Nor do I think that there can be any reasonable doubt in the present case, where the testator left with a fund more than double what is required to secure the annuity. There are, no doubt, many cases in which a security for a provision has been

¹ *Scheniman v. Wilson*, June 25, 1828, 6 S. 1019; *Shaw v. Shaw*, note, 6 S. 1149.

² *Kinmond's Trustees v. Kinmond*, Feb. 5, 1873, 11 Macph. 381, 45 S. Jur. 255; *Birch v. Shirratt*, 1867, L. R., 2 Ch. App. 644.

³ *Wood v. Wood*, Jan. 18, 1861, 23 D. 338, 33 Scot. Jur. 177; *Paterson Gray*, 1868, L. R., 6 Eq. 215; *Gimblet v. Purton*, 1871, L. R., 12 Eq. 4; *Jarman on Wills*, 3d ed., vol. ii. p. 141, *et seq.*; *Whitbread v. Lord St. John*, 1804, 10 Ves. 152.

stituted over the *corpus* of an estate, but where no real prejudice to the creditor could occur the Court have over and over again interfered to settle the rights of parties on equitable principles. On this point of the case therefore I would suggest that the trustees retain a sum of £10,000 to meet the annuity, and be retained to pay over what remains.

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The second question is one which has given rise to a vast amount of discussion both in England and here. But the result has always depended upon the particular terms of the settlement as disclosing the intention of the testator. The provision of the deed with which we are dealing is—(reads clause quoted *supra*. 755). Now, the events on which payment is contingent have happened, for Mrs Douglas, the life-rentrix, has died, and of Isaac Buchanan's children at least three have attained the age of twenty-five. Are they, then, entitled to immediate payment of their shares of the fund so far as presently divisible? I can find nothing in the deed to the contrary. It is said that the bequest is to a class; and so it is; but these children are members of that class. They have fulfilled the condition of the testament. Whatever may be the right of others, and whether or not the members of the class may be subsequently increased in number, there can be no doubt that a right to their shares has indefeasibly vested in these particular children. But then it is said there is a possibility of the birth of other children, who, as members of the class, would be entitled to a share. All I have to say on this point is, that there are no other children here except those who are entitled to payment, and that the testator's direction to pay cannot be suspended on a mere hypothesis.

It is unnecessary for us to decide whether there must be any divestiture and payment in the event of other children coming into existence. It will be time enough to determine that question when other children are born. But I must say I am strongly of opinion that no children except those actually in existence at the death of the life-rentrix are entitled to participate in this fund. There are cases on both sides. There are cases in which presumptive issue have been held to be eligible beneficiaries. And there are other cases in which children subsequently born have been held excluded. On the one hand, we have the well-known case of *Scheniman v. Wilson*, June 25, 1828, 6 S. 1019, and *Shaw v. Shaw*, 1841, in note 6 S. 1149. On the other hand, we have the case of *Wood v. Wood*, 1861, Jan. 18, 1861, 23 D. 338 (33 Scot. Jur. 177), in which Lord Cowan, delivering the opinion of the Court, reviews some of the previous authorities. I am of opinion that the present case falls within the latter class, and I am therefore confirmed in this view that I find that had the case occurred in England it must have been decided in the way which I have indicated—See *Jarman on Wills*, 3d ed. ii. 141, *et seq.* At the death of the life-rentrix there were two children here who had attained the age of twenty-five. According to the law of England the effect of that reflected back on those who had not attained the age, but at the same time fixed the number of the class who were to take the fund. Now, without saying that this case necessarily falls under the rule of law understood in England, I think that there is so much force in what is said by the Vice-Chancellor (Malins) in *Gimblet v. Purton*, 1871, L. R. 12 Eq. 427, that I should readily adopt it as the ratio of my judgment if I required to give

“Experience has shewn me,” he says, “the sound sense of the rule, and the object of the law is to make property vest as early as possible, so that the persons to whom it is given may know what they have to expect, and so that the fund available at the earliest period.” In this case it would be a

No. 119. grievous hardship to this family, looking to the age of the father, and to the circumstances of the children, if the trustees were to be compelled to hold the fund for ten, fifteen, or it might be even twenty years, until the impossibility of other children being born was determined by the father's death.

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Holding these views, I am not prepared to follow the case of *Scheniman v. Wilson* and require the parties to find caution before receiving payment of their shares.

LORD ORMDALE.—It appears to me that there is raised in this case a question of nicety and difficulty. In order to arrive at its true solution the intention of the testator, which is the governing rule in this as in all such cases, must be ascertained so far as it has been expressed in, or can be inferred from, his deed of settlement, and be given effect to.

According to his deed of settlement £20,000 forms the subject of its first purpose. He there directs that upon the death of his sister Mrs Douglas (reads the direction in the fourth purpose, quoted *supra*, p. 755). Nothing could be well be plainer or more explicit than this bequest. It is not made to certain children specifically named, nor is it made to the children who may be born at a particular marriage, but generally to "all the children of my brother Isaac Buchanan, procreated or to be procreated." Why, therefore, should that be limited, contrary to the ordinary meaning of the words employed, to be limited to children alive or born prior to the attainment by one of them, if a son, of the age of twenty-five, or the attainment of that age or marriage of one of them, if a daughter? The testator has attached no such restrictive condition to his bequest, but, on the contrary, expressly destines it to all the children of his brother, whether created or to be procreated.

But, then, he provides that the several children's shares should be payable to the sons on their attaining twenty-five years of age, and to the daughters on their attaining that age or being married, whichever of these events shall first happen; and, founding on this provision, it was argued for the respondents that the testator must have intended to restrict his bequest to the children of his brother procreated before the attainment by any of them of the age of twenty-five if sons, or of that age or being married if daughters. But why this should be so I have not been able to see. It would not be correct to say that other children no share of the bequest can vest or be payable to any of the children intended to be benefited so long as the testator's brother Isaac Buchanan is alive, although not only some but all of his existing children might in the meantime be greatly more than twenty-five years of age, and in the case of daughters be either married or more than that age; for this need not be so except in a sense which it is unnecessary, as it would, I think, be erroneous, to attribute to the testator. The shares of Isaac Buchanan's children may in another sense be thought the true, sense be held to vest in and be payable to the children as they respectively reach the age of twenty-five in the case of sons, or that age or being married in the case of daughters, and yet there need be no exclusion of their participation along with them in the £20,000 of any children the testator's brother Isaac Buchanan may subsequently have. There is such a thing in the law as the vesting of provisions or legacies in children as a class, on their arriving at a certain age, subject to the amount of the benefit being diminished by the coming subsequently into existence of other children entitled to participate along with them. Such a mode of vesting has been frequently given effect to, and was distinctly recognised and assumed to be indisputable, but

this Court and the House of Lords, in the case of Carleton v. Thomson, 11th Feb. No. 119. 1865, and 30th July 1867, 3 Macph. 514, and 5 Macph. H. of L. 151. There could, therefore, be no inconsistency in holding that the shares of the £20,000 in question accruing to the existing children of the testator's brother Isaac Buchanan will vest as the sons reach the age of twenty-five, and the daughters at age or are married, subject to the contingency of a divestiture to some extent in the event of there being more children of Mr Isaac Buchanan.

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And just as little need any difficulty be supposed to arise in regard to the shares of the existing children being payable and paid when and as they become vested rights, for that could quite well be effected by the children, on receiving payment of their shares, finding caution to repeat so much as might be necessary to satisfy the claims of other children, if any, that might thereafter come to exist and be entitled to participate in the £20,000. This was the course directed by the Court to be followed in the cases of Shaw v. Shaw, 6 Sh. 1149, and Beniman v. Wilson, 6 Sh. 1019, the circumstances of which were in all essential respects, so far as they bear on the question now under consideration, the same as those of the present case; and the cases referred to are all the more valuable as precedents for the present case, considering that they were cited and recognised as authorities, both in this Court and the House of Lords, in the subsequent and comparatively recent case of Carleton v. Thomson, to which reference has already been made. They, as well as the principles they embody, are also recognised with approval in the case of Blackwood v. Dykes and Others, 11 February 1833, 11 Sh. 443 (5 Scot. Jur. 269), and June 11, 1833, 11 S. 9 (5 Scot. Jur. 425).

Nor am I satisfied that any of the other cases, Scotch or English, which were cited and apparently relied on by the respondents at the debate, are of an adverse description. The case of Wood and others v. Wood, 23 D. 338, is certainly not so, for there the bequest was, not to children "procreated or to be procreated," but generally to nephews and nieces, the children of two brothers of the testator, which, in the circumstances which there occurred, was held to denote children existing at the death of the liferentrix of the fund, and not children subsequently born. But it is clear, I think, judging from the observations and reasoning of the learned Judges in that case as reported, that the judgment would have been different if the bequest had been, as here, to children "procreated or to be procreated." Thus, the Lord Ordinary (Kinloch) takes care to say that, while he decided, as he did, in favour of the children existing at the death of

liferentrix, "it is open in every case to gather from the deed evidence of a different purpose, and to hold, if the deed affords sufficient warrant for the conclusion, that it was not the children at a particular date, but the whole children born or to be born during their father's lifetime, who were intended to be included." Lord Cowan, again, who delivered the judgment of the Court, remarking that of Lord Kinloch under a reclaiming note, made observations to the same effect; and, in particular, he observed that the cases cited as being adverse to that judgment "had mostly reference to questions under settlements which contained clear destinations to children born or to be born, or were so expressed as to lead to that inference." In place, therefore, of the case of Wood v. Wood being an authority against, it rather appears to me to be one favourable to the view which I have adopted in the present case, where the bequest is expressly to children "procreated or to be procreated," or, to use the words of Lord Kinloch and Cowan, "born or to be born."

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Neither am I satisfied that the English authorities on which the respondent founded can be held to be clearly or conclusively favourable to them. Take, for example, the case of *Whitbread v. Lord St John*, 1804, 10 Vesey, 152, which was that chiefly relied upon by the respondents. It is not stated in the report that Lady St John, in favour of whose children the bequest was made, was dead, although this may be inferred as well from the statement of the case given in the report, as from the circumstance that Lord St John alone, and not his wife, appears to have been a party to the discussion; and, if so, the decision which was pronounced cannot be said to be adverse to the view I have adopted in the present case. But, assuming that Lady St John was alive, as possibly she was, still I would hesitate to say that the case is conclusive of the present question. I find that Mr Jarman in his treatise on Wills (p. 165 of 2d vol. 3d ed.) makes remarks in reference to the question which has here arisen—"We are now to consider how the construction is affected by the words 'to be born' or 'to be begotten,' annexed to a devise or bequest to children; with respect to which the established rule is that if the gift be immediate, so that it would, but for the words in question, have been confined to children, if any, existing at the testator's death, they will have the effect of extending it to all the children who shall ever come into existence, since, in order to give to the words in question some operation, the gift is necessarily made to comprehend the whole;" and the case of *Mogg v. Mogg*, 1 Mer. 654, to which reference is made in support of this passage, seems to bear it out. Mr M'Laren also, in his book on Wills (vol. i. p. 654-5), while he notices all the cases bearing on the point, as well English as Scotch, states the law, as I read his remarks, to the same effect. But independently of the text writers, either English or Scotch, I should feel myself bound by the decisions of our own Court in the cases of *Shaw v. Shaw* and *Scheniman v. Wilson*, the authority of which has not, so far as I am aware, been ever impugned.

As to the date when the shares of the £20,000, including any surplus interest arising therefrom after satisfying Major Douglas' annuity, vested, I concur with the Lord Ordinary in thinking that it must be held to be on the children, whenever born, of Mr Isaac Buchanan respectively reaching the age of twenty in the case of sons, or on their attaining that age or being married, whichever of these events should happen first, in the case of daughters. Nor do I very much see how, in opposition to this view, it can be held, as was contended for by some of the parties, that vesting took place on the death of the life-rentrix Mrs Buchanan or Douglas, when it is borne in mind that it is expressly declared by the testator that "in the event of the decease of any one or more of the children, whether before or after their aunt, the said Jane Buchanan or Douglas leaving issue, such issue shall receive equally among them the share to which their respective parents would have been entitled had they survived; and the shares of one or more of the children dying after their said aunt without issue shall accrue to and be equally divided among the survivors." There is here a destination over and also a survivorship clause, both of which might be defeated, and, at any rate, could not with certainty be carried into effect on the footing of vesting taking place sooner than on the children attaining twenty years of age in the case of sons, or, in the case of daughters, attaining that age or being married.

The remaining question, whether the whole of the £20,000, capital as well as income, must remain intact as long as Major Douglas lives, in order to see

ment of his annuity, is not, I think, attended with any real difficulty, except, No. 119.
 rhaps, in regard to the precise amount of capital that ought to be retained by
 : trustees to meet the annuity. But to hold that the whole of the £20,000 May 26, 1877.
 st be so retained would be as unreasonable as it would be obviously unneces- Buchanan's
 y. The object of the testator as regards Major Douglas' annuity will be en- Trustees v.
 dly satisfied by the retention, not of the whole £20,000, but merely of so Buchanan.
 ch of that sum as will be sufficient to secure payment of the annuity.
 0,000 was suggested as sufficient, and as I cannot see any reason for thinking
 ould not, that may be held to be the sum which the trustees should be
 orised to retain, power being reserved to them, as the Lord Ordinary has
 rved it, to expend any surplus income arising on the £20,000 for behoof of
 c Buchanan's children respectively till they attain twenty-five years of age
 he case of sons, or that age or are married in the case of daughters.

ORD GIFFORD.—The Lord Ordinary says that he has found a good deal of
 culty in construing the trust-settlement of the late Peter Buchanan, and in
 rmining its exact effect. I have felt the same difficulty, and although I
 : ultimately come to agree substantially in the result which the Lord Ord-
 : has reached—I mean in the mode in which the trustees are bound to dis-
 te the fund *in medio*—there is one question upon which I have great
 culty in agreeing with the Lord Ordinary, and as to which I am disposed,
 can be done, to reserve any rights which may hereafter emerge, that is, the
 is which may possibly arise to future children of Mr Isaac Buchanan in case
 such children should hereafter be born.

the first place, I am of opinion that no right to any part of the £20,000
 l vest in any of the children of Isaac Buchanan until the death of Mrs
 glas, who was the liferentrix of the whole sum, because the deed directs
 it is not till that event that the trustees are to hold and apply the said sum
 20,000 and the income and proceeds thereof to and for behoof of the child-
 of Isaac Buchanan (excluding his eldest son Peter). If any of Isaac
 anan's children had predeceased Mrs Douglas, who died on 9th May 1875,
 nk such predeceasing children would have taken no share of the £20,000,
 ough their issue, if any, would have taken under the express words of the

the second place, I do not think that the subsistence of the annuity to
 r George Douglas of itself prevents either the vesting or the payment of
 rovision in favour of Isaac Buchanan's children. The deed expressly pro-
 for the payment or application of the provision subject to the burden of
 annuity. This can only mean that provision shall be made for the annui-
 that is, that such sum shall be retained as is sufficient to meet the
 ty. It goes no further than that. Therefore, I am of opinion that
 making due and reasonable provision for this annuity (and I agree
 if £10,000 is retained to meet the annuity this will be more
 sufficient to secure the annuitant) the provision of the deed shall take

t although the annuity to Major Douglas will not of itself prevent either
 ig or payment, to a reasonable extent, of the £20,000, I am of opinion that
 as to the children of Isaac Buchanan who survived Mrs Douglas, no
 could vest in any of them until they respectively attained the age of
 y-five, or in the case of daughters until they attained that age or were

No. 119. married, for not only are the shares not payable before these dates or events, but there is a declaration that in the event of the decease of any of the children after Mrs Douglas, and without issue, the shares of such deceasers shall be equally divided among the survivors. I think this conditional clause of survivorship prevents the vesting until the age of twenty-five or the marriage in the case of the daughters. In all cases, however, the trustees have power to expend the interest of the shares or to advance even before the vesting, in terms of the deed.

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As I have already said, the main point upon which I have found difficulty the question, who are the ultimate beneficiaries embraced under the words "the lawful children of my brother, the said Isaac Buchanan, procreated or to be procreated" ? and the question is, whether these words will not include children who may yet be born to Mr Isaac Buchanan either of his present or of a future marriage. Mr Isaac Buchanan, I understand, is a gentleman sixty-six or sixty-seven years of age.

It seems to have been ruled in England that in bequests to the children of a living person the legacy is restricted to the children only who are born at the time of payment of the bequest, and will not include children who may be born after the date of payment or distribution, and this even where the bequest is to the children of a living person. It seems also to have been held that where a bequest is payable to such children at different dates, for example, at the respective majorities, it is the date of the first payment which will fix the number of legatees so as to exclude children born after that date. I feel the weight of these authorities, and although the words of the will in the present case are not precisely the same as those which occurred in any of the cases which I have observed, I am not prepared to take the present case out of the general rule so established.

At the same time, I am not prepared to say that the rule will override the expressed intention of the testator, wherever that will is so expressed as to make it clear and unambiguous that he intended children born even after the date of payment or distribution to participate in the bequest, for example, by having a claim of repetition from those who had already received payment. Indeed, I think such will must receive effect, so that if the will in the present case, instead of merely saying children to be procreated, which may mean children procreated before the term of payment, had said children to be procreated at any time during the life of Isaac Buchanan although after the term of payment, I could not have denied effect to an intention so expressed. The present case, however, seems to fall under the English authorities, and, therefore, though not without hesitation, I agree in the finding of the Lord Ordinary that "the only persons entitled to participate in the sum of £20,000 settled by the truster are the children of Isaac Buchanan alive at the death of Mrs Jane Buchanan or Douglas other than James Toronto Buchanan."

I am not sure, however, whether in the present process it is necessary to decide this question, or to pronounce an express finding excluding the right of the, as yet, unborn children. I think it would be enough in this present process of distribution of the fund *in medio* to find that the pursuers, Peter Buchanan and the trustees, are bound to distribute and pay the fund *in medio* (subject to the claims of the children to and among the children of Isaac Buchanan now existing, and that the children respectively attain the age of twenty-five, and are not bound and are not entitled to withhold payment or to set apart or retain any sum in respect of the possibility that Mr Isaac Buchanan may yet have other or additional children.

ould meet the necessities of the present case, and avoid deciding absolutely No. 119.
 ainst unborn children who cannot of course appear and claim in this process, May 26, 1877.
 d who can only be represented by the trustees as holders of the fund. With Buchanan's
 is suggested variation, and also with the variation that no more need be re- Trustees v.
 ned to meet the annuity than £10,000, I am for adhering to the interlocu- Buchanan.
 of the Lord Ordinary. I do not think that the existing children of Isaac
 chanan who have attained twenty-five or those in their right are bound, as a
 addition of instant payment, to find security or caution of any kind or to any
 ent to meet the possible case of additional children being hereafter born to
 ac Buchanan. I think to require such caution would be to deny effect to the
 ress direction of the truster, who appoints payment to be made at dates which
 y be long before the death of Mr Isaac Buchanan.

THIS interlocutor was pronounced :—" Find that the said trustees are
 bound to pay and divide the sum of £20,000, settled by the trus-
 ter, to and among the children of Isaac Buchanan now alive, ex-
 cepting Peter Toronto Buchanan, and that at the terms of payment
 fixed by the deed, and are not entitled to retain or withhold any
 sum in respect that the said Isaac Buchanan may yet have other
 or additional children either of his present or of any future mar-
 riage; and find that no right vests in any such child until it
 reaches the age of twenty-five: Find that at the death of the
 defender a ninth vested in each of Jane Milligan Buchanan and
 Margaret Douglas Buchanan, who were then twenty-five years of
 age: Find that another one-ninth share vested in Harris Buchanan
 when he attained twenty-five on 10th April 1876: Find that after
 setting aside the sum of £10,000 in order to secure the annual
 sum of £300 per annum to Major Douglas, payment must be made
 to such of the children as have attained the age of twenty-five of
 one-ninth part of such proportion of the sum of £20,000 as may
 be available for division; and that until the other children respec-
 tively attain the age of twenty-five they are not entitled to demand
 payment of any interest thereon, but without prejudice to the power
 of the trustees to expend the interest of said shares for their behoof
 until they attain the age of twenty-five: Find all the parties to
 the cause entitled to their expenses out of the sum of £10,000
 available for division," &c.

ERSTER & WILL, S.S.C.—T. & R. B. RANKEN, W.S.—JOHN MARTIN, W.S.—Agents.

THE DUKE OF SUTHERLAND, Pursuer.—*Balfour—Mackintosh—Darling.* No. 120.
 SIR CHARLES WILLIAM AUGUSTUS ROSS, Bart., Defender.—
Asher—H. Johnston.

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 Ross.

*Salmon Fishery Acts—Obstruction to the Passage of Salmon—River
 Fishings—Property.*—Part of a barony consisted of a long narrow island in
 the estuary, between which and the shore there existed a side channel dry at low
 water. Prior to 1857 a long stretch of foreshore extended down the estuary
 to the seaward end of the island, forming a bank which prevented the water
 from the main channel of the river at low tide from spreading over a large stretch
 of low ground called the bay of K. A breach having been made in this foreshore
 by the stream and tide, in consequence of the erection of a weir on the opposite
 side of the estuary, the proprietor of the barony and salmon-fishings, in 1862,
 raised the foreshore by an artificial embankment which, in 1868, he raised to
 a height of sixteen inches above the original level of the foreshore. The em-
 bankment was found to afford him additional facilities for salmon-fishing.
 The proprietor of salmon-fishings on the river having in 1875 objected to the

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embankment as an illegal obstruction to salmon passing up the river, but that the proprietor was entitled to restore the foreshore; and (2) that the bankment, whether regarded by itself or as affording to the proprietor great facilities for the capture of salmon, was not in fact an obstruction in the sense of the Salmon Fishery Acts.

Observed that even if the operations had been made *in alveo* the upper heritors would have had no title to object to them except in so far as they were obstructions to salmon.

Opinion (per Lord Gifford), that the proprietor was entitled to gain land from his own foreshore and use it for the purposes of salmon-fishing.

2D DIVISION.
Lord Young.
R.

THIS action was raised by the Duke of Sutherland, as proprietor of salmon-fishings on the river Shinn and others of the upper waters that flow into the kyle of Oykel or Sutherland, against Sir Charles W. A. Ross Balnagown, Baronet, an inferior heritor, proprietor of the lands of Bonar and fishings *ex adverso* thereof in the kyle of Sutherland, to have it declared that certain artificial works erected by the defender within the limits of the estuary of the kyle of Sutherland were "fixed obstructions to the passage of salmon and other fish of the salmon kind," or others, and that they were erections made and maintained by the defender with a view of unduly facilitating the capture of salmon by him at his fishing stations at Bonar to the prejudice of the pursuer. The summons further concluded that the erections in question should be removed.

Messrs Pourie and Pitcaithley, tenants of the Bonar fishings, were called as defenders, but did not appear.

The river Oykel, which divides the counties of Ross and Sutherland, receives as it flows from west to east the Cassley, the Shinn, and other streams. Its estuary is known as the kyle of Oykel or Sutherland or Dornoch Firth. The kyle is navigable for vessels of 150 to 200 tons as far as Bonar Bridge, and for smaller craft for some distance farther. It runs for ten miles above Bonar Bridge.

At Bonar Bridge the kyle narrows to a width of about 100 yards. Below Bonar Bridge on the Sutherland shore, which belongs to the estate of Skibo, the banks of the kyle are abrupt and rocky, and have a natural tendency to throw the stream somewhat on the opposite shore. On the Ross-shire shore, which belongs to the defender's estate of Bonar, the kyle is low-lying and the banks of a soft alluvial nature. On this side, at a point about 150 yards below Bonar Bridge, a long narrow strip of land known to the fishermen as the "green island," and extending to about 100 yards in length, and varying from 10 to 50 yards in breadth, has, by the action of the tide and of winter spates from the upper waters, been gradually separated from the mainland. At a point a little below the lower end of this island the kyle on the Bonar side spreads out into a wide and very shallow bay called Kincardine Bay. By the separation of the "green island" from the Bonar shore a narrow channel or gullet has been formed 20 to 30 yards wide leading from the upper end of Kincardine Bay into the main channel of the kyle just below Bonar Bridge. This side channel is dry at low water, and at its upper end a raised beach from 1 to 2 feet above low-water mark in the main channel joins the upper end of the island to the mainland. This beach, which is always covered in ordinary states of the tide within little more than an hour of the tide beginning to flow, is often covered even at low tide when the upper waters are in flood. After the tide has risen above the raised beach the upper end of this side channel forms a passage for fish from Kincardine Bay into the main channel of the kyle, and so to the upper waters.

The main and navigable channel of the kyle at low water runs close to the Sutherland shore.

The erections objected to by the pursuer were :—First, An embankment marked A B on the plan referred to in the action, erected on the raised beach joining the upper end of the “green island” to the mainland. It consisted of a row of piles driven into this beach and supported on both sides by laid stones. It rose about four feet from the surface of the beach and to within about one foot of high water of ordinary spring tides; second, an embankment, marked F H on the plan, about 25 yards in length, commencing at the lower end of the “green island,” and continuing seawards along the edge of the low-water channel of the kyle. This embankment consisted of two parallel rows of piles, about five feet apart, joined together by cross ties, the intervening space being filled with stones, and both sides being pitched with laid stones at a slope of one in three. The top of this embankment formed a raised pathway two feet four inches above low-water mark, and at two places landing-stages for hauling nets had been formed. The pursuer averred that both these structures constituted obstructions in the sense of the Salmon Fisheries Acts¹ to the free passage of salmon up the kyle. And particularly that, by the lower erection F H salmon coming up the kyle were turned aside into the bay of Kincardine, and thereafter, being stopped by the upper erection, A B, were compelled to turn back and seek a way into the main channel to the seaward of the lower end of F H, from which point, if they went up the main channel, they had to run the gauntlet of the defender’s nets at his station on the “green island” and the embankment F H, and of those of the Skibo fishers on the opposite shore.

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The pursuer further averred that the embankment F H supplied and was intended to supply means for the defender taking additional shots of salmon at a place where, but for its erection, he could not take such shots, or, at any rate, could not take such shots so effectually or for such long period at each tide.

The pursuer pleaded ;—(1) The erections complained of being of the character of obstructions prohibited by the statutes, and being within a river and its estuary, and in a locality falling within the prohibitions of the statutes, are illegal, and ought to be removed. (2) *Separatim*, the structures or erections are illegal, and ought to be removed, in respect that they are fitted and designed unduly, and by artificial means, to facilitate the capture of salmon by the defender and his tenants.

The defender maintained (1) that what was known as the “green island” was, within the years of prescription, been joined to the mainland by a low ridge at its upper end, which had only recently been broken through by the action of the tide and of floods, and that in building the embankment A B, which he had done to assist in preserving the “green island” from further encroachments, he had only replaced what was there before. (2) That formerly a continuous bank of shingle ran from the lower end of the island as far as the Black Scaup point, a distance of more than a mile down the river. That this bank, which was dry at low water, separated the main low-water channel of the kyle from Kincardine Bay; and in consequence of the erection in 1837 and extension in 1857 of a dyke on the Skibo side running obliquely into the kyle for some distance across of the lower end of the island the main stream of the kyle, which had a natural tendency to strike against the Bonar shore, and needed this bank to retain it in its proper channel, had been deflected on to the Skibo bank, and had ultimately about the year 1862 burst through and forced

¹ 424, c. 11; 1427, c. 6; 1469, c. 38; 1477, c. 73; 1488, c. 16; 1489, c. 1563, c. 68; 1579, c. 89; 1581, c. 3; 1685, c. 20; 1705, c. 2; 25 and 26 c. 97; and 31 and 32 Vict. c. 123.

No. 120. its way into Kincardine Bay; that the result of this deflection of the water and threatened formation of a new channel of the kyle through Kincardine Bay was most detrimental to the defender's fishings, both at the "green island" and at the Black Scaup, and that accordingly he had proceeded to make up the breach formed in the natural bank, which was part of his own foreshore, and to which he had right under his titles.

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The defender pleaded that the erections complained of did not come within the prohibitions of the salmon fisheries statutes, and were a lawful exercise of his rights of property, and necessary for the protection of his property and fishings.

A proof was led, in which the defender failed to establish his averments as to the erection A B.

With regard to the erection F H, it was established that the Skibo weir was erected in 1837, and strengthened and extended in 1857; that prior to 1857 a firm bank of shingle had extended from the end of the "green island" as far as the Black Scaup; that, though in no place more than one foot above low-water mark in the main channel, and in some places probably less, it was sufficient to confine the main channel in its proper course so as to cause it to run in a sort of canal and to prevent its breaking into Kincardine Bay, which was always dry for a considerable time both before and after low water, notwithstanding that the bottom of the bay was three feet below the low-water level in the main channel; that the bank was burst through shortly before 1862 near the end of the "green island;" that this breach was attributable to the deflection of the water by the Skibo weir; that in 1862 this breach was made up by the defender, care being taken not to raise the artificial work above the level of the former natural beach; that further breaches occurred in subsequent years, and were made up in 1864 and 1866 and 1868 by an extension of the embankment; and that in 1868, the first embankment being thought insufficient, it was strengthened and raised about sixteen inches to give it greater stability.

It was further proved that, though not made for the purpose of facilitating the shooting of the nets at the Bonar station, and not used for that purpose for some time after its completion, it was at the date of the action and had been for some years so used with beneficial results to the defender's fishings; that no objection was taken by the pursuer to the erection of F H until after the erection of A B, which was not till the summer of 1874. The first objection was intimated in the autumn of 1875.

The Lord Ordinary, on 22d December 1876, pronounced this interlocutor:—"Finds that the bulwark, first mentioned in the summons, erected at or near Bonar Bridge, and marked A B on the plan produced along with the summons and referred to in the condescendence, is a sufficient obstruction to the passage of salmon and other fish of the salmon kind, and is situated within the limits of the river Oykel and its tributary streams, including the estuary thereof, and is illegal, and ought to be removed; and decerns and ordains the defender to remove the same within six months from the date hereof: *Quoad ultra* assoilizes the defender from the conclusions of the action, and decerns: Finds nevertheless the party entitled to expenses." *

* "OPINION.—With regard to the erection between the north end of the island and the bank, marked A B on the plan, I think the result of the evidence is that this erection operates, or may, and probably does, operate as an obstruction to the passage of salmon; and as it was recently made and immediately objected to by the pursuer, whose title to complain of it is clear, I have no difficulty in giving decree for its removal.

"With regard to the erection at the south end of the island, marked F H

The pursuer reclaimed.

The defender intimated his acquiescence in the Lord Ordinary's judgment, so far as relating to the erection A B.

Argued for the pursuer;—There could be no doubt that the erections

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a plan, I think the pursuer's case has not been established. This erection no doubt facilitates the capture of fish by affording standing ground to the fishermen, and it probably extends and improves the natural standing ground which existed in the same locality before the change in the current caused by the embankment on the Skibo bank. But except by facilitating the capture of fish, by a mode of fishing which is in itself unobjectionable, I do not think it is proved that the erection is an obstruction to the passage of fish. In considering the defence, the long period during which the erection was allowed to stand without objection has not been without influence on my mind. The first erection was made fourteen years ago, and the latest change upon it, which is, I think, upon reasonable evidence, to have been rendered necessary by the variation of the current, was made eight years ago. I do not say that the acquiescence thence inferable would have been sufficient to bar the pursuer from objecting, after such lapse of time, to an erection clearly proved to be a considerable obstruction to the passage of fish. But in considering conflicting evidence with regard to the probable operation of such an erection as that in question, and made under the circumstances which existed, and which undoubtedly, in my opinion, warranted some such erection for the conservation or correction of what the current had recently carried, and was continuing to carry, by lapse of time, without complaint stated, is, I think, an important topic which affects the initial presumption and *onus*, and warrants some leaning in favour of what exists, and against the objection stated to it after what may be reasonably termed a settled state of possession had been established. It is serious, and it appears from the evidence in this case that although the erection immediately in question may be, and probably is, of an unusually substantial description, erections of a similar character, and for a similar purpose, are usual in the estuaries of rivers. Now, when the proprietor of a fishing has erected such an erection without objection, and no complaint has been made against its existence or use for a considerable number of years, it is, I think, reasonable to assume that he on his part may have made arrangements with the fishermen, and that they on their part have arranged their business on the footing of its continuance, and so that much inconvenience and substantial hardship would result to them from its removal. I do not say or think that this consideration ought to weigh more heavily, or to be pressed further against an objector who tardily urges his complaint than this—that it raises a more or less strong presumption against the objection to begin with, and to a corresponding extent increases the *onus* upon the objector to overcome the presumption, which presumption has been raised or strengthened, by evidence to establish the validity of the objection. I do not forget that the objection, though the statement of it may be prompted by private interest, itself rests on public grounds; but I am nevertheless of opinion that the evidence in support of such an objection ought to be considered with reference to any considerable delay in bringing it forward, and that if the objector was from the first and all along in a position to urge it if founded. For the objection, although of a *quasi* public character, is nevertheless such as the law leaves to be stated and enforced by private persons on the prompting of private interest, the assertion of which is, if not the only, certainly the most obvious and satisfactory criterion of its existence, at least in such a case as that which we have here to consider. These considerations are, I think, more forcible when the question raised by the objection is one of alleged nuisance, as, for example, whether a particular erection is some inches higher or some feet longer than it ought to have been, or generally of such a character as to give rise to a reasonable difference of opinion.

Considering and weighing (in the spirit which I have endeavoured to maintain) the evidence respecting the erection at the tail of the island, and where it is proved that a natural embankment or ridge of sand and gravel of

No. 120. A B and F H together constituted an obstruction in point of fact to the passage of salmon from Kincardine Bay to the upper waters, and so came within the prohibitions of the statutes. But even if A B were removed F H remained such an obstruction, though to a lesser extent. For the whole of its length, until the tide rose above it, it blocked the passage of fish from Kincardine Bay into the main channel. Being turned by the tide they would run up the channel behind the island, and finding not sufficient water to carry them over the beach at its upper end would have to return and find a way into the channel at the lower end of F H. and thereafter be exposed to the nets on both sides instead of escaping them. There could be no doubt that whatever might be said about a fortification on a natural bank, F H was truly erected for the purpose of improving the fishing, and for nothing else. And the defender was not entitled to make erections which could impede the passage of fish, however slightly, for that purpose.¹ A tow-path had been already expressly pronounced an illegal erection.²

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Argued for the defender;—Now that A B was removed there was no pretence for calling F H, taken separately, an obstruction within the scope of the statutes. The pursuer was forced to put his case as high as that that anything whatever placed in the water which could by any possibility even deflect the course of a salmon was illegal. But there was no authority for such a stretch of the statutes. If the cases cited in support of the pursuer's argument were examined it would be found that they all related either to fixed engines for the direct capture of fish, or to weirs or weirs placed in rivers to prevent the passage of fish with the purpose of obstructing them in order that they might be caught by other means. But the present case did not come within either category. It was an erection on the foreshore, and in no way prevented the passage of fish from the upper water. The way for them was just as clear on either side as it was when the island stood there alone. Much stress was laid on the case of Forbes v. Smith,³ as establishing that a tow-path or gangway in the *alveus* of a river was illegal. But (1) F H was not in the *alveus*; and (2) the case of Forbes v. Smith only found that a proprietor of salmonings on a private river, who had no right of property in the bank or *alveus*, was not entitled to erect a tow-path in the *alveus* with the effect of deflecting the water and injuring the banks of an *ex adverso* riparian owner. The case was not between rival proprietors of fishings, but purely and simply like the case of Jackson v. Marshall,⁴ the case

of appreciable size and utility for fishing purposes formerly existed, I am of opinion that I ought not to pronounce it to be an illegal obstruction to the passage of fish, as distinguished from a facility for capture by legitimate fishing. In respect to this erection, therefore, I shall hold that the pursuer has not discharged the *onus* which was upon him, and assoilzie the defender. Regarding the result of the whole case as one of divided success, I shall not give expression to either party.

¹ Duke of Queensberry v. Marquis of Annandale, 1771, M. 14,279; Duke of v. Littles, 1797, M. 14,282; Kinnoul v. Hunter, 1802, M. 14,301; Gair v. M'William, 1846, Lord Corehouse's opinion, 10 D. 666, note.

² Forbes v. Smith, Feb. 19, 1824, 2 S. 721, June 28, 1825, 1 W. and 3 J. 113; Hay v. Magistrates of Perth, Dec. 20, 1861, 24 D. 230, 34 Scot. Jur. 118; May 12, 1863, 1 Macph. H. of L. 41, 35 Scot. Jur. 463, 4 Macq. 535, and Chancellor's opinion, *ad fin.*; Jackson v. Marshall, July 4, 1872, 10 Macph. 44 Scot. Jur. 506; Morris v. Bicket, May 20, 1864, 2 Macph. 1082, 36 Jur. 529, July 13, 1866, 4 Macph. H. of L. 44, L. R. 1 Sc. App. 47, 38 Jur. 547; Colquhoun v. Orr Ewing, Jan. 26, 1877, *supra*, p. 344.

³ *Supra*, note 2.

⁴ *Supra*, note 2.

riparian proprietor objecting to an erection *in alveo ex adverso* of his property to its detriment. Here, however, the pursuer's only title was that he was proprietor of fishings higher up the kyle. What the defender really had done was not to erect an obstruction, but to restore his foreshore to the condition in which it was prior to the breaches in it caused by the deflection of the current by the Skibo embankment. This he was entitled to do. If he had done more than restore the natural bank it was only because his first work was insufficient for the purpose of resisting the weight of water which now came against it.¹ The pursuer could not now be heard to object to this small addition to the original embankment after having remained silent since 1868.

At advising,—

LORD JUSTICE-CLERK.—My Lords, this case raises some interesting questions to the views of law applicable to the rights of proprietors of salmon-fishings.

Originally presented, it was a case of very considerable difficulty; but now that the parties have agreed that one of the two alleged obstructions shall be removed it does not appear to me that the question in regard to the lower obstruction is really, when it is looked at with attention, attended with much perplexity or doubt. I need not go into a long detail of the locality, which is familiar to your Lordships and the parties. It seems that this ground of Sir Charles Ross is opposite property belonging, or which did belong, to Mr Dempster of Skibo. It is situated on the river Oykel, and the salmon-fishing there, as is well known, is a very valuable property. It is below Bonar Bridge. The Duke of Sutherland has the salmon-fishing some miles up, and is entitled, of course, to all the rights of a proprietor of salmon-fishing in respect of his property above; but he is not a riparian *ex adverso* proprietor, and any right which he has, therefore, apart altogether from any direct injury which he can qualify, is the right of a proprietor of salmon-fishing, and therefore having an interest in the free passage of the salmon as far as the law provides for and protects it. What he says is substantially this,—that there is a portion of the stream of the Oykel which breaks into two channels, one going round the west side of a small island in the river, and the main channel, going up on the east or north side along the Skibo bank; and he complains of two things,—first, that at the upper end of the island Sir Charles Ross, or those acting for him, had made a barrier preventing the salmon from getting up by the end of the island to the main channel of the Oykel, and that thereby the fish were scared or turned back for the reason of their not having that ordinary mode of access to the channel. Secondly, he says that in order to make that effectual Sir Charles Ross had also made a barrier along the sandbank at the lower end of the island, which had the effect that at a certain period of the tide the fish which came up that channel were obstructed from getting into the main channel of the Oykel. Now, these two things seem to be quite true. I may mention that generally the whole of this portion of the river is under water at high tide. At low tide flows over the whole of it. The operations in question affect the river only at certain periods of the tide, and these periods are very material for salmon-fishing. Now, there seems no doubt at all that the first of these obstructions at A B had the effect of turning back the fish at certain periods of the

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¹ *Mather v. Macbraire*, March 14, 1873, 11 Macph. 522, 45 Scot. Jur. 337; *and of Nairn v. Brodie*, 1738, M. 12,779; *West v. Aberdeen Harbour Commissioners*, Dec. 8, 1876, *supra*, p. 207.

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tide, and the effect of that obstruction and the other barrier below the island was to throw the fish back into a portion of the stream from which they had no access to the main stream without returning upon their path, and, accordingly, they were there captured by the nets of Sir Charles Ross at the point marked on the plan. If the case had stood there I do not think there is any doubt, and I concur with the Lord Ordinary entirely that this was a device altogether contrary to the rights of the upper heritors. It prevented the salmon from having a free run, according to the ordinary mode in which they were accustomed to reach the main channel; and, moreover, it was an obstruction directly struck at by the terms of the statutes relating to salmon-fishings placed within the tide and reflux of the tide, which is the very locality to which these Acts of Parliament apply. But the case has been entirely altered by Sir Charles Ross undertaking to do away with the first of these barriers, and to leave the channel at the head of the island as free as it was before. And now the question is, whether that which has been constructed at the other end of the island, above the sandbank, should be allowed to remain? According to Sir Charles Ross, this erection or bulwark—I suppose it is made of loose stones—has no other object but to counteract the effect of the stream being thrown back from an embankment made many years ago upon the Skibo side. Whether that was the sole object of the erection may possibly be doubted, but there can be no question that the effect of that embankment which was made on the Skibo side was to carry away the previous bank which had existed in the locality where this erection has been made; and Sir Charles Ross says, and says with great deal of force, that he was entitled to remedy that operation, seeing that the *ex adverso* proprietor had no right to injure his bank,—that he was entitled, as in a question with him, at all events, to protect his own bank, and to raise this barrier, which should have the effect of the previous bank before it was carried away. It has been said that that is not his remedy, and that he should have required the opposite proprietor to take away the embankment. Now, I greatly doubt whether the Duke of Sutherland has any interest to say that. I do not think that that is a matter with which he has any concern. If this is an illegal obstruction in the sense of the statutes then that will be quite sufficient for his purpose, whatever the object it was; but if, on the other hand, it is not, he is not in a position to object to the structure of this kind on any ground which might be competent to parties, either lower or *ex adverso* heritors. But, in the second place, I do not think that this plea would be sound if pleaded for an inferior heritor. There was a case referred to—the case of Jackson v. Marshall, I think,—where we prevented a proprietor from building an embankment in the *alveus* of the river, although it was for the purpose of preventing the washing away of his bank, in consequence of some operations which had taken place above; but there seems no doubt at all that this is on the foreshore, and not in the *alveus*. It is a construction which rests on ground on which the proprietor is entitled to build,—at least, in any question with a merely upper proprietor. And therefore I hold that *prima facie* Sir Charles Ross was entitled to do what he did for the purpose of protecting his bank; and, moreover, that if he made the structure where the bank had been previously, and made it stronger, he was entitled to do so, seeing that the bank had not proved strong enough to resist the action of the water. But then it is said that it has been raised too high—that it is a foot and a half higher than the bank ever was, &c.

result of which is that, as the tide only makes some eight or ten inches in the course of the hour, at least a couple of hours are added to the period when the salmon are unable to get across the barrier, and the result is that these salmon are kept waiting there, and fall a prey to the fishers of Sir Charles Ross. That that is the effect I think we may assume; and if Sir Charles Ross made that erection with the purpose of making a better fishing station the question is whether he was entitled to do it? I do not think it at all unlikely that he did, but then I do not think this is an obstruction in any sense contemplated by the statute. It is a mistake to suppose that everything which is erected on the foreshore, which may have the effect of altering the course of the salmon, is an obstruction of which an upper heritor is entitled to complain. That is not the meaning of the statute. An obstruction must be something which prevents a fish from getting up. If all that can be said is, that while the fish have the choice of the two channels going up, by the right or west bank, or the left or east bank, there is an intermediate place where a fish might have gone across, which has now been shut up by the operations of the defender, I do not think that is an obstruction. That the fish has to go two or three yards round in order to get to a stream is certainly not an obstruction to the passage of salmon in the sense of the statute; and it is wholly immaterial whether the result is to improve the fishing of Sir Charles Ross, seeing that if it be not an obstruction in the sense of the statute the Duke of Sutherland has no title and no interest to object to what has been done; and, subject to the provisions of the statute, Sir Charles Ross is perfectly entitled, in a question with him, by anything he pleases to put there, to improve his own chance of catching salmon. I am therefore of opinion, that there was a good and reasonable ground for, at all events, a portion of the erection complained of; but, in the second place, that, as it stands, no part of it seems to me to come up to what is necessary in order to constitute an obstruction to the passage of salmon in the sense of the salmon statutes, and that, consequently, the Duke of Sutherland has no title to complain of what has been done upon ground belonging to the defender. I should not have thought it of consequence here that this was on the foreshore, if it had been an obstruction; because, as I have already said, it is to obstructions to the passage of salmon by means of artificial erections within the flux and reflux of the tide, or in rivers, that the statutes refer; and nothing can prove that more clearly than the fact that the commissioners under the Salmon Act were instructed to fix, and have fixed, the places where the tide ebbs and flows, so as to save the necessity of the long and expensive inquiries which used to proceed between the proprietors of the salmon-fishings in such rivers. Now, the boundary of the estuary where the sea is fixed, and that is the place above which no obstruction can be erected to the passage of salmon. My Lords, these are the views, generally, which I take of this case, and they substantially coincide with those of the Lord Ordinary. I think that, with the removal of the upper obstruction, this erection is not an obstruction in the sense of the statutes, and that Sir Charles Ross is entitled to keep it there.

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HARD ORMDALE.—The object of the action in this case is to enforce the decree by the defender of, 1st, what is called a “bulwark,” on the line marked on the plan referred to by the pursuer in article 8 of his condescendence, erected by the defender across the west channel of the river Oykel; and of, 2d, what is called a jetty or embankment, erected on the line marked, on the same

No. 120. plan, F G H, at a lower part of the river. And the pursuer concludes in his summons for declarator to the effect that these erections are fixed obstructions to the passage of salmon, and other fish of the salmon kind, and are situated within the limits of the river Oykel and its tributary streams, including the estuary thereof; or, otherwise, that the same are erections made or material enlarged and maintained by the defender, with the view of unduly facilitating the capture of salmon by him at his fishing stations at or near Bonar Bridge, to the prejudice of the pursuer and other parties possessing salmon-fishings in the river Oykel and its tributaries above Bonar Bridge.

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The Lord Ordinary has, by his interlocutor under review, decided in favour of the pursuer in regard to the first of these alleged obstructions, and against him in regard to the second. I am of opinion that the Lord Ordinary has decided rightly.

It was not, indeed, disputed by the defender that to some, if not the whole, of its extent, the bulwark A B was erected by him, and that it operated as an obstruction to the passage of salmon as complained of by the pursuer: but, as he ultimately, in the course of the discussion, intimated that he did not object to the removal of that obstruction, it is unnecessary to say more on the subject of it. The mode of removal and the extent to which it ought to be carried may, I think, be safely left to the man of skill to be appointed by the Court, under whose immediate charge and directions the removal will be made.

In regard to the other alleged obstruction the defender makes no concession. But, if I am not greatly mistaken, the removal which is to take place of the obstruction A B has a very material bearing upon the question whether the pursuer is entitled to prevail in regard to the second obstruction F G H. As I understand his averments on record, and as I understood his arguments in the debate, the latter obstruction operated to his prejudice chiefly in consequence of the obstruction A B, so that if the latter is removed the injurious sequences alleged to result from the former will be, in a great measure, if not entirely, obviated. In accordance with this view, the pursuer says that the means of the obstruction A B, "salmon coming up the river and into the bay of Kincardine, in place of passing up by the said channel into the Oykel, close to Bonar Bridge, are compelled to turn back and go up the main channel, where they run the gauntlet not only of the nets belonging to the salmon fishery of the said Sir Charles William Augustus Ross, but also of the salmon fishery opposite on the north or east side of the kyle, belonging to Mr Sutherland Walker of Sutherland and also let to the defenders Messrs Pourie and Pitcaithley. By these means Messrs Pourie and Pitcaithley capture a larger number of salmon than they would do if the said channel were not obstructed." And again, in the second article of his condescendence, the pursuer says that "salmon coming up the kyle are turned aside into the bay of Kincardine, and thereafter, being stopped by the first obstruction before mentioned, are compelled to turn back and go up the main channel, and particularly that portion of it *ex adverso* of the jetty, where they are exposed to be caught by the nets on both sides of the water as aforesaid." It thus appears, on the shewing of the pursuer's plea, that the injurious effects of the second of the alleged obstructions depend much upon the first.

But, it is true, that the pursuer, after the statements which have now been quoted from article 8 of his condescendence, goes on to say,—“Further, the jetty supplies, and was intended to supply, means for the said Messrs Pourie

and Pitcaithley taking two additional shots for salmon at a place where, without any artificial erection, no shot could be taken for salmon at all, or at all events, such shots could not be taken so effectually or for so long a period at each place." I doubt, however, whether this is an averment sufficiently relevant to sustain the pursuer's conclusions against the defender. It will not do for the pursuer merely to say that the defender has improved the banks of his own property so as to be better able to catch the salmon in passing, or, in the pursuer's own words, to give him the additional shots, it not being alleged that this mode of fishing is in itself illegal or objectionable. I can, therefore, very well understand how the pursuer should have allowed a period of fourteen years to elapse since the greater part of the second of the alleged obstructions was erected by the defender before bringing his action, and that it was only after the effect of the first came to be observed and felt that it occurred to him to insist for removal of the second. In this view I should have little or no hesitation in thinking, with the Lord Ordinary, that, after the lapse of time which the pursuer allowed to occur before raising the present or any action, his conclusions as regards the second alleged obstruction cannot be sustained, especially if it is not even said or proved that any complaint was in any form made on the subject until the present action was raised. It would be unfair to the defender now to compel him to restore matters to the condition in which they were before his operations commenced. The defender was entitled to believe that what he did in regard to the second alleged obstruction was not objectionable, or, at any rate, was not so objectionable as to call for any action or complaint on the part of the pursuer. He may, accordingly, in this belief, have entered into contracts and engagements with others, against the consequences of which he could not now be restored. It would be inequitable, therefore, and unfair to the defender in such circumstances, to sustain the action so far as the second of the alleged obstructions is concerned.

Nor am I satisfied on the proof that, independently of these considerations, the pursuer has succeeded in establishing his grounds of action in regard to the first and alleged obstruction. The proof is certainly not conclusively in his favour, whether the defender's object in extending the embankment F G H, or the alleged injurious effect of it on the pursuer's salmon-fishing, is considered. It nevertheless appears to me that the proof goes to shew that the object of the defender was to preserve his banks and fishing-station from being destroyed by the action of the sea, aggravated by the operations on the Skibo side, rather than to desire, or illegal attempt, to interrupt the passage of the salmon; and, if so, I am not prepared to say that this was an object which the defender was not entitled to carry into effect, the more especially as the pursuer did not interfere to prevent him, or, so far as appears, give any intimation of his disapproval. It must not be overlooked that while the pursuer had a right to salmon-fishing in the upper waters, the defender had not only a similar right at the place in question,—that is, the place where the second of the alleged obstructions was erected by him,—but also, and this, as it appears to me, is a very important consideration, a right of property in the *solum* or ground upon which the obstruction was erected. And, at any rate, it was expressly admitted at the debate that the erection was on the foreshore and not in the *alveus* of the river. It may be true that when the erection of the alleged second obstruction was commenced in 1862 the sea had encroached on, and partly submerged, the ground, but that was no reason, but the contrary, why the defender should not recover

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No. 120. his property and protect it from further dilapidation. That the defender did no more than this is, I think, sufficiently established by the proof, and I would refer in particular to the evidence of the defender's witnesses, Mr Adie, Mr Lipscomb, John Ross, and George Pitcaithley, and to the pursuer's own witnesses Donald Urquhart and John Urquhart. Having regard to the statements made by these witnesses, as well as to the other evidence in the case, I must take to be proved, in point of fact, that the second alleged obstruction is substantially nothing more than a restoration *de recenti* of the *status quo*, and a necessary protection against future inroads of the sea. And if this be so I can not doubt that in point of law the defenders did not exceed their legitimate rights as illustrated by the cases of the Town of Nairn v. Brodie, Mor. 12,777 Forbes v. Smith, as decided in the House of Lords, 1 W. and S. 583, and Math and Young v. Macbraire, decided 14th March 1873, 11 Macpherson, p. 522.

There is, no doubt, some evidence to the effect that the height of the jetty or bulwark founded on by the pursuer as forming the second of the alleged obstructions complained of by him is about eighteen or twenty inches higher than the old weir, but I cannot hold this to be, in the circumstances, a sufficient reason for now interfering with it. The pursuer has not proved, and there is nothing in the proof to indicate, that these eighteen or twenty inches are in themselves injurious to the pursuer, and I do not think they can be so. Besides, it is to be presumed that it was necessary, in order to render the bulwark efficient and capable of resisting the inroads of the sea, to make it, especially at first, somewhat higher than it originally was. It has in all probability consolidated and subsided so much as to remove all ground of complaint now on the score of undue height, if indeed it could have previously been made the subject of complaint.

These are the grounds, shortly stated, upon which I am of opinion that the Lord Ordinary's judgment is right and ought to be adhered to.

LORD GIFFORD.—I have come to be of the same opinion. I think the judgment of the Lord Ordinary is right, and ought to be adhered to; and I will state the ground of my opinion in one or two sentences. The pursuer of this action, His Grace the Duke of Sutherland, is proprietor of certain salmon-fishings in the upper parts of the river Oykel, a good many miles from the sea. The defender is proprietor of salmon-fishings at the mouth of the Oykel and of his lands on the kyle of Sutherland or kyle of Oykel, which is the name of the estuary of the river. The tide flows several miles above Bonar Bridge. The pursuer complains that the defender has made two embankments in the kyle of the estuary below high-water mark, which embankments, the pursuer says, do obstruct the passage of salmon up and down the Oykel to and from the sea. The first of these embankments or bulwarks is described on the plan as the bank A B, and it connects the shore or mainland with the north end of a tidal island in the estuary of the Oykel. The effect of that embankment is to convert the island into a peninsula or long strip of land running down the estuary, and it is said that that is an obstruction, because, when fish ascend on the hand of the island in going up, instead of getting up the river they find themselves met by the embankment, and being obstructed in ascending they have to return, and are exposed to the nets of Sir Charles Ross' fishermen, and thus caught. The second embankment, which, however, must be taken as having a mutual relation and mutual action with the first, is at the other end of the island, and extends

in the direction of the island down towards the sea. It is described on the plan as the embankment F H. Now, these two embankments, although they have a mutual relation and a mutual action, must, I think, be taken separately. The Lord Ordinary has done so, and has found that the first, the embankment A B, is illegal, and must be removed, but that the second embankment, F H, is not illegal, and that the defender is entitled to maintain it. I agree with that result. I need say very little as to the first, because the finding of the Lord Ordinary in favour of the pursuer has been acquiesced in by the defender, and that first embankment is to be removed and matters restored to their original condition at the sight of a man of skill to be named by the Court, and the result of that will be that what was formerly will be again an island in the estuary, upon both sides of which the tide will flow, and salmon will be able to ascend the Oykel on either side of the tidal island. This, of course, removes the objection that fish coming up between the island and the mainland will be met and prevented from reaching the river to a greater extent than they were by the natural inequality of the bottom or natural ridge which always existed there. And that brings me to the second question, whether the embankment at the south end of the island, stretching down the estuary, is or is not, in the sense of the statutes, as they have been interpreted by decision, an illegal obstruction to the passage of salmon. Now, I am of opinion that that second embankment, the first being removed, is not an illegal obstruction. In the first place, I think, upon the evidence and upon the common sense of the thing, it is not an obstruction in any reasonable meaning of that word. The island was always there, and, to the same extent of course, the island is an obstruction, for the fish must take either the right hand or the left, and go round the island in order to ascend the river; and the lengthening of the island, which is practically done by building this embankment on the foreshore at the south end of it, does not make the island a greater obstruction to their ascending than it was before. The amount of water that flows up or down with the tide is exactly the same; the breadth of passage which the fish have to swim in on the right hand or left is exactly the same. The only difference is that they have to pass a somewhat longer island in ascending, and I do not think that this circumstance constitutes, on any fair construction of the statutes, an obstruction to the passage of fish. As many fish may pass the river with the island lengthened as could pass on either side of the island shortened; and if Sir Charles Ross had not the salmon-fishings, or if no salmon-fishings existed at the mouth of the river, it would have been impossible for the Duke of Sutherland to say that the mere lengthening of the estuary island kept salmon from ascending to the higher reaches of the river. But then it is said that although it will not prevent salmon from swimming up on either side, it actually gives Sir Charles Ross an additional shot, or, in another view, two additional shots, at the salmon as they pass, and that is true; and that brings me to consider whether the mere arranging the foreshore or arranging the estuary and so as to have better or more shots with the net and coble than could be taken before is an illegal obstruction in the sense of the statutes. Now, I do not think it is. Suppose that the foreshore of Sir Charles Ross' land had been rough,—so covered with rocks or boulders as to prevent nets from being easily drawn there, it would be quite within his power, and perfectly legal for him, to remove these rocks or boulders from his own foreshore, and to dress the foreshore so as to make it possible to draw salmon nets upon it, with net and coble, in the usual way. There would be no obstruction to fish by removing the

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No. 120. rocks, though the effect would be that more shots were made and more fish caught, and in that sense obstructed, because you cannot obstruct fish more effectually than by catching them ; but then catching fish by the net and cobb is a legal mode of obstructing, so that this is not an obstruction in the sense of the statutes. The lengthening of the island does not stop the salmon, but merely affords a facility for salmon-fishing by net and cobb in a legal and ordinary way. But, in the second place, and even supposing that the lengthening the tide island seawards were to be held an obstruction, I am of opinion that it is proved on the evidence that substantially the so-called pier or bulwark lengthening the island is nothing more than a restoration of an old bank that was there before and I cannot help attaching great importance to the real evidence, for such appears to me, of the levels of the tide and ground here. It is not disputed that Kincardine Bay is at a lower level than the proper channels of the river Oyne so that in the flow and ebb of the tide there will always be a tendency for the water to flow, if it can get an opening at all, into the lower level of Kincardine Bay. And thus there will necessarily be a tendency to eat away, so to speak, the long bank which forms the tail of this tidal island. I think that presumption, which we can reach by the nature of the ground, is corroborated by the witnesses to whom Lord Ormidale has referred. But still further, I think it is proved that that tendency is increased by what is called the Skibo embankment on the other side ; and, on the whole, I have very little doubt that during good many years back there has been a gradual tendency of the tide and of the water of the river to get over this ridge, which originally kept it in its main channel, and to wear away the ridge, and thus abolish and take away more and more the bank or division between that main channel and Kincardine Bay. Now, I take it to be quite legal for a proprietor of the foreshore, in circumstances of this kind, to restore timeously a bank that is in the course of being eaten away, and the eating away of which is to his detriment. On the evidence I think Sir Charles Ross has not done more than fairly to restore to that extent. I agree with Lord Ormidale that the excess of eighteen inches at part—for it only applies to part—is not more than may be fairly said to strengthen the bank against a force which was found too strong for it. But then, in the third place, even though there had been no bank there before, I am of opinion that it is a legal operation of a defender with an island of this kind to lengthen seawards upon the foreshore. The island and the foreshore are both Sir Charles Ross' own property. The embankment F H is all, I think, within the proper foreshore. It is all marked as uncovered at dead low water. Now, I think it is legal for him to do that. Even if it were in the *alveus* I agree with your Lordship in the chair that the Duke of Sutherland, who is not an *ex vires* proprietor, but at some considerable distance up the river, would not be able to any title to challenge it. But we are freed from any delicacy as to operations in *alveo*, for the operations are on the foreshore. Now, why should not the proprietor of the foreshore, and this is a barony, gain land from his own shore ? I do not see any reason why he may not, excepting that it is alleged that so gaining land will give him an additional shot as a salmon-fishing proprietor. But what does that matter ? A man may get as many shots as he can by an erection on his own land if he does not obstruct the passage of the fish or infringe any of the laws enacted for the preservation of salmon. And therefore on all these grounds, I think the embankment F H is a legal embankment. If the Lord Ordinary puts it, it is little more than giving him additional standing

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and to draw his nets upon, and I see nothing illegal in smoothing the ground making it fit for standing upon when the net is being drawn. And, therefore, these three main grounds, I think the embankment F H is legal, and that it is not an illegal obstruction in terms of the statutes. These statutes have been interpreted very widely in favour of salmon rights, and things have been held to be obstructions which, in common language, could hardly be considered as such—the rattling of bones under a bridge for instance; but I do not think the statutes, in their widest possible application, apply to a case like the present.

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THE following interlocutor was pronounced :—“ Having heard counsel on the reclaiming note for the Duke of Sutherland against Lord Young’s interlocutor of 22d December 1876, adhere to the said interlocutor; but further, remit to Mr Allan Stewart, civil engineer, to examine the bulwark marked A B on the plan No. of process, and see the same removed, in terms of the Lord Ordinary’s interlocutor,” &c.

MACKENZIE & BLACK, W.S.—MACLACHLAN & RODGER, W.S.—Agents.

KERR, ANDERSON, AND COMPANY, Complainers.—*Fraser—Gloag.*
JOHN LANG, Respondent.—*Guthrie Smith—Lang.*

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See—Glasgow Police Act, 1866, 29 and 30 Vict. c. cclxxiii. sec. 384—Objection to Fence River—Right of Way.—The Glasgow Police Act authorises the Master of Works to call upon “any proprietor or occupier of a land or heritable fence the same, or repair any chimney-stalk, . . . or any rhone, sign-board, or other thing connected with or appertaining to any building thereon, which appears to be dangerous.” *Held* (reversed judgment of Lord Rutherford, *dis. Lord Deas*), that this did not authorise him to call upon the proprietor of lands, bounded by a public navigable and tidal river along the bank of which the public had acquired a right of footpath by prescription, to erect a fence between the path and the river.

On 23d February 1875 the Master of Works appointed under the Glasgow Police Act* gave notice to Messrs Kerr, Anderson, and Company, as agents for Mr Monteith of Carstairs, that the north bank of the Clyde, in connection with the lands and heritages of which they were “proprietors” within the meaning of said Act, situated at or near Rutherglen Bridge eastward as far as their property extended, was in an insecure and dangerous condition, and not protected, and required them within ten days thereafter to put up a fence along the north bank of the river Clyde as far as their property extended. Kerr, Anderson, and Company objected to this notice on the grounds, *inter alia*, that they disputed the power of the Master of Works to make it, and that the fence required was unnecessary.

1ST DIVISION.
Lord Rutherford
Clark.
B.

John Lang, the procurator-fiscal for the public interest, on 19th August

Section 384 of the Glasgow Police Act provides, that “the Master of Works by notice given in manner hereinafter provided, require any proprietor or occupier of a land or heritage to fence the same or repair any chimney-stalk or chimney-head or can, or any rhone, signboard, or other thing connected with or appertaining to any building thereon, which appears to be dangerous, to his entire satisfaction.”

No. 121. 1875, presented a petition to the Dean of Guild of Glasgow, in which he narrated the notice and requisition by the Master of Works and objection by Kerr, Anderson, and Company, and prayed the said Dean of Guild inquire into, try, and determine the questions competently raised in the objections by Kerr, Anderson, and Company, with respect to the necessity and reasonableness of the work required to be executed, and the liability of the said proprietors for the cost thereof.

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The Dean of Guild pronounced a decision whereby he disallowed the objections of Kerr, Anderson, and Company, and found that the notice had been competently issued, and that the work required to be done by the said notice, and specified therein, was necessary and reasonable, and that he found Kerr, Anderson, and Company, liable in the expenses of the process.

Messrs Kerr, Anderson, and Company brought the present suspension of the decision of the Dean of Guild.

The complainers averred ;—"The complainers' property is not in a dangerous condition, and is not in the said requisition or petition to the Dean of Guild alleged to be so. Further, the complainers' said property is already sufficiently fenced, and neither the river bank nor the road are, in the said petition, of the 384th section of the statute, lands or heritages of which the complainers are proprietors or occupiers. The notice and requisition by the Master of Works were *ultra vires* of him, and not in pursuance of the statute."

The complainers pleaded ;—1. The notice and requisition libelled, and the interlocutor libelled following thereon, are incompetent, *ultra vires*, and not in pursuance of the statute, in respect (1) the statute contains no warrant for requiring the complainers to fence the river Clyde ; (2) neither the river bank nor the road mentioned in the statement of facts are in the sense of the statute lands and heritages of which the complainers are proprietors or in possession ; (3) the complainers' property is not in a dangerous condition, nor said to be so in said notice or petition ; and (4) the complainers' property is already fenced. 4. The fence ordered not to be required for the safety of the public, and the complainers being under no obligation to erect it, decree of suspension and interdict falls to be pronounced as prayed for.

Answers were lodged for John Lang, procurator-fiscal.

The respondent pleaded ;—1. No record having been made up in the Dean of Guild Court the present suspension is excluded by the statute and is incompetent.* 3. The proceedings in the Dean of Guild Court having been in all respects regular, and in conformity with the statutory requirements, the note should be refused, with expenses.

The Lord Ordinary pronounced the following interlocutor :—"Refuse the note of suspension, and decerns : Finds the complainers liable to the respondent in expenses, of which allows an account," &c.†

* The 277th section of the Glasgow Police Act provides,—“Every proceeding before the Dean of Guild in pursuance of this Act shall be subject to the following rules and regulations :— Where a record is not made, the decision given by the Dean of Guild shall be final and not subject to review, objection, advocacy, or appeal, or any other form of review or stay of execution.”

† “NOTE.— The decision of the Court in the case of Bruce v. Macph. 377 (45 Scot. Jur. 257), settles that the statute applies to all lands and heritages situated within the municipal boundaries. But as the case related to a mill-lade it is not conclusive on the present, where the dam does not exist by reason of an artificial structure.

“The Lord Ordinary is of opinion that the purpose of the Act was to secure

The complainers reclaimed, and argued;—"Lands and heritages" did not include rivers. The kind of fencing referred to in the Act was temporary fencing round buildings in the course of construction. The fencing was not intended to be between two public places, but between a public and a private place. The public had acquired a right to use the road, but that could not entail any further obligation on the proprietor of the ground. The case of Bruce, referred to by the Lord Ordinary, was very different, as there the source of danger was a mill-lade, which was the property of the owner. The source of the danger was the river, which did not belong to the complainer but to the Crown.

Argued for the respondent;—The road, which was the property of the complainers, was dangerous, and they were bound to fence it. The case Bruce decided that the custodiers of a public road were not bound to fence it, and here the river Clyde was in the same position as a public road.

During the discussion in the Inner-House a minute was lodged adding the following facts:—The lands of Barrowfield, lying along the north side of the river Clyde, bear in the title-deeds thereof to be bounded on the south by the river Clyde. A river-wall at one time extended continuously along the whole river frontage of the complainers' property, but has been to a great extent destroyed by the current of the river, although at some places it is still tolerably entire. There is a public right of way along the river on the north side thereof by a footpath. Along the north side of this path there is a stone wall which extends for a distance of 270 yards, and there is a wooden fence along the south side of said road from the end of said wall to the eastern extremity of the said lands. The space lying between the footpath and the river is of varying steepness and breadth, supported by a retaining or a wall of varying height. The greatest breadth of the said bank between the footpath and the river is 26 feet. The least breadth is 11 feet. The complainers draw water from the river Clyde by means of pipes laid along the said bank and running out to the middle of the river. The road is used only by foot passengers. The Clyde opposite the complainers' property, and for some miles above the same, is capable of being navigated, and is in point of fact used by sand barges and rowing boats, ships built at Rutherglen are floated down to the harbour at spring tides. A weir which extends across the river upwards of a mile below the western boundary of the complainers' property renders the river incapable of being continuously navigated to the sea. At ordinary high tides the water does not come to the top of the said weir, but at spring tides there is a depth of about 3 feet 3 inches over the same. At such times the tidal water affects the river for a considerable distance above the complainers' property.

It advising,—

ORD PRESIDENT.—This is a suspension brought for the purpose of quashing the order of the Dean of Guild of Glasgow. The jurisdiction of the Dean of

public from danger in the exercise of the rights belonging to them, and he decides that the property of the complainers is dangerous within the meaning of the Act. It is dangerous, because one of the uses to which it is subject cannot be enjoyed with safety in its present condition. It appears to the Lord Ordinary it would be a too limited construction of the statute to restrict it to cases where the danger arises from artificial causes.

The complainers did not press any technical objections, as they were desirous to obtain a judgment as to the effect of the statute, on the assumption that in the present state of things there is danger to the public."

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Guild under the Glasgow Police Act is privative and not subject to review, therefore unless this order is in excess of that jurisdiction we cannot touch it. The question is, whether the Dean of Guild was in fair exercise of his jurisdiction in making the order to erect this fence, which he has done.

The complainers are the representatives of the proprietor of the property at Barrowfield, which bears in the titles to be bounded on the south by the river Clyde. The lands in question extend from Rutherglen Bridge eastwards for 100 yards, and are occupied by manufacturing premises, which are enclosed by a wall from the river. On the outside of the wall there is a public footpath running parallel to the Clyde, acquired by the public, not by grant but by prescription. In some places the path runs close to the river and at some places above it, and is supported by a retaining or river wall. At other places there is a strip of ground interposed between the path and the river. This strip is undoubtedly the property of the proprietor of Barrowfield, and it is also clear that the same proprietor is the owner of the *solum* of the footpath, and accordingly the whole ground outside the wall is the property of the complainers' constituents but subject to the right of way. Now, the path being above the river and close to it, the police authorities think that its use is attended with danger, and indeed nobody can doubt that it is desirable that it should be fenced in order to protect the people that use it. The question is, whether the proprietor of the ground over which the footpath runs can be compelled to erect such a fence under the Glasgow Police Act. Under the 384th section of that Act the Master of Works is empowered to require the owners of property to fence their property. To the particular terms of that clause I shall return immediately. The Master of Works called on the proprietors of Barrowfield "to put up a wooden fence along said north bank of the river Clyde as far as their property extended less than 4 feet 6 inches high, with double railing on top, and fastened to the wall in accordance with instructions given by him, and that to the satisfaction of said Master of Works." The complainers objected, and in terms of the Act the Master of Works presented an application to the Dean of Guild, in which he sets out "that the north bank of the river Clyde, in connection with the lands and heritages of which they then were 'proprietors' within the meaning of said Act, situated at or near and extending from Rutherglen Bridge eastwards as far as their property extended, was in an insecure and dangerous condition and not properly fenced;" that he had required them to fence it to his satisfaction, and that they had refused. He accordingly asks the Dean of Guild to order the parties, and "to inquire into, try, and decide the questions competently raised in said objections with respect to the necessity or reasonableness of the work required to be executed, and the liability of the said proprietors for the cost thereof, and to award the expenses of this application and subsequent proceedings against the said Kerr, Anderson, and Company, all in terms of and to the effect provided for in the said Glasgow Police Act, 1866." And upon this the Dean of Guild, on the 9th December 1875, issued this interlocutor:—"Disallow said objections, and find that the said notice has been competently issued, and that the work required to be done by said notice, and specified therein, is necessary and reasonable." The question really is, whether the original notice was competently issued—whether it was authorised by the terms of the Act of 1866. The clause of the statute on which the whole question depends is the 384th, which provides that "the Master of Works may, by notice in the manner hereinafter provided, require any proprietor or occupier of a

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eritage to fence the same, or repair any chimney-stalk or flue, or any chimney-head or can, or any rhone, signboard, or other thing connected with or appertaining to any building thereon, which appears to be dangerous, to his entire satisfaction." We had some discussion whether the words "which appears to be dangerous" apply to all that goes before, and that therefore the Master of Works can only call on proprietors to fence their property when it is dangerous. Now, I confess I am not disposed to limit his powers in this way, for it may be very desirable to fence ground that is not absolutely dangerous, either for the sake of decency or some other good reason, and there is a large discretion given to the Master of Works to say whether property should be fenced or not. But what we have to determine is, whether the present case is a case falling under the clause of the statute. I am of opinion that it is not so.

This is a demand that the proprietor of Barrowfield shall fence the river Clyde, and that is not contemplated by the clause of the Act of Parliament. I should be sorry if the Act of Parliament required me to say that the proprietor of the land was bound to fence the river Clyde for the benefit of those who, by carelessness or good nature on his part, have been allowed to acquire a right which they must first have exercised as intruders. But considerations of hardship have to do with the interpretation of an Act of Parliament. My reason for holding that the Act of Parliament does not apply to this case is that the Clyde is not a "land or heritage." It is a public navigable river, not continuously navigable from the sea up to this point, for there is a weir some way below this which interrupts the navigation. But it is navigable, and it is tidal, for there is no doubt that spring-tides do, in spite of the weir, ascend the river as far as this point. The river, therefore, may fairly be said to be a public navigable and tidal river. Now, if that is so, the property of the *alveus* and the banks is vested in the Crown. Then, the source of the danger, and the reason why the Master of Works is induced to interfere, is that the Clyde is there, and is a source of danger. Therefore it seems to me that, whoever may be liable to fence the river, the proprietor of Barrowfield is not liable, for he is not proprietor of the subject which is dangerous.

The Lord Ordinary refers to the case of *Bruce v. Lang*. But there is an essential distinction between this case and that, and it is this: That there the danger was that was the cause of danger and required to be fenced was a private mill-race. The only defence was: Let the road trustees fence their road. The answer was that the Master of Works is entitled to call on the proprietor of any lands or heritages to fence them if they are dangerous or inconvenient to the public. I can see no possible application of that case to the present.

I do not wish it to be thought that this section can be construed so as to exempt from his obligation to fence any one who is called on by the Master of Works to fence his property. But I cannot read this notice and petition as a demand and petition warranted by the statute at all, for I think that this is only a demand to fence the river Clyde.

ORD DEAS.—The notice here relates to a public footpath running along the river Clyde in the heart of the city of Glasgow. The public are entitled to use the path, and certain portions of it have nothing at all to divide them from the river. Others have a strip of ground separating them from the river. Fearing that footpath is admitted to be attended with danger to the public, and that the Master of Works, by the 384th section of the Glasgow Police Act, is

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authorised to give notice requiring "any proprietor or occupier of a land or heritage to fence the same or repair any chimney-stalk or flue, or any chimney-head or can, or any rhone, signboard, or other thing connected with or appertaining to any building thereon, which appears to be dangerous, to his entire satisfaction." Now, it is not material whether the words "which appear to be dangerous" apply to the whole preceding words or not. Danger is admitted to be one of the considerations in respect of which this order, if competent in any case, may be made. It can hardly, I think, be disputed that somebody must be liable to fence this footpath, and so prevent danger to the public frequenting it. Now, the only persons who can possibly be bound to fence it are, first, the proprietors of the Clyde—these are the Crown authorities. It is not said that the Crown can be made liable. Second, The municipal authorities, at the expense of the town. But neither is it said that they are liable. There remains only the proprietor of the footpath,—I mean of the *solum* of the footpath,—and my opinion is that to him alone liability can be attached.

It is quite true that the danger arises from the proximity of the river, and that if there were no river there would be no danger. But this is a fallacious view of the matter. The danger arises from the right conferred by the proprietor of the *solum* upon the public to use that footpath, and the consequent exercise by the public of that lawful right. The Lord Ordinary grapples with that fact, and I am disposed to agree with his Lordship when he says—"The Lord Ordinary is of opinion that the purpose of the Act was to secure the public from danger in the exercise of the rights belonging to them, and he thinks that the property of the complainers is dangerous within the meaning of the Act. It is dangerous, because one of the uses to which it is subject cannot be enjoyed with safety in its present condition. It appears to the Lord Ordinary that it would be a too limited construction of the statute to restrict it to cases where the danger arises from artificial causes." I think that that is a reasonable view of the statute. The danger arises from the use the proprietor of this land is allowed, or, in other words, has authorised, to be made by the public of the *solum* of this footpath. The public have not, it is true, a written grant: but what is the same thing, they have a grant by prescription of this footpath from the proprietor of the ground in a position in which they cannot use the ground with safety. The danger arises out of this grant of footpath. It is of no relevance to inquire whether the grant was made tacitly or expressly. The law prevents a grant from the prescriptive possession. I do not know that there is any law to prevent the proprietor of the *solum* from diverting the footpath in a somewhat different direction. He could most certainly have prevented it from being in this place at the beginning. In that state of matters I am of opinion that the proprietor of this land is the proprietor of land which is dangerous from the use made of it in conformity with the grant made by him, and that he is the party who is bound to fence it. I can derive no analogy from the common law applicable to rural footpaths, which are not regulated by statute. I regard the statutory enactment made to meet the emerging necessities for the public safety in a great and growing municipality.

I do not know that I am entitled to go into what is rather a question of fact and merits, viz., how far the whole footpath, or only certain portions of it, should be fenced. All I shall say is—that where the footpath is close to the river there can be no doubt of the necessity for its being fenced. Where there is a wide interval between the river and the path, so that without straying wilfully or negligently

from the path there is no danger, it may possibly be different. But in the No. 121.
 shape of the case, and according to the view of your Lordship, that distinction,
 there be room for it, does not seem to be before us.

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LORD MURE.—The property of the complainers, as stated in the joint minute, tends along the bank of the Clyde, which is here a navigable river for about 10 yards east of Rutherglen Bridge. That property has for time immemorial been separated from the river, partly by a wall and partly by a wooden fence on the south side of the property; and when this wall and fence were erected a strip of ground appears to have been left between them and the river, upon which the public appear to have acquired by prescriptive use a right of footpath along the bank of the river. In these circumstances there can be little doubt that there may, at some parts of this bank, be a certain amount of danger to parties using the footpath; but not more so than there is in the case of most navigable rivers to parties who go along the bank, as they are entitled to do, at all events for purposes of navigation. The question to be decided, therefore, is, whether a danger thus arising from the proximity of a navigable river to a public footpath along the banks of that river is one which the owners of the land on which the right of footpath has been acquired can, in respect of the 14th section of the Act founded on, be called upon to obviate by fencing the river banks. I am of opinion, with your Lordship in the chair, that they cannot. The bank of the river on which the complainers are here required to erect a fence is not, I conceive, their property in the sense of this statute. It is ground over which the complainers have any exclusive right or control, inasmuch as the use of it is in the public, at least for the purposes of navigation. This is laid down very distinctly, both by Lord Stair, ii. 1, 5, and by Mr. Kine, ii. 1, 5. Now, the proposal here made by the Master of Works amounts substantially to this, that the complainers should be ordered to fence a public footpath, on the banks of a navigable river, from that river, and is not, therefore, as I apprehend, within the provisions of section 384 of the statute; it amounts to an order on the complainers to erect a fence upon ground which is neither the exclusive property, nor in the exclusive occupation, of the complainers who are required to fence it.

LORD SHAND.—I concur in opinion with the majority of your Lordships. It may be remarked that the case has been presented to us in a different aspect from that in which it was presented to the Lord Ordinary. Then it was apparently conceded that the river was within the property of Barrowfield; but now that we have the joint minute before us it appears that the boundary of the property of Barrowfield is the north side of the river Clyde—that is to say, that the property being bounded by the river Clyde, which at that part is admittedly tidal and navigable, the river is no part of the property of Barrowfield. These facts appear to me to be material facts for the decision of the case.

I agree with your Lordship in the chair as to the purport and construction of section 384 of the statute, and if this had been the case of a private river, whether tidal nor navigable, and where the adjoining proprietor had therefore a right of property in the river bed, I should have held that the case was ruled by the decision in the case of Bruce, and that the river, being the property of the adjoining proprietor, and a source of danger, he was bound to fence it. But the source of danger not being the property of the proprietor of Barrowfield, and, as

No. 121. I think, the statute lays the burden of fencing on the proprietor of the dangerous subject, it follows that there is no obligation on the complainer to fence.
 June 1, 1877. It has been said that as the proprietor here has allowed the public to exercise the right of footpath for the period of prescription he is bound to ensure the safety in the exercise of that right. But I know of no principle of law that requires him to do more than suffer the use of this footpath by the public, or that requires him to repair or improve the path, or that imposes any further obligation than that he shall allow the public to use it. As proprietor he is subject to a servitude *patiendi* only. If we had the case of a mill-lade or a private river or a quarry pit or hole on his property and in proximity to the path, then, as owner of that source of danger, he would be required to fence it. The obligation, however, affects the owner of the river or lade or pit which is the source of danger.

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I am not sure that the argument presented to us, viz., that this is a public navigable river, and that its bed and banks below high-water mark are therefore not the property of the proprietor of Barrowfield, was presented to the Lord Ordinary. From the passage already referred to I see that the distinction the Lordship had in view between this case and the case of Bruce was the distinction between an artificial subject and a natural subject. He says—"It appears to the Lord Ordinary that it would be a too limited construction of the statute to restrict it to cases where the danger arises from artificial causes." I quite agree with that observation, and though it had appeared that the danger was the result of a natural as distinguished from an artificial cause, yet if that cause—the river in this instance,—were the property of the complainer, I should have held him liable to fence it.

It has been said by my brother Lord Deas that some one must be bound to fence this river. That probably is so, at least as regards such points as are obviously dangerous, and it may very well be that the magistrates have that duty laid upon them, as the public seem to resort extensively to this place. For we have here no question as to whether that responsibility rests on the magistrates, or possibly on the Crown. All I say, and all that is necessary for the decision of this case is, that the proprietor of Barrowfield is not bound to fence off a source of danger not on his property.

THE COURT pronounced this interlocutor:—"Recall the interlocutor: Sustain the reasons of suspension: Suspend the proceedings complained of: Interdict, prohibit, and discharge, as prayed, and decern: Find the respondent liable in expenses, and remit," &c.

MACKENZIE & KERMAK, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

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PETER DUFFUS AND OTHERS (White's Trustees), First Parties—
Kinnear—Pearson.

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ROBERT WHYTE, Second Party.—*Trayner—A. J. Young.*
 RACHEL WHITE, Third Party.—*Millie.*

Alimentary Provision—Discharge—Trust.—In a trust-settlement the trustees were directed to pay an annuity, which was declared to be an alimentary provision and not arrestable nor assignable by the annuitant onerously or gratuitously. After the whole purposes of the trust had been fulfilled except payment of the annuity the heir-at-law of the truster, who was entitled to the residue of the trust-estate, called upon the trustees to denude, and proposed to grant a heritable annuity over the heritable property, which formed the residue of the trust-estate.

in favour of the annuitant, in precisely the same terms as provided in the trust-deed. The annuitant was willing to accept of the security offered in place of the provision in the trust-deed, and to concur in granting a discharge to the trustees. *Held* that the annuitant had not power to grant a discharge of the alimentary provision, and that the trustees were not entitled to denude.

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DAVID WHITE, bookseller, Edinburgh, died on 1st March 1870, leaving a trust-disposition and settlement in which he directed his trustees "to make payment to my said sister, Rachel White, of an annuity of £60, payable half-yearly in advance at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first of these terms after my decease for the then ensuing half year, and so on half-yearly in advance during all the days of her life; declaring that the said annuity shall be purely an alimentary provision to my said sister, and that the same shall not be arrestable for her debts or deeds, nor shall it be in her power to assign or convey the same either onerously or gratuitously in any manner of way." With regard to the annuity the settlement further provided—"Excluding, as I hereby expressly exclude, the *jus mariti* and right of administration of any husband whom my daughter or granddaughters or my said sister may marry, in reference to the provisions conceived in their favour under these presents; and declaring that the said provisions shall noway be affected by nor liable to be attached for the debts or obligations of their husbands, and that they shall not be at liberty to assign the same, and that the receipts or discharges of my daughter and granddaughters and sister alone shall be sufficient to my trustees without the consent of their husbands."

In 1876 the whole purposes of the trust had been fulfilled except those owing reference to the payment of the annuity to Rachel White, the truster's sister, who was unmarried, and was then seventy-six years of age. Robert Whyte, the heir-at-law of the truster and of his daughter, who is entitled to the residue of the trust-estate, which consisted entirely of real estate, called upon the trustees to denude in his favour, offering to put a bond over the heritable estate belonging to the trust in favour of the annuitant.

A special case was presented to the Court by Peter Duffus and others, trustees of David White, the truster, as first parties, by Robert Whyte second party, and by Miss Rachel White as third party.

The special case set forth,—"The second party proposes to grant a bond of annuity for £60 sterling in favour of the said Rachel White, in the same terms in which that annuity is provided to her by said trust-disposition and settlement, and in security of said annuity to convey to her the whole estate forming the foresaid residue in such manner that the said annuity may be heritably secured as a preferable debt upon said estate, as freely and as if the same had been a heritable burden affecting the said subjects at the date of the truster's death. The said Rachel White is willing to accept of the bond of annuity and conveyance in security."

The following question was submitted for the opinion and judgment of the Court:—"Whether, on obtaining a full discharge from the parties interested, and on the second party granting bond of annuity in the terms with the conveyance in security above mentioned, the first parties are, without the consent of the said Rachel White, bound or entitled to denude the said trust, and to convey the residue of the trust-estate to the second party as heir-at-law aforesaid?"

It was argued for the first parties;—The truster had taken a well-known mode of securing the annuity, and this was the only competent way of doing it.

The object was to prevent the annuitant from alienating the provision, and the heir-at-law would have to put the annuitant in the same position

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Argued for the heir-at-law ;—The security proposed was ample, and the annuitant might be protected without the form of a trust. She would be no more able to discharge the heir-at-law than she could discharge the trustees. The Court had often authorised a transaction of the kind proposed.²

At advising,—

LORD PRESIDENT.—(After stating the facts)—The heir-at-law calls on the trustees, in these circumstances, to concur with him and Miss Rachel White in finding another security for the payment of her annuity, and then to convey the trust-estate to him, the heir-at-law. Miss Rachel White is willing to concur in these proceedings ; but the trustees have very properly maintained before your Lordships that they are not in safety, and are not bound to denude of this trust, but, on the contrary, are bound to maintain it for the purpose of securing the annuity of Miss Rachel White in terms of the trust-deed, even although she herself is willing to renounce that annuity, and the security for its payment which the trust affords, because, as they say, the annuity is provided to her on such terms that she has not the power of renouncing it. The only part of the trust-deed, accordingly, which it is necessary to consider, is the third purpose, which provides this annuity. It is in these terms :—" I direct my trustees to make payment to my said sister Rachel White of an annuity of £60, payable half-yearly in advance at two terms in the year, Whitsunday and Martinmas, in equal portions, beginning the first term's payment thereof at the first of the terms after my decease for the then ensuing half year, and so on half-yearly in advance during all the days of her life ; declaring that the said annuity shall be purely an alimentary provision to my said sister, and that the same shall not be arrestable for her debts or deeds, nor shall it be in her power to assign or convey the same either onerously or gratuitously in any manner of way."

Now, *prima facie*, one would say that this lady, being expressly debarred by the trust-deed from assigning or conveying her annuity, either onerously or gratuitously, in any manner of way, is not in a condition to renounce her annuity as secured by the trust-deed. For a renunciation of a security is really a conveyance, and it cannot be supposed for one moment that it could be in the contemplation of the maker of this deed that the lady whom he had thus striven to protect against all acts and deeds should nevertheless be able gratuitously to defeat his intention and her own rights by resigning her right to the annuity to the trustees, or, in other words, by renouncing her right to the annuity secured by the trust-deed. It is said, however, that although in form this would look like a violation of the trust-deed, and that accession to this transaction would involve a breach of trust on the part of the trustees, yet, if there were substituted for the annuity, and the security for the annuity which the trust-deed provides, an obligation and a security equally good, equally unex-

¹ Smith and Campbell, May 30, 1873, 11 Macph. 639, 45 Scot. Jur. 41 ; Menzies v. Murray, March 5, 1875, *ante*, vol. ii. p. 507.

² Standard Property Investment Co. v. Cowe, March 20, 1877, *supra*, p. 507 ; Watt v. Greenfield's Trs., Feb. 18, 1825, 3 S. 544 ; Nicolson's Trs. v. Nicolson, Dec. 5, 1850, 13 D. 240, 23 Scot. Jur. 94 ; Pretty v. Newbigging, March 1, 1824, 16 D. 667, 26 Scot. Jur. 338 ; Cosens v. Stevenson, June 26, 1863, 11 M. 761, 45 Scot. Jur. 469.

able as that provided by the trust-deed itself, it would be very hard to maintain his trust merely for the purpose of securing the payment of this £60 a-year to Miss Rachel White, and keeping the heir of the trust out of possession of what is really his estate. Now, I do not hesitate to say that under ordinary circumstances, wherever there is left only one special interest to be provided for, or which alone it is necessary that the trust should be kept up, and that interest of a partial kind, and may be provided for just as effectually in some other way, and thus the estate be liberated from the trust and set free, so as to be conveyed directly to the residuary legatee or heir-at-law, this may competently be done. Indeed we have many examples of such arrangements being made by all the parties interested, with the entire approval of the Court. But then, in order to justify such a proceeding, it must be made quite clear, in the first place, that all parties interested consent, and, in the second place, that all parties interested have power to consent. Now, the question put to us here is, "Whether, on obtaining a full discharge from the parties interested, and on the second party granting bond of annuity in the terms and with the conveyance in security above mentioned, the first parties are, with the consent of the said Rachel White, bound and entitled to denude of the said trust, and to convey the residue of the trust-estate to the second party as heir-at-law foresaid." The manner in which the annuity is to be secured, as referred to in this question, is set forth upon the first page of the case thus:—"The second party proposes to grant a bond of annuity for £60 sterling in favour of the said Rachel White, in the precise terms in which that annuity is provided to her by said trust-disposition and settlement, and in security of said annuity to convey to her the whole estate comprising the foresaid residue in such manner that the said annuity may be heritably secured as a preferable debt upon said estate, as fully and freely as if the same had been a heritable burden affecting the trust-subjects at the date of the trustor's death. The said Rachel White is willing to accept of the bond of annuity and conveyance in security."

As I understand this proposal, there is, in the first place, a personal obligation to be undertaken by the heir-at-law to pay the annuity, and in the second place, there is to be a conveyance of the heritable estate which forms the trust-property in security of that personal obligation. Now, it occurs to us to inquire what would be the effect of such a bond and such a disposition in security if this trust had never existed; and I think the answer to that question is not doubtful. If a party, being in right of an annuity, takes a personal bond herself, or if a party not having any antecedent right to an annuity takes a personal bond for payment of a certain sum of money in name of an annuity, and a heritable security for that, and puts into that bond a provision that this annuity shall be purely alimentary, shall not be liable for the debts or deeds of the creditor in the obligation, and shall not be liable to be assigned or renounced by her, the result would be simply that she would be the absolute mistress of the annuity, and could do what she liked with it, and that that qualification of her rights, so inserted by her in security of the annuity, would be of no avail whatever. It is against the whole principles and policy of the law to enable a party so to settle the property belonging to himself or herself that he or she may have the full beneficial enjoyment, and yet put it *extra commercium*, and exempt it from the diligence of creditors; and in the case which I suppose, the effect of the annuity is just creating these fetters for the purpose of placing it *extra commercium*, and exempting it from the diligence of creditors. Now, if that

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case be clear, what is the difference in effect of the proposal which is made in this case? It is proposed that the trustees shall convey the estate to the heir-at-law upon condition of his granting such a bond and conveyance in security to Miss Rachel White, the annuitant, but with the circumstance that he receives a conveyance of the trust-estate as the consideration of his creating such a right. Does that alter the nature of the right which he creates in her favour? I cannot see that it does. It seems to me that the effect of these deeds, when granted would be just the same as if Miss Rachel White had purchased this annuity from the heir-at-law, and had taken these deeds herself in the terms suggested. What is to prevent Miss Rachel White, for example, the day after she has obtained delivery of these deeds, from renouncing her right in favour of her own debtor, the heir-at-law? It is said she cannot do that, because the deeds declare she is to have no power to do so. Well, this trust-deed declares that in the same terms, and, in my opinion, much more effectually than the proposed deeds would do. And yet one part of the proposal before us is that Miss Rachel White, notwithstanding the restriction of her right as a beneficiary under the trust, is to discharge the trustees. If she can discharge the trustees, notwithstanding the terms in which this annuity is settled for her, *multo magis* can she discharge the heir-at-law after she has got, in place of the security, the deeds proposed to be granted; and that, in my mind, is conclusive of the whole matter. But I think it right to say further, for the purpose of distinguishing the principle of the case, that I do not very well see how a right of this kind, restricted in the manner here described, can be effectually created except through the operation of a trust-deed. I have already said that a man can tie up his own property so as to exclude the diligence of his own creditors, and I do not think that anybody, by a mere conveyance to an individual, can exempt that individual from the diligence of his creditors as regards property conveyed. But if a settler desires to provide an alimentary payment to some person in whom he has a want of confidence (as is to be inferred in the present case from the clause referred to), and desires to make a provision that the party recipient shall not have the power to discharge or assign, or give in any way, he may do this: he may place a sum of money in the hands of trustees, and may direct them to use that money in such a way that with a breach of trust they could not possibly listen either to an assignee or an attaching creditor, because the directions of the truster would be—as they are in the trust-deed—“You shall pay over term by term a certain sum of money to the beneficiary whom I have named. You shall not pay it to anybody else. The trust is created for the purpose of the money going into her hands, and I intend to and restrain you from doing anything else with it.” I apprehend a trust-deed does that. This has been recognised for a long time as an effectual way of creating such a restrictive alimentary right, and I know of no other way in which this has ever been supposed that it can be done.

I am therefore of opinion that this question must be answered in the negative.

LORD DEAS.—It appears distinctly from this trust-deed that what the testator wished to do with reference to his sister was to give her an annuity *trustis causa* trustees half-yearly in advance for her aliment, and to declare that it should not be arrestable or assignable, and that in the event of her marrying her husband's *jus mariti* should be excluded, and his creditors should be excluded from attaching or interfering with that annuity. That is the declared

at present charged, with the addition of the personal obligation of the heir-at-law, which may be of some value. And if there were no other consideration in the case I should hold that the heir-at-law was entitled to have the estate conveyed to him on condition of his granting the security proposed.

But the obstacle—the unsurmountable obstacle as I think—which presents itself in the way of the proposed arrangement arises upon that clause of the deed which declares that this annuity shall be purely an alimentary provision, &c.—(*reads clause*). That clause does not in express terms prohibit the charge of the annuity; but as assignation, either onerous or gratuitous, is prohibited, and as a discharge is substantially an assignation of the right in favour of a person getting it, it is clear that a discharge of the annuity is as effectually prohibited as an assignation. Now, that being so, it lies upon the heir-at-law, to make the proposal, to shew that this annuity would be as well secured against the lady's creditors and her own acts under the new arrangement as it is at present. I have come to be clearly of opinion that it would not be so, whether if the heir-at-law were to grant a bond, as he proposes to do, with a disposition in security, or if the estate were to be conveyed to him under burden of an annuity. For I think that the moment the trust is discharged the declaration that the annuity should not be affected by the lady's debts or deeds would no longer be effectual.

Your Lordship in the chair has explained the general law on this subject, and concurs in the statement that has been made. If a proprietor of a heritable subject, either by deed of conveyance *de presenti* or *mortis causa*, gives away the *dominium* or fee of that estate, not to trustees, but to a third party, the absolute fee being conveyed, he cannot at the same time limit the powers of his donee to deal with the estate. The absolute fee being conveyed he cannot impose conditions restraining alienation or the like, which is practically effecting an entail, except by compliance with the provisions of the entail statutes. He cannot fetter the property with conditions which are inconsistent with the right of fee, as, for example, with the condition that the person vested with property shall not be entitled to assign his right to it, or that the estate shall not be liable to his debts or deeds.

Again, the estate may be conveyed to one in liferent and another in fee, and the former right may be described as in liferent simply, or for liferent use only. The result is the same as regards the granter of the deed. He is entirely divested of the fee, and the terms of the conveyance mark and define the character and limits of the rights conferred on the respective disponees. Having conveyed away the entire property he cannot, however, affect the estate of life or fee with conditions which shall protect either estate against the acts and omissions of the respective owners or the diligence of their creditors. I should say the same with an annuity made a burden on an heritable estate, which the owner has conveyed to a third party. The right of annuity cannot, any more than the right of fee or liferent, be affected by conditions against alienation or effecting the right against diligence.

There is a way by which a proprietor can effectually impose such restrictions as he desires to create either on the fee or liferent or on any right of annuity created, viz., by conveyance to trustees who hold the property for him so long as the trust subsists, and are bound to fulfil his directions, and in a position to secure the fulfilment of the conditions which the truster has imposed. On the whole, being of opinion that if this trust is brought to an end this lady could

No. 122.

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No. 122. discharge her right, whether the one proposal or the other to secure the annuity against her debts and deeds were carried out, I am of opinion with your Lordships that the question must be answered in the negative.

June 1, 1877.
White's
Trustees v.
Whyte.

THE COURT pronounced this interlocutor:—"Find and declare that the parties of the first part are not bound or entitled to demand themselves of the trust committed to them by the trust-disposition and settlement of the late David White, or to convey the residue of the trust-estate to the party of the second part on the terms and conditions proposed in this case, and decern."

MACANDREW & WRIGHT, W.S.—W. R. SKINNER, S.S.C.—Agents.

No. 123. Mrs HESTER ANN MOSTYN LOMAX OF FRASER and OTHERS (Fraser's Trustees), Pursuers.—*Lord-Adv. Watson—Trayner—Asher.*
JOHN CRAN, Defender.—*Fraser—Mackintosh.*

June 1, 1877.*
Fraser's
Trustees v.
Cran.

Nuisance—Pollution of air—Interim interdict granted.—In an action of declarator and interdict against a manure manufacturer at the instance of a neighbouring proprietor interim interdict granted (after proof) against the defender carrying on the work so as to create a nuisance, although a man of skill to whom the Court had remitted had expressed his satisfaction with the way in which the defender had carried out improvements suggested by the reporter, and reported that these improvements had produced a great amelioration of the nuisance.

2D DIVISION.
Lord Shand.
R.

THIS action was raised on 30th November 1875 by the late John Fraser, Esq. of Bunchrew, in the county of Inverness, against John Cran tenant under a long lease of an area of ground near Bunchrew station, in which he had erected an artificial manure work.

The conclusions of the summons were to have it found and declared "that the said defender is not entitled to carry on the manufacture of artificial manures at present carried on by him at the works or other premises presently occupied by him near the railway station of Bunchrew in the said county, on the Highland Railway; at least that he is not entitled to carry on the said manufacture in such way and manner as to cause injury to the pursuer, his property, his tenants, and others residing in the vicinity of the said manure work or other premises, in their health, comfort, or otherwise, or so as to create a nuisance," and to have the defender interdicted "from carrying on the said manufacture of artificial manure at the said work or other premises, at least from carrying on in such way and manner as to cause injury to the pursuer, his property, tenants, and others, as aforesaid, in their health, comfort, or otherwise, or so as to create a nuisance."

The pursuer averred that the defender's work was carried on so as to be a nuisance, and injurious to the comfort and health of persons residing at Bunchrew.

The defender denied that any nuisance had been caused or existed at the date of the action. He also pleaded that the pursuer was prevented from objecting to the existence of his works or their use for the manufacture of manure, in respect that he had allowed the works to be erected in the full knowledge of their purpose, without objection.

The original pursuer having died during the dependence of the action, his testamentary trustees were sisted in his room.

After a proof the Lord Ordinary, on 24th March 1876, pronounced the following interlocutor:—"Finds that at and for a considerable time prior to the institution of the present action the manufacture of manure at

defender's works near Bunchrew station was carried on to the nuisance of No. 123. the proprietor and occupants of the mansion-house, garden, and grounds of Bunchrew: Finds that although the remedial measures adopted by the defender, and put in operation for the first time on or about the 16th of last month, are calculated, with the exercise of due care, to remedy the evil complained of to a certain extent, and have, in point of fact, done so, yet the manufacture, as still carried on, is to the nuisance of the pursuers: Remits Professor Crum Brown, Edinburgh, whom failing, Professor Dewar, Cambridge, to visit the premises, and to report what changes, if any, in the buildings and other works, are necessary in order to secure the absorption and destruction within the manufactory of the fumes and gases evolved in the course of the manufacture, so as to prevent the nuisance complained of: Finds the defender liable in expenses; and remits the account thereof, when lodged, to the Auditor, to tax and to report: Farther, on the motion of the defender, grants leave to him to reclaim against this interlocutor, without prejudice to proceedings being taken forthwith, in order that a report under the above remit may be given in by the meeting of the Court in May next.*

June 1, 1877.
Fraser's
Trustees v.
Cran.

* **OPINION** delivered at advising.—“The pursuers of this action are the testatary trustees of the late Mr Fraser of Bunchrew, a property situated about one and a half miles from the town of Inverness; and the object of the action is to have the defender, John Cran, interdicted from carrying on the manufacture of artificial manures at the works occupied by him near the railway station of Bunchrew, and in the neighbourhood of the pursuer's property, on the ground that the manufacture has been so carried on as to be a nuisance and injurious to the comfort and health of persons residing at Bunchrew.

“The works, which were originally put up in 1870, have been considerably extended as the manufacture increased. The defence is a complete denial that a nuisance has been caused or now exists.

“The property of Bunchrew extends to about 1000 acres. The mansion-house and grounds have for many years been occupied by the late Mr Fraser and his family for several months in the year, and are at a distance from the defender's works of about 660 yards, and on a considerably lower level. The action was originally instituted on 30th November 1875 by the late Mr Fraser, who died recently as the 24th of last month; and it is a remarkable and painful feature in the case that he and his family attribute the origin of the four days' illness which he died to nausea produced by inhaling polluted air coming from the works, and which caused severe and continued sickness. His trustees, immediately after his death, took up the litigation, which has now to be disposed of after a period of which has lasted over four days.

“At the close of the pursuer's evidence I intimated a clear opinion that so long a case of nuisance had been made out as to render it extremely difficult for the defender to resist a finding to the effect that a nuisance did exist, and suggested that advantage might be taken by the defender of the suggestions of some of the scientific witnesses as to possible modes of remedying the evil. The defender's counsel, however, stated that they anticipated they would be able to produce evidence to disprove entirely the case made by the pursuer. I am, however, of opinion, after careful attention to the defender's evidence of the two succeeding days, that it falls far short of meeting the pursuer's case.

“There is no question as to the law which is applicable to the case. Apart from any limited rights which may have been acquired by prescriptive possession one is entitled so to use his property as to cause injury to the health of his neighbour, or to render the occupation of his neighbour's property positively uncomfortable. In particular, and with special reference to the question raised in this case, no one is entitled, in the use of his property for the purpose of any manufacture or otherwise, to emit gases, fumes, or vapours, either noxious in their nature, or causing nauseous or offensive smells, which sensibly diminish the comfort of others in the use and enjoyment of their adjoining property. It

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June 1, 1877.
White's
Trustees v.
Whyte.

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June 1, 1877.*
Fraser's
Trustees v.
Cran.

Nuisance—Pollution of air—Interim interdict granted.—In an action of declarator and interdict against a manure manufacturer at the instance of a neighbouring proprietor interim interdict granted (after proof) against the defender carrying on the work so as to create a nuisance, although a man of skill to whom the Court had remitted had expressed his satisfaction with the way in which the defender had carried out improvements suggested by the reporter, and reported that these improvements had produced a great amelioration of the nuisance.

2D DIVISION.
Lord Shand.
R.

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The conclusions of the summons were to have it found and declared "that the said defender is not entitled to carry on the manufacture of artificial manures at present carried on by him at the works or other premises presently occupied by him near the railway station of Bunchrew in the said county, on the Highland Railway; at least that he is not entitled to carry on the said manufacture in such way and manner as to cause injury to the pursuer, his property, his tenants, and others residing in the vicinity of the said manure work or other premises, in their health, comfort, or otherwise, or so as to create a nuisance," and to have the defender interdicted "from carrying on the said manufacture of artificial manure at the said work or other premises, at least from carrying on the same in such way and manner as to cause injury to the pursuer, his property, tenants, and others, as aforesaid, in their health, comfort, or otherwise, or so as to create a nuisance."

The pursuer averred that the defender's work was carried on so as to be a nuisance, and injurious to the comfort and health of persons residing at Bunchrew.

The defender denied that any nuisance had been caused or existed at the date of the action. He also pleaded that the pursuer was prevented from objecting to the existence of his works or their use for the manufacture of manure, in respect that he had allowed the works to be erected in the full knowledge of their purpose, without objection.

The original pursuer having died during the dependence of the action, his testamentary trustees were sisted in his room.

After a proof the Lord Ordinary, on 24th March 1876, pronounced the following interlocutor:—"Finds that at and for a considerable time prior to the institution of the present action the manufacture of manure at the

defender's works near Bunchrew station was carried on to the nuisance of the proprietor and occupants of the mansion-house, garden, and grounds of Bunchrew: Finds that although the remedial measures adopted by the defender, and put in operation for the first time on or about the 16th of last month, are calculated, with the exercise of due care, to remedy the evil complained of to a certain extent, and have, in point of fact, done so, yet the manufacture, as still carried on, is to the nuisance of the pursuers: Remits Professor Crum Brown, Edinburgh, whom failing, Professor Dewar, Cambridge, to visit the premises, and to report what changes, if any, in the buildings and other works, are necessary in order to secure the absorption and destruction within the manufactory of the fumes and gases evolved in the course of the manufacture, so as to prevent the nuisance complained of: Finds the defender liable in expenses; and remits the account thereof, when lodged, to the Auditor, to tax and to report: Farther, on the motion of the defender, grants leave to him to reclaim against this interlocutor, without prejudice to proceedings being taken forthwith, in order that a report under the above remit may be given in by the meeting of the Court in May next.*

No. 123.
June 1, 1877.
Fraser's
Trustees v.
Cran.

* OPINION delivered at advising.—“The pursuers of this action are the testatory trustees of the late Mr Fraser of Bunchrew, a property situated about two and a half miles from the town of Inverness; and the object of the action is to have the defender, John Cran, interdicted from carrying on the manufacture of artificial manures at the works occupied by him near the railway station of Bunchrew, and in the neighbourhood of the pursuer's property, on the ground that the manufacture has been so carried on as to be a nuisance and injurious to the comfort and health of persons residing at Bunchrew.

“The works, which were originally put up in 1870, have been considerably extended as the manufacture increased. The defence is a complete denial that a nuisance has been caused or now exists.

“The property of Bunchrew extends to about 1000 acres. The mansion-house and grounds have for many years been occupied by the late Mr Fraser and his family for several months in the year, and are at a distance from the defender's works of about 660 yards, and on a considerably lower level. The action was originally instituted on 30th November 1875 by the late Mr Fraser, who died recently as the 24th of last month; and it is a remarkable and painful feature of the case that he and his family attribute the origin of the four days' illness which he died to nausea produced by inhaling polluted air coming from the works, and which caused severe and continued sickness. His trustees, immediately after his death, took up the litigation, which has now to be disposed of after a period of which has lasted over four days.

“At the close of the pursuer's evidence I intimated a clear opinion that so long a case of nuisance had been made out as to render it extremely difficult for the defender to resist a finding to the effect that a nuisance did exist, and suggested that advantage might be taken by the defender of the suggestions of some of the scientific witnesses as to possible modes of remedying the evil. The defender's counsel, however, stated that they anticipated they would be able to produce evidence to disprove entirely the case made by the pursuer. I am, however, of opinion, after careful attention to the defender's evidence of the two succeeding days, that it falls far short of meeting the pursuer's case.

There is no question as to the law which is applicable to the case. Apart from any limited rights which may have been acquired by prescriptive possession, one is entitled so to use his property as to cause injury to the health of his neighbour, or to render the occupation of his neighbour's property positively uncomfortable. In particular, and with special reference to the question raised in this case, no one is entitled, in the use of his property for the purpose of any manufacture or otherwise, to emit gases, fumes, or vapours, either noxious in their nature, or causing nauseous or offensive smells, which sensibly diminish the comfort of others in the use and enjoyment of their adjoining property. It

No. 123. Professor Dewar having made a report in accordance with the remit contained in the preceding interlocutor, the Lord Ordinary, on 27th June

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may be shewn beyond question that the smells complained of are not in a direct sense injurious to health ; but even in that case, if they be such as cause sensible discomfort, and so destroy, or in a practical sense restrict and diminish the use and enjoyment of a neighbouring property,—as, for example, by compelling the proprietors or occupants to close their windows and doors against the admission of fresh air, on account of the disagreeable odour which accompanies it,—the law will put a stop to the use complained of, as a nuisance. There is no answer to the party injured, and no justification of the nuisance, that the work or manufacture is in what is called a convenient and suitable place, either for the manufacture, or for such members of the public as may purchase and be the subject of manufacture. The convenience and benefit of the manufacturer and his customers cannot be gained by requiring others, for the profit or convenience of their neighbours, to submit to such injury or discomfort as results in a sensible diminution or restriction of their enjoyment of their property, distinguished from a mere trifling or temporary passing inconvenience.”

After an examination of the evidence his Lordship proceeded :—“ The defender has examined a number of witnesses from a distance—generally speaking persons engaged in the same or similar trades—who say that at their works in their neighbourhood similar manufactories cause no injury to health, or discomfort, or inconvenience ; and, as generally occurs in cases of this class, it is represented that the decision in this case involves the settlement of a much larger question, viz., whether the existence of such works is to be tolerated at all in the neighbourhood of human habitations. I do not think the case involves any such general question, nor do I think that much benefit is to be gained from the evidence of the nature now referred to which has been adduced. Whether the operations at a particular work constitute a nuisance to an adjoining property or a neighbouring district must always be a question of circumstances. Everything depends on the nature of the situation—the position of the locality which may be affected in relation to the works. The situation may be open, as on or near the sea-side ; or confined by the contour of the neighbouring ground ; or open at one side and shut in at another ; the work may be in the midst of a locality filled with other manufactories, the smoke or fumes of which have to a great extent pervaded and affected the atmosphere, and where the surrounding inhabitants are mainly if not exclusively engaged as operatives in the manufactories, which to them, from habit, are little if any annoyance. Much may depend on the prevailing direction of the wind as affecting a particular house or district ; and very much on the nature of the buildings of which the manufactory consists, and the system on which the work is conducted. In order to judge properly of most of the other works referred to by the witnesses it would be necessary to know about as much in regard to each of them, by the evidence of people from the locality besides that of the owner or occupant, as is now before the Court on the proof in regard to the work in question. Taking the partial evidence adduced, I can only say that the impression on my mind, in reference to the other works now referred to is, that some of them are in a similar situation and carried on in such a manner as not to constitute a nuisance to the particular neighbourhood in which they are placed ; while, in regard to others, if they were made the subject of legal proceedings, it would probably be found that they do constitute a nuisance, and could not be permitted to be continued unless under such an entire change of system as would prevent the escape of fumes and disagreeable odours.

On the grounds now stated, I am of opinion that it is the clear result of the evidence that the defender's manufactory, at the date of the action, and for a considerable time prior to that date, did constitute a nuisance to the owners and occupiers of Bunchrew House. Taking advantage of a suggestion made by Stevenson Macadam, who, having examined the works in order to give evidence for the pursuers, was precognosed by the defender with their consent, the defender, in the early part of last month, erected a coke-tower, with connate

1876, made another remit to him to see the works reported on by him No. 123. obviating the evils complained of executed forthwith.

The defender reclaimed against the interlocutor of 24th March 1876, ^{June 1, 1877.} Fraser's Trustees v. Cran. and after hearing counsel for the defender the Court, upon the grounds stated by the Lord Ordinary, on 30th November 1876 pronounced this interlocutor:—"Adhere to the first finding in the said interlocutor, and point parties to be further heard on the cause, reserving, in the meantime, the question of expenses."

Professor Dewar having made a second report, the result of which was that, in his opinion, while the improvements introduced by the defender had greatly diminished the nuisance, they had not as yet wholly removed the case was again put out for debate in May 1877.

The pursuers submitted that they were entitled to interdict. The nuisance had not been wholly removed. The only effectual means of curing the defender's watchfulness was to grant an interdict against him. The defender had already received more than ordinary indulgence. In the case of *M'Neill v. Scott*¹ interim interdict was granted (on caution) on inquiry.

Argued for the defender;—Professor Dewar's report shewed that he had done everything in his power to abate the nuisance. Before interdict was granted he should be allowed an opportunity for perfecting his arrangements.

ORD JUSTICE-CLERK.—I am quite satisfied that the pursuers are entitled to interdict. It is proved that a very serious nuisance has been perpetrated by this manufactory. The defender says that he has done everything in his power to abate the nuisance, and that the manufactory is a new one. I think that the novelty of the manufacture rather strengthens the pursuers' right to interdict. It is true that Professor Dewar reports "his great satisfaction with the mode in

which the chamber in which the bones are dissolved, for the purpose of dissipating or destroying the fumes arising from the manufacture. This work was completed on the 16th of February, and stated by the defender to be a complete remedy of any evil that existed. I do not think it is so; although, when carefully attended to, it has greatly modified the evil complained of. . . . It appears to me, however, to be the result of the evidence as a whole, and I particularly refer to the evidence of Dr Stevenson Macadam, that the work should be put into such a condition and may be so carried on as to obviate the nuisance, although, undoubtedly, with the best appliances, it will require great attention on the defender's part. It was stated for the defender that while he denied that any nuisance existed, yet if the Court should decide otherwise, he desired an opportunity of adopting such remedial measures as might remove all cause of complaint. In the circumstances, I think such an opportunity should be allowed; with that view I propose to remit to a person of skill, who, after perusing the evidence, particularly with reference to the suggestions of means for removing the existing evil, will visit the manufactory, and report as to the works which are necessary for that purpose."

Professor Dewar's report contained the following passages:—"I have to express generally my great satisfaction with the mode in which the above objections have been executed, and also with the willingness and desire of the defender to carry out all my recommendations.

The above improvements have produced a great amelioration of the nuisance formerly arose from the Bunchrew Works, and I regard the principle of the order on its first trial as so satisfactory that it only requires judgment and a scientific knowledge to reduce almost indefinitely annoyances arising from the manufactory."

March 17, 1866, 4 Macph. 608, 38 Scot. Jur. 316.

No. 123.

June 1, 1877.
Fraser's
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which the alterations suggested by him have been executed," and also with the willingness and desire of the defender to carry out all his recommendations. I think that we should remit back to Professor Dewar to report, not whether the recommendations have been carried out, but whether the nuisance has been abated, and that we should in the meantime grant interim interdict.

LORD ORMDALE.—I think this is a clamant case for interim interdict. On 24th March 1876 the Lord Ordinary found that there was a nuisance. The Court unanimously adhered to that judgment. At first sight, and independent of specialities, I should have thought that, if the Lord Ordinary had not previously granted interim interdict, he could not have gone wrong in granting interim interdict in his interlocutor of 24th March 1876. His Lordship, however, so far gave an indulgence to the defender, and merely made a remit to Professor Dewar.

If Professor Dewar had reported that the nuisance had been completely removed even then I am not sure that, nuisance having once been established, we ought not to have granted interdict, so as to prevent its recurrence. On reading the Professor's report I find that he does not say that the nuisance has been entirely removed, but only that it has been greatly abated.

The work on which the defender is engaged is a new work, perhaps a valuable work; still he is carrying it on for his own pecuniary benefit, which he is right to do, but not at imminent risk to the health and comfort of the pursuers.

LORD GIFFORD concurred.

ON 31st May this interlocutor was pronounced:—"Remit to Professor Dewar to visit the premises at such intervals between this 15th October next as he may think necessary, and to report at that date whether the nuisance complained of is then abated, and to accompany his report with such remarks as he may judge important for the consideration of the Court; meantime grant interim interdict against the defender carrying on the manufacture complained of so as to create a nuisance, and reserve in meantime all questions of expenses, and *quoad ultra* continue cause, and decern."

IRONS & ROBERTS, S.S.C.—THOMAS CARMICHAEL, S.S.C.—Agents.

No. 124.

June 4, 1877.
Minister of
Brydekirk v.
Minister and
Heritors of
Hoddam.

REV. JOHN HENDERSON GOURLIE, Minister of Brydekirk *quoad sacra* Petitioner.—*Balfour—Mackintosh.*

REV. ROBERT MENZIES AND OTHERS, Minister and Heritors of Hoddam Respondents.—*Kinnear—R. Johnstone.*

Parish—Parish quoad sacra disjoined from united parish—Transfer of Glebe from united parish to quoad sacra parish—39 Vict. c. 11 (The Parishes Act, 1876), sec. 4.—The United Parishes Act, 1876, sec. 4. provides that where a portion of a united parish has "been erected into a parish quoad sacra" and there is more than one glebe belonging to the united parish, it shall be lawful for the Court of Teinds . . . to decern and declare that of such glebes . . . shall be transferred from the minister of such united parish to the minister of such parish quoad sacra."

Held that the section did not apply to the case of a *quoad sacra* parish, a small portion of which only had been disjoined from a united parish and transferred from adjoining parishes.

Opinion (per Lord President) that the provision applied only in the case of No. 124.
quoad sacra parish the whole of which had been disjoined from the united
 Irish.

June 4, 1877.

Minister of
 Brydekirk v.
 Minister and
 Heritors of
 Hoddam.

UNDER the Act 1609, c. 23, the parishes of Hoddam, Ecclefechan, and
 were formed into the united parish of Hoddam. At the date of the
 tion each of these parishes had a glebe. The three glebes thereafter
 med part of the benefice of the united parish.

TEIND COURT.
 Teind Clerk.

Under the Disjunction and Erection Act, 1844 (7 and 8 Vict. c. 44), a
 rtion of the united parish of Hoddam, consisting of a portion of the old
 ish of Luce, but not including the glebe of Luce, together with parts of
 e adjacent parishes of Annan and Cummertrees, were, in 1853, disjoined
 d erected into the *quoad sacra* parish of Brydekirk.

The Rev. J. H. Gourlie, minister of the *quoad sacra* parish of Brydekirk,
 nding on the 4th section * of the United Parishes Act, 1876 (39 Vict.
 11), presented this petition, with consent of the presbytery of Annan,
 ving that the glebe of the old parish of Luce, which formed part of the
 nefice of the united parish of Hoddam, should be transferred from the
 ister of the united parish of Hoddam to him as minister of the *quoad*
ra parish of Brydekirk.

The petition was opposed by the minister and heritors of the united
 ish of Hoddam on these grounds, *inter alia*,—1. That the petitioner
 not entitled under the provisions of the United Parishes (Scotland) Act,
 6, to obtain the transference sought, in respect that the *quoad sacra*
 sh of Brydekirk was formed by the disjunction of portions of various
 shes, and not by the erection of a portion of the parish of Hoddam
 ie into a *quoad sacra* parish. 2. That the glebe of the old parish of
 e was not situated within the *quoad sacra* parish of Brydekirk, and
 its transference would be injurious to the benefice of Hoddam.

It was stated in the answers for the respondents, and substantially
 itted by the petitioner at the bar, that of the *quoad sacra* parish of
 lekirk only about one-eighth had been disjoined from the parish of
 dam, that the annual value of this one-eighth was only £475, and
 nhabitants eighty persons, while the total value of Brydekirk was
 37, and its population 731, and that the value of the united parish of
 dam was £14,297, and its population 1520.

RD PRESIDENT.—This is a petition under the 4th section of the Act 39 Vict.

The petitioner is the minister of the *quoad sacra* parish of Brydekirk,
 asks to have a glebe transferred from the benefice of Hoddam to the benefice
 ydekirk in the following circumstances:—

Under the Act 1609, c. 23, the united parish of Hoddam was formed by the
 of the old parishes of Hoddam, Ecclefechan, and Luce.

A *quoad sacra* parish of Brydekirk was afterwards erected under the provi-
 of 7 and 8 Vict. c. 44, and was composed of portions of the parishes of
 n, Cummertrees, and of a portion of that part of the united parish of Hod-
 which had once been the parish of Luce.

Section 4 of 39 Vict. c. 11 runs thus—"If a portion of a united parish in
 nd has, under the provisions of the recited Act (7 and 8 Vict. c. 44), been
 l into a parish *quoad sacra*, and it shall appear in the course of any pro-
 gs taken under this Act that there is more than one glebe forming part of
 nefice of such united parish, it shall be lawful for the Court of Teinds
 . . . to decern and declare that one of such glebes . . . shall be

* For the terms of this section see opinion of Lord President.

No. 124. transferred from the minister of such united parish to the minister of such parish *quoad sacra*." The petitioner maintains that his parish being composed, *inter alia*, of a portion of the united parish of Hoddam, he is entitled to one of its glebes under this section.

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Hoddam.

Now, in construing this section regard must be paid to the preamble and previous sections of the Act.

The part of the preamble which is important in this question is this—"And whereas it is expedient that where an application is presented under the recited Act (7 and 8 Vict. c. 44) for the disjunction of a portion of a united parish having more than one glebe, and its erection into a parish *quoad sacra*," it should be lawful for the Court of Teinds, under certain conditions, to transfer to the minister of such parish *quoad sacra* one of the glebes of such united parish. Section 3 is also important, and is as follows:—"If in the course of any proceedings under the recited Act, for the disjunction of a portion of a united parish in Scotland and for its erection into a *quoad sacra* parish, it shall appear that there be more than one glebe forming part of the benefice of such united parish, it shall be lawful for the Court of Teinds, . . . in pronouncing decree of disjunction and erection, to declare that one of such glebes . . . shall be transferred from the minister of such united parish to the minister of such parish *quoad sacra*."

Now, reading section 4 in the light of the preceding parts of the Act, I am of opinion that it was intended to apply only in the case where the portion taken from the united parish had by itself been erected into the *quoad sacra* parish. Upon the question whether it might not be extended to the case of a *quoad sacra* parish composed of portions of several parishes, whereof the part taken from the united parish is the largest, I give no opinion—it is not the case here. Parties are not quite at one as to the facts stated in the answers of the heritors: but taking the admissions of the counsel for the petitioner made at the bar, it is evident that only a small part of the united parish of Hoddam forms part of the parish of Brydekirk, and that by far the greater portion of that parish has been formed of parts of the parishes of Annan and Cummertrees. I am therefore of opinion that to this case the Act does not apply, and that the petition must be dismissed.

LORD DEAS, LORD MURE, LORD SHAND, and LORD RUTHERFURD CONCURRED.

THE COURT refused the prayer of the petition, with expenses.

C. S. TAYLOR, S.S.C.—MACKENZIE & KERMAK, W.S.—Agents.

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JOHN MITCHELL, Pursuer.—*Fraser—Millie*.
JAMES HOGG AND OTHERS (Mitchell's Trustees), Defenders.—
Asher—A. J. Young.

Husband and Wife—Mutual Settlement—Donatio inter vivos et mortis causa—Jus quesitum tertio—Revocation.—A husband and wife, who had married without an antenuptial contract, executed a mutual settlement, by which they conveyed the whole estate presently belonging or which should belong to the spouses, jointly or individually, at the death of the predeceaser, to trustees, who were directed to allow the survivor the life rent use and enjoyment of the same, and, upon the death of the survivor, to realise and pay over the same to the

is at present charged, with the addition of the personal obligation of the heir-at-law, which may be of some value. And if there were no other consideration in the case I should hold that the heir-at-law was entitled to have the estate conveyed to him on condition of his granting the security proposed.

But the obstacle—the unsurmountable obstacle as I think—which presents itself in the way of the proposed arrangement arises upon that clause of the trust-deed which declares that this annuity shall be purely an alimentary provision, &c.—(*reads clause*). That clause does not in express terms prohibit the discharge of the annuity; but as assignation, either onerous or gratuitous, is prohibited, and as a discharge is substantially an assignation of the right in favour of a person getting it, it is clear that a discharge of the annuity is as effectually prohibited as an assignation. Now, that being so, it lies upon the heir-at-law, who makes the proposal, to shew that this annuity would be as well secured against the lady's creditors and her own acts under the new arrangement as it is at present. I have come to be clearly of opinion that it would not be so, whether if the heir-at-law were to grant a bond, as he proposes to do, with a disposition in security, or if the estate were to be conveyed to him under burden of an annuity. For I think that the moment the trust is discharged the declaration that the annuity should not be affected by the lady's debts or deeds would no longer be effectual.

Your Lordship in the chair has explained the general law on this subject, and occurs in the statement that has been made. If a proprietor of a heritable subject, either by deed of conveyance *de presenti* or *mortis causa*, gives away the full *dominium* or fee of that estate, not to trustees, but to a third party, the absolute fee being conveyed, he cannot at the same time limit the powers of his donee to deal with the estate. The absolute fee being conveyed he cannot impose conditions restraining alienation or the like, which is practically excluding an entail, except by compliance with the provisions of the entail statutes.

He cannot fetter the property with conditions which are inconsistent with the right of fee, as, for example, with the condition that the person vested with property shall not be entitled to assign his right to it, or that the estate shall not be liable to his debts or deeds.

Again, the estate may be conveyed to one in liferent and another in fee, and the former right may be described as in liferent simply, or for liferent use only. The result is the same as regards the granter of the deed. He is entirely divested of the fee, and the terms of the conveyance mark and define the character and limits of the rights conferred on the respective disponees. Having conveyed away the entire property he cannot, however, affect the estate of life or fee with conditions which shall protect either estate against the acts and debts of the respective owners or the diligence of their creditors. I should say the same with an annuity made a burden on an heritable estate, which the owner has conveyed to a third party. The right of annuity cannot, any more than the right of fee or liferent, be affected by conditions against alienation or affecting the right against diligence.

There is a way by which a proprietor can effectually impose such restrictions as he desires to create either on the fee or liferent or on any right of annuity created, viz., by conveyance to trustees who hold the property for him so long as the trust subsists, and are bound to fulfil his directions, and in a position to enforce the fulfilment of the conditions which the truster has imposed. On the whole, being of opinion that if this trust is brought to an end this lady could

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And further, we hereby declare that in case from any cause the free income of the estates hereby conveyed shall be considered by the survivor of us insufficient for his or her proper and comfortable maintenance, such survivor shall, with the consent and approbation of the said trustees, be entitled to receive and use from time to time such portion of the capital (but not exceeding one-half thereof) as may by the survivor of us, with approval of the said trustees, be considered necessary for the proper and comfortable maintenance and support of the survivor of us."

By the fifth purpose the trustees were directed, on the death of the survivor, to realise and convert into cash the whole estate, and to pay over one-half to the brothers and sisters then alive of Mr Mitchell, and the issue of such as might have predeceased, *per stirpes*, and the other half to the brothers and sisters then alive of Mrs Mitchell, and the issue of such as might have predeceased, *per stirpes* (excluding, however, from the succession two nephews of Mrs Mitchell); "and further declaring that in case any portion of the said capital shall be paid to and used by the survivor of us for his or her maintenance and support, such portion so paid to the survivor shall form a deduction from the half of the free residue hereinbefore directed to be paid to the brothers and sisters of the survivor of us or their issue as aforesaid."

The trustees were empowered, on the death of the predeceaser, to enter into possession of the estate, and to sue for, uplift, receive, and discharge all debts and sums of money then owing to either spouse, and, with consent of the survivor, to output and input tenants, to grant leases, and to sell the subjects by public roup. The trustees were farther empowered to invest the estate during the life of the survivor, to change the investments with consent of the survivor, and to submit and compound differences in relation to the trust. The deed also contained the following clauses:—"Declaring always that the said trustees shall not be bound to take possession of the said trust-estate until after the death of the last survivor of us, and they shall not be liable or responsible in any way for the capital of the trust-estate which may be left in the hands and under the control of the survivor of us after the predeceaser's death, nor for the income thereof during the lifetime of the survivor, but shall only be responsible for what they, the said trustees, may receive possession of and intromit with after the death of the survivor of us. . . . And we hereby, during our joint lives, reserve our own liferent of the whole estate and effects above conveyed, with full power to us during our joint lives to alter, innovate, or revoke these presents in whole or in part as we shall think proper: But declaring that upon the death of either of us these presents shall become absolute and irrevocable; it being hereby specially agreed betwixt us that the survivor of us shall not have any power to alter or recall these presents, which shall be a valid and effectual deed immediately upon the death of the predeceaser of us, although found lying in the repositories of the predeceaser of us, or in the custody of the survivor of us, or of any other person to whom we or either of us may entrust the same, undelivered at the time of the death of the predeceaser of us, with the delivery whereof we hereby dispense for ever."

There were no children of the marriage. After Mrs Mitchell's death the persons named as trustees under the mutual settlement, which had been placed in the hands of the person who had acted as the pursuer's agent, accepted office, ascertained the net amount of the trust-estate, completed their title to the heritage, part of which they sold, and invested the funds. In 1875 the pursuer entered into a second marriage.

The parties were agreed that at the date of the mutual settlement the pursuer was possessed of means and estate to the extent of about £3000.

but it did not appear how much thereof consisted of heritable property. No. 125.
The wife's estate at that date consisted of two heritable bonds, together of
the value of £460.

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The pursuer made various averments with regard to the intention of himself and his wife in entering into the mutual settlement. These averments were not admitted by the defenders, and neither of the parties asked for proof. The case was argued on the footing that the pursuer and his late wife had not entered into an antenuptial contract of marriage.

The pursuer put in a minute, renouncing all benefit under the trust-disposition and settlement in the estate of his deceased wife, and offering a refund, with interest, any part of that estate which he might have received under the same.

The pursuer pleaded;—(1) The mutual settlement, being a *mortis causa* deed, is revocable by the pursuer. (2) At all events, it is revocable in so far as it disposes of his own estate. *Separatim*, it is revocable in so far as it disposes of one-half of the residue in favour of the pursuer's own brothers and sisters.* (3) The said settlement was a donation *inter vivos* *in uxorem* by the pursuer, and is revocable.

The defenders pleaded;—(2) The trust-deed in question is not revocable by the pursuer, in respect that it is a mutual and onerous contract, intended to take effect during the survivor's lifetime; and, *separatim*, in respect that there is an express exclusion of the power of revocation. (3) The said trust-deed is at least mutual and onerous to such an extent that the pursuer cannot revoke it, so as to affect the provisions conceived in favour of his late wife's brothers and sisters or their issue.

The Lord Ordinary, on 20th December 1876, pronounced this interlocutor:—"Having heard the counsel for the parties, and considered the record and productions, finds that the trust-disposition and settlement referred to in the summons and record is revocable by the pursuer in so far as it disposes of his own estate, but that only on the condition that he shall renounce all benefit under the said disposition and settlement in the estate of his deceased wife, and refund, with interest, any part of that estate which he may have received under the same: Grants leave to claim against this interlocutor."†

* The summons contained alternative conclusions, to which the second part of this plea was relative.

† "NOTE.—Applying the language of the mutual trust-disposition to the event that happened (*viz.* the predecease of the wife on 18th October 1874), the pursuer thereby divested himself of his whole property as then (18th October 1874) existing, conveying it to trustees, with a direction to allow him the liferent, and on his death to divide the fee among his own and his deceased wife's brothers and sisters. If this be the legal import and plain meaning of the language employed, as I think it is, I must assume that the pursuer so understood and at the time intended, whatever doubt I may have of the fact, looking to the extraordinary and apparently improvident character of the proceeding, whether the deed was revocable by him or not. The question in the case is, whether or not he is at liberty to revoke.

"In the event that happened, the pursuer's part of the deed was not testamentary, but an alienation in his lifetime of his estate as it stood on 18th October 1874, in which his wife, who died on that day, had no interest except the benefit intended to her brothers and sisters or their issue, to take effect at the pursuer's death. But such a conveyance, while unimplemented, is, I think, clearly subject to revocation as a donation, unless protected therefrom by onerosity, *i.e.* looking to the facts of the particular case), by being the consideration or interpart of some conveyance or obligation by the wife in favour of the husband or others for whom he chose so to purchase a benefit. The defenders ac-

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Argued for them ;—The deed was an onerous mutual settlement, which could not be revoked by one of the granters after the death of the other. There was no such inequality in the counter considerations of the deed as to make it a donation *inter virum et uxorem*. Further, revocation was barred by a *jus quæsitum* having been created in favour of third parties. The case could not be distinguished from that of *Kidd v. Kidds*.¹

cordingly contend, in defence of their trust and the interests under their protection, that the conveyance which the pursuer seeks to revoke is onerous, and therefore irrevocable. The ground of the contention is, that by the same deed the wife made an exactly corresponding conveyance of her estate, which the defenders say has passed to them, to be held subject to the same trusts as the estate of the husband. As she predeceased, her conveyance, with the relative direction operates testamentarily ; but as the pursuer's conveyance would have done : also had he been the predeceaser, there is in this circumstance no interference with the exactness of the mutuality.

“ It is, I think, clear that as regards the benefits conferred by the spouses on each other, the deed was onerous and not revocable by either. The survivor was thus secured irrevocably in the benefit designed by the deed to him or her, and this was no doubt the primary purpose of the deed. With respect to the ulterior benefit designed to the brothers and sisters of the spouses, to be satisfied out of the estate on the death of the survivor after the primary purpose of the deed was served, I think this was gratuitous when regarded as the joint act of the spouses, who were under no obligation or duty of which the law can take account, to provide for them. It follows that these parties had no *jus quæsitum* which would have been available against a joint revocation by the spouses. I am disposed to think (though this is not so clear), by one of them so far as regards his or her estate. The effect of such revocation by one only, on the interest under the deed of the revoking spouse in the estate of the other, is another matter, and involves the doctrine of election, or approbate and reprobate. If the survivor (say the husband) took the interest in his wife's estate which the deed assigned to him, I should hold that he was thereby precluded from revoking his own part of the deed, though in favour of strangers, which was the consideration (or part of it) of that benefit. In an ordinary contract, a party cannot, of course, free himself of the obligations upon him by simply renouncing those in his favour. But such a contract (as this deed implies) between husband and wife, is, I think, exceptional to this extent, that as regards strangers,—gratuitously benefited, and having nothing but the contract of a man and his wife to rest upon for legal onerosity,—either spouse may, by revocation, free his or her estate from its operation on the condition of surrendering all benefit under it in the estate of the other. If this is any extension of the doctrine which allows the revocation of gifts passing between husband and wife (which I doubt), it is, in my opinion, allowable as being according to the spirit and policy of the doctrine.

“ About two years have elapsed since the death of the pursuer's wife, but I am nevertheless of opinion that the pursuer ought not, on the ground of undue delay, to be denied a remedy otherwise competent to him. The deed was manifestly improvident, and I think he ought to be dealt with as having challenged it so soon as he realised its import and practical operation. The only parties having an adverse interest are in no way prejudiced by any delay that has occurred. I shall therefore allow the proposed revocation, on the condition of the pursuer renouncing all benefit under the deed, and refunding, with interest, any part of his wife's estate which he may have drawn under it. Beyond this I cannot in this process decide anything. In the meantime I shall only pronounce a general finding, which may be taken to review. With regard to expenses, in case the action should be ultimately disposed of in conformity with the opinion which I have expressed, I think the whole expenses of the trustees (the defenders) ought to be paid out of the pursuer's estate.”

¹ *Hepburn v. Brown*, 1814, 2 Dow's App. 342 ; *Wood v. Fairley*, Dec. 3, 1822, 2 S. 549 ; *Gentles v. Aitken*, June 23, 1826, 4 S. 749 ; *Craich's Trustees v. Ma*

Argued for the pursuer;—The rationality of the deed must be judged of, not merely at the date of its execution, but at the date when it came into operation, *i.e.* the death of the wife.¹ In the event which occurred there was no “reasonable proportion”² between what the spouses gave for the husband gave up everything, and received nothing beyond what the law would have given him. He was therefore entitled to revoke the deed as a donation *inter virum et uxorem*. The bequests to the relatives of the spouses were gratuitous and testamentary, and formed no part of the mutual considerations.³ The fact that the deed was placed in the hands of the agent for the spouses did not operate as delivery *quoad* the ultimate legatees. Besides, even delivery did not render a bequest irrevocable which was purely testamentary and gratuitous in its character.⁴ Nor did a mere statement that a bequest was irrevocable make it so.

At advising.—

LORD GIFFORD.—This case involves the consideration of several very important principles regulating settlements, mutual deeds, and donations between husband and wife, and particularly the rights of revocation and alteration which surviving spouse has after the death of the predeceaser.

The mutual trust-disposition and settlement in the present case, executed between the pursuer, Mr Mitchell, and his late wife, is a very peculiar deed, expressed in unusual terms, and containing very unusual provisions, and I have felt its construction and effect to be attended with a great deal of difficulty. Ultimately, however, I have come to substantially the same result as that reached by the Lord Ordinary, only, instead of making the renunciation by the husband of all interest in his wife's estate a condition of the revocation which the husband seeks, I am disposed to put such renunciation as a matter of consent upon the minute lodged by the pursuer. I hardly think it follows in all cases that a husband or wife who revokes the provisions of a mutual settlement as donations must give up all right to the estate of the other spouse, and although such renunciation by the husband may be quite reasonable in the present case decline to lay down any general rule on the subject.

The first observation which occurs in relation to the mutual disposition and settlement is that it is in substance a *mortis causa* deed, or, at all events, it is a deed not intended to have any effect whatever until the dissolution of the marriage by the death of one or other of the spouses. It is not a contract or remuneratory grant which is to be operative *stante matrimonio*, but is both in form and in substance a settlement of, in the words of the deed itself, “our affairs, so as to prevent disputes in regard thereto after our deaths.” No doubt

e, &c., June 24, 1870, 8 Macph. 898; Kidd v. Kidds, Dec. 10, 1863, 2 Macph. 17, 36 Scot. Jur. 112.

¹ Hunter v. Dickson, Sept. 19, 1831, 5 W. and S. 455; McNeill or Steel v. Steel's Trustees, Dec. 8, 1829, 5 F. C., and 8 S. 210; Thomson v. Thomson, Feb. 20, 1838, 16 S. 641, 10 Scot. Jur. 319; Blaikie v. Milne, Nov. 14, 1838, 1 S. 18, 11 Scot. Jur. 29.

² Ersk. Inst. i. 6, 30.

³ Jardine v. Currie, June 17, 1830, 8 S. 937, 2 Scot. Jur. 483; Cousin v. Caldwell, June 5, 1838, 16 S. 1109, 10 Scot. Jur. 467; Fernie v. Colquhoun's Trustees, Dec. 20, 1854, 17 D. 232, 27 Scot. Jur. 86; Lang v. Brown, May 24, 1867, Macph. 789, 39 Scot. Jur. 407; Davidson and Others, May 27, 1870, 8 Macph. 17, 42 Scot. Jur. 458, and cases in note.

⁴ Somerville v. Somerville, May 18, 1819, F. C.; Spalding v. Spalding's Trustees, Dec. 18, 1874, *ante*, vol. ii. 237.

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No. 125. it is to take effect on the death of either of the spouses, and it contains a clause dispensing with delivery. Still it is to a large extent of a proper testamentary nature in reference to the estates of both the granters.

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And this leads, in the second place, to the inquiry,—At what date are the estates of the spouses to be considered, and the relative value of the grants or provisions made by the spouses *hinc inde* to be considered, so as to judge how far they are onerous and mutual, or how far they are donations? Is the date at which the comparison is to be made the date of the deed itself, when both spouses were alive and when their chances of life or of future successions were unknown, or is it the date of the dissolution of the marriage by the predecease of the wife, when the rights of the husband and of his wife's next of kin became by law fixed and known?

Now, I am of opinion that in this case it is the date of the death of the wife, the date of the dissolution of the marriage by her death, which is to be taken as the date of comparison of the value of what the husband took and received and of what he gave or obliged himself to give *per contra* by the deed in question so as to judge how far the grants by the husband were donations or not. I think this is the general rule in all cases where the alleged deed of donation is not to take effect till the dissolution of the marriage. It is then and then only you can exactly ascertain how far it is a donation or not. Where there is no proper contract between the living spouses, with remuneratory or onerous grant to take effect instantly or *stante matrimonio*, the case might be otherwise, but where a provision to take effect at the dissolution of the marriage must, I think, as to its reasonableness, extent, or onerosity, be judged of at the dissolution. And accordingly, I think it has been fixed by the decided cases. In *M'Neill v. Steel v. Steel's Trustees*, 8th December 1829, F. C., this was one of the points, and the value of the husband's estate was taken not at the date of the postnuptial contract (which was reduced as a donation), but at the date of Mr Steel's death. Lord Justice-Clerk Boyle says, and the other Judges concur, "I am clear that we are not to look at its value as at the date of the deed, but as at the time of his (Mr Steel's) death, when the question arises. We are therefore to take the value of his estate as at the time of his death." In *Hunt v. Dickson*, as decided in the House of Lords 19th December 1831, 5 W. R. S. 455, the same principle was applied even when the contract challenged as a donation was a contract of separation which had taken effect during marriage and had not been revoked at its dissolution. The annuity to the wife stipulated in the contract, and which she had received *stante matrimonio*, was held to be inadequate and a donation on her part, in respect that at the death of her husband he left an estate which would have given her by law a much larger provision. The Lord Chancellor says,—“In order to ascertain whether there was an inadequacy of consideration, another question, and that of law and not of fact, is to be determined, namely, whether the consideration given by the one party, in respect to and in comparison with the rights surrendered by the other, is to be compared with the amount and value of those rights at the date of the contract executed, or at the determination of the matrimonial contract, that is to say, at the death of the husband. I was at first inclined to think, on general principles (for no doubt in other cases it would be so), that the comparison of the consideration with the value given up was to be taken at the date of the contract, and not at any subsequent time, but I am satisfied now by the case decided on the authority of the Lord Justice-Clerk, and that recent case not

sented from by his brethren, and I am still more satisfied from the reason of the thing, that there is a peculiarity in the irrevocable nature of the marriage-contract, and that in those donations you are, upon the plainest principle, to regard not merely the date of the contract, but also the last period, namely, the decease of the husband." The same principle seems to have been applied in subsequent cases, among which I may mention Thomson, 20th February 1838, 16 S. 641, *Blaikie v. Milne*, 14th November 1838, 1 D. 18.

How, then, did matters stand at the dissolution of the marriage by the death of Mrs Mitchell? We have not the relative values of the estates of the husband and wife respectively very accurately ascertained or stated on record, but, as in such questions, to use the expression of Lord Eldon, matters are not to be weighed in very nice scales, probably we have enough for the purposes of the case. The wife's estate, then, at the dissolution, may be taken as consisting of two heritable bonds, together of the value of £460, and the husband's means, including his heritable estate, about £3000. Now, as there was no antenuptial contract, if there had been no mutual settlement, the husband, on his wife's death, would have retained the whole of his own estate, and in virtue of his courtesy would have liferented his wife's two bonds. By the mutual settlement he gets a liferent of the whole, that is, practically, and leaving his own estate out of view, he gets a simple liferent of his wife's two bonds, and the result is that under the deed he takes nothing whatever to which he had not right independent of the deed and at common law. On the other hand, by the mutual deed he gives away gratuitously the absolute fee of his whole estate, one-half to his own brothers and sisters, and the other half to the brothers and sisters of his deceased wife and their issue, excluding David and Thomas Hogg, two of his wife's nephews specially named, and he retains a bare liferent of his own property. I think it can hardly be maintained that the provisions *hinc inde* here, and as the case has turned out, are mutual or remuneratory, or that there is any reasonable equitable relation between the two. The husband really gives all and gets nothing, and so, instead of being an onerous or remuneratory contract it is very truly, indeed altogether, a pure donation so far as the husband is concerned. In the case stopped here I think there would be no doubt of the husband's power to revoke, for it is quite fixed that [a husband or wife being the donor] he may revoke the gift even after the death of the other spouse, and at any time during the life of the donor.

But, then, it is said, and here also are questions attended with nicety, that the donation by the husband in this case is not a donation to the wife at all, but a donation to third parties, namely, to his own brothers and sisters as to one-half of his estate, and to the brothers and sisters of his wife and their children, in two specified exceptions, as to the other half of his estate. It is contended that the deed *quoad* these ultimate legatees has been delivered, or must be held such, that *jus quæritum tertio* has taken place, and that the whole estate of the husband and the wife are now disposed of beyond recall, the deed being expressly declared irrevocable.

Now, this would be a very startling result, for its effect would be, if the condition is well founded, that the pursuer, Mr Mitchell, stands divested of everything he possessed, of his whole estate, heritable and moveable, including his furniture and body clothes, for although the body clothes of the predecessor are excepted, there is no such exception as to the survivor, and, accordingly, although the pursuer has married again, and may have a family, he is not to

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be allowed to make any provision for his new wife, or for his children, but every thing he has is to go to his own brothers and sisters, and the brothers and sisters of his late wife. His present wife and any children he may leave are to be left destitute unless he should happen to earn in his later years a new estate.

I find myself unable to accede to this contention. In the first place, the declaration as to irrevocability really goes for nothing if the bequest is in its nature revocable, for the clause of irrevocability may be itself revoked. It falls with the deed. No man by merely calling his will his last and irrevocable will can bar himself from altering it.

In the next place, I think the deed, though delivered as between the spouses and in the hands of their mutual agent, has not been delivered *quoad* the ultimate residuary legatees of the husband. It would be held delivered *quoad* the wife's estate, because it is really her will, and she is dead, and in testamentary death is delivery, or rather no delivery is needed; but it cannot be said as in the question between the husband and either his wife's brothers and sisters or his own brothers and sisters, that he, the husband, has delivered the deed to them. Apart from the deed being left in the hands of the agent of the spouses there has been no delivery whatever.

But, in the third place, and this is the main point, I am of opinion that the provisions made by the husband, and by the wife too for that part of it in favour of their respective brothers and sisters or nephews and nieces, are testamentary in their nature, and are not conventional or obligatory. The narrative of the deed shews this, for it proceeds on a statement not only of love and favour which the spouses bear to each other and certain onerous causes, and this relates to the provisions to the spouses respectively *inter se*—but it goes on to say that it is a “duty incumbent on us to settle our affairs so as to prevent disputes in regard thereto after our deaths,” that is, after the death of both of us, and this is just the narrative of an ordinary testament. It often happens that the same deed embraces various ends, and is intended to accomplish various purposes, and the effects in such cases will not be different from those which would have followed had they been provided for in separate deeds. The nature and essence of the provisions must always be ascertained, and the proper interpretation applied. An antenuptial contract of marriage very often embraces settlement by each of the engaging spouses of their separate and independent estates, in case the marriage be dissolved without issue; and although the contract is onerous and irrevocable, *quoad* the spouses and their issue, it will be read as a mere testament, and be ambulatory and revocable during the life of each spouse *quoad* their respective estates. The same may happen, perhaps, even more frequently in postnuptial contracts, and there are many instances of this. In the present case is an example. The spouses, after providing for each other, whichever be the survivor, contemplate the death of both without issue, and proceed to make their respective testaments accordingly. The wife gives her estate to her brothers and sisters, next of kin, with certain exceptions, and the husband leaves his estate to his brothers and sisters. If either of them had children would this not have operated as a revocation? If either of them, after the dissolution of the marriage, had married again, as has happened, would not the spouse so marrying be entitled to revoke his testamentary arrangements? Nor do I think any difficulty really arises from the circumstance, which is doubtless an important peculiarity, that instead of using separate testamentary words, each spouse bequeathing his or her own estate, they use mutual words.

wh bequeathing the estate as a whole, one-half to each set of next of kin. If No. 125.
 is had been done between strangers it might easily have been held in certain
 rumstances to have been a mutual settlement, which in general, and, except June 5, 1877.
 some unforeseen cases, may be only revocable by mutual consent. But when Mitchell v.
 ch a deed is made between husband and wife the general law of revocation Trustees.
 of nations comes into play, and a wife or husband who stipulates for a bequest to
 air heirs or next of kin is really, unless there is something very exceptional, in
 e same position as if stipulating for herself or himself. This was the principle
 cognised in the cases of Glasford v. Dawling, March 22, 1634, M. 6106; Stewart
 Foulis, Feb. 1686, M. 6096; Jardine v. Currie, 17th June 1830, 8 S. 937.
 In the present case I cannot hold that it was *pars contractus* between husband
 d wife, and an onerous contract, that the husband should at the dissolution of
 e marriage divest himself of his whole estate, and I think no distinction can
 taken, so far as the husband's estate is concerned, between his wife's relatives
 d his own. If the one set of relatives have a *jus quæsitum* so have the other.
 Of course it is quite different, *quoad* the wife's estate, because her testament
 s become final by her death; and I am of opinion that it will carry the fee of
 e whole of her estate, and not merely of one-half of it, to her preferred next of
 n, for it was a condition of her bequest of one-half of her estate to her
 sband's brothers that one-half of the husband's estate should come to her own
 eferred heirs. If this condition is not fulfilled the wife's heirs-nominate will
 im her whole estate in part compensation of what the husband has revoked
 d withheld.

There might have been a question whether the husband, besides retaining his
 n estate, might not have also claimed the liferent or courtesy—(of course he
 ld not claim the fee of the wife's bonds);—but as he has wisely and properly
 ren up this it is needless to consider it.

On the whole, then, I think the Lord Ordinary's interlocutor should be
 hered to, inserting, in reference to the renunciation by the husband of all
 erest in the wife's estate, that this renunciation is in terms of the pursuer's
 nute of consent.

LORD ORMDALE—This is a peculiar case as regards its circumstances, and
 rious nice and difficult questions in law have been raised in it. And it is cer-
 nly not without misgiving that I have now to express my opinion on these
 estions, seeing it differs not only from that of Lord Gifford, but also, I under-
 nd, from that of your Lordship in the chair, and, in reference to one branch
 the case, from that of the Lord Ordinary.

The first and most important inquiry is, how far the mutual disposition and
 tlement must be held to have been onerous and obligatory, or, to put it dif-
 erently, how far were the considerations given by the wife fair and reasonable
 counterparts of those which were given to her by her husband. The Lord
 dinary in the note to his judgment says that he thinks "it clear that as
 ards the benefits conferred by the spouses on each other the deed was onerous
 d not revocable by either." But this view of the matter was disputed by the
 rsuer, and as the case depends very much on whether it is to be taken as sound
 rnot, it is right that I should at once, and at the outset, address myself to it.
 It is not, I think, quite clear from the record what were the means and estate
 onging to each of the spouses when they executed the mutual disposition
 d settlement in question in December 1873. In the first article of his con-

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descendence the pursuer states that at its date he "was possessed of means and estate to the extent of £3000, or thereby, and his said wife was lender and creditor in two bonds and dispositions in security, together of the value of £460, and which were executed by the granters thereof in her favour before her marriage with the pursuer;" and the answer made by the defenders to this statement is, that "the value of the means and estate belonging to the pursuer and his said wife respectively at that date is admitted." Whether any, and, if any, how much of the £3000 consisted of heritage is not stated, but neither in regard to this or any other matter of fact did either of the parties ask a proof. The debate took place on the footing that probate was not desired. I have not, however, overlooked the statement in article 13 of the condescendence and answer thereto, from which it appears that at his death the trustor had heritable property in Carnoustie, but what was its value does not appear from the record, although it was stated, if I recollect rightly, at the debate, on the part of the pursuer, that its value was £2000.

The question then arises, was there any such inequality in the counter considerations, in reference to which the mutual disposition and settlement was executed, as to entitle the pursuer, as the husband, to revoke it after the death of his wife, on the principle of *donatio inter virum et uxorem*. There were no children of the marriage, and it does not appear, and was not said, that any antenuptial contract of marriage had been entered into between the parties. It was therefore not unreasonable that the husband should by postnuptial deed make some provision for his wife in the event of her survivance. Independently, however, of this I am not prepared to say that there was any such inequality in the mutual considerations in the deed in question as to entitle the pursuer, as husband, to revoke it after his wife's death. According to the general rule, as illustrated by many decided cases, a mutual deed of settlement, partaking as it does of the nature of contract, cannot be altered or revoked except by both of the parties to it. And, in the present case, the deed expressly bears that it was specially agreed by the parties that the survivor should not have any power to alter or recall it, but that immediately on the death of the predecessor it should be a valid and effectual deed.

It is true that while the husband is admitted to have had means and estate to the extent of £3000, and the wife £460 only when the deed was executed, it is also true that the £3000, so far as moveable estate, formed the fund in communion between the spouses, to one-half of which the wife would have been entitled in the event of her surviving her husband. In this view the wife's own £460 and half of her husband's £3000, if moveable, would belong to her. But supposing that some portion of the £3000 was heritable estate it does not appear to me that even in that view, and bearing in mind the rights which would arise of terce and courtesy, according as the death of the one spouse or the other first happened, there is sufficient room for holding that there was inequality in the counter considerations, in reference to which the deed in question was executed, attending to what the parties did by that deed. Now, what the parties did by the fourth purpose of the deed was to declare that the survivor was to enjoy the liferent of the whole of their means and estate, and even to encroach on the capital if necessary for his or her subsistence; and by the fifth purpose it is provided that the capital, or what might remain of it, that is, the free residue on the death of the longest liver of the spouses, should go in equal

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lives to the brothers and sisters, then alive, of the parties respectively, and their issue, to the exclusion of two of the wife's nephews specially named. I must own my inability, in this state of matters, on any fair and reasonable view I can adopt, to hold that there was any such inequality in the counter considerations in the deed as to entitle the husband to revoke it after the death of his wife. It is true that in virtue of the Intestate Moveable Succession Act, 1820, cap. 23, section 6, the wife's representatives could have no right to any part of the £3000—supposing it were wholly moveable—as forming the goods and chattels of the husband in the event, which happened, of her predeceasing her husband, in reference to that contingency, if it alone were to be looked at, there would be a considerable inequality. But, in reference to the other contingency of the wife surviving her husband, and this might have happened just as well rather more likely than the other, if she was considerably younger than her husband, as, I understand from what was stated at the debate she was, the preponderance of consideration was in favour of the wife. And, at any rate, she had all she had, and all that might come to her, and the pursuer, her husband, had no more. In these circumstances, and as it was impossible to tell at the time the mutual disposition and settlement was executed which of the two spouses would predecease the other, I cannot say there was any such inequality as to counter considerations as to entitle the pursuer as husband to revoke the deed after the death of his wife.

It was argued, however, for the pursuer, that the date at which the equality of consideration must be judged of is the death of the wife, when the deed came into operation. But I must take leave to doubt this, either as a general rule or as which is applicable to the circumstances with which we are here dealing. In the case of *Hunter v. Dickson* as decided in the House of Lords (19th Sept. 1852, 5 W. and S., p. 455), it would rather appear to have been held by the Chancellor, looking at the whole of his observations and not an isolated part, that both the date of the deed and the date when it comes into operation ought to be taken into consideration. In the present case, having regard to the circumstances, and especially that the spouses became parties to a deed purporting to be of the nature of contract, I am disposed to think that the date of the deed is that at which the parties themselves must have had chiefly, if not exclusively, in view when it was executed by them; but I am not unwilling to hold that the date of the deed and the date when it came into operation should be taken into account, and in this view my opinion as to the right of the husband to revoke the deed after the death of his wife is that which has been already expressed by me.

There is still another ground in respect of which the mutual disposition and settlement in question must, in my opinion, be held irrevocable by the pursuer after the death of his wife, and that is the vested interests which have been created by it in favour of third parties, viz., the brothers and sisters of the spouses respectively. A mere *spes successionis* would not have been sufficient to prevent revocation as was decided in the case of *Fernie v. Colquhoun*, 20th Nov. 1854, 17 D. 232; but the opinions of the Judges were, in that case, to the effect that the decision would have been otherwise if there had been any *vestitum tertio* in respect of a vested interest. Nor did I understand it to be contended that there were in the present case interests vested in third parties, but a mere *spes successionis*. The deed being a mutual disposition and settlement in favour of trustees, and so expressed and dealt with as to have been operative, and, indeed, put into full operation immediately on the death

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descentence the pursuer states that at its date he "was possessed of means and estate to the extent of £3000, or thereby, and his said wife was lender as creditor in two bonds and dispositions in security, together of the value of £460 and which were executed by the granters thereof in her favour before her marriage with the pursuer;" and the answer made by the defenders to this statement is, that "the value of the means and estate belonging to the pursuer and his said wife respectively at that date is admitted." Whether any, and, if any, how much of the £3000 consisted of heritage is not stated, but neither regard to this or any other matter of fact did either of the parties ask a proof. The debate took place on the footing that probate was not desired. I have not, however, overlooked the statement in article 13 of the condescendence and answer thereto, from which it appears that at his death the trustor had heritable property in Carnoustie, but what was its value does not appear from the record, although it was stated, if I recollect rightly, at the debate, on the part of the pursuer, that its value was £2000.

The question then arises, was there any such inequality in the counter considerations, in reference to which the mutual disposition and settlement was executed, as to entitle the pursuer, as the husband, to revoke it after the death of his wife, on the principle of *donatio inter virum et uxorem*. There were children of the marriage, and it does not appear, and was not said, that an antenuptial contract of marriage had been entered into between the parties. It was therefore not unreasonable that the husband should by postnuptial deed make some provision for his wife in the event of her survivance. Independent, however, of this I am not prepared to say that there was any such inequality in the mutual considerations in the deed in question as to entitle the pursuer, as husband, to revoke it after his wife's death. According to the general rule, illustrated by many decided cases, a mutual deed of settlement, partaking as it does of the nature of contract, cannot be altered or revoked except by both the parties to it. And, in the present case, the deed expressly bears that it was specially agreed by the parties that the survivor should not have any power to alter or recall it, but that immediately on the death of the predeceasing it should be a valid and effectual deed.

It is true that while the husband is admitted to have had means and estate to the extent of £3000, and the wife £460 only when the deed was executed, it is also true that the £3000, so far as moveable estate, formed the fund in common between the spouses, to one-half of which the wife would have been entitled in the event of her surviving her husband. In this view the wife's own £460 and half of her husband's £3000, if moveable, would belong to her. But supposing that some portion of the £3000 was heritable estate it does not appear to me that even in that view, and bearing in mind the rights which would arise of terce and courtesy, according as the death of the one spouse or the other first happened, there is sufficient room for holding that there was inequality in the counter considerations, in reference to which the deed in question was executed, attending to what the parties did by that deed. Now, what the parties did by the fourth purpose of the deed was to declare that the survivor was to enjoy the liferent of the whole of their means and estate, and was not to encroach on the capital if necessary for his or her subsistence; and by the fifth purpose it is provided that the capital, or what might remain of it, that is, the free residue on the death of the longest liver of the spouses, should go in equal

served by Lord Glenlee in the case of *Gentles v. Aitken*, 23d June 1826, 4 No. 125. 1749—and his observation was concurred in by the rest of the Court—"A party may undoubtedly give legacies to strangers in a contract; and where it is clear that they are not in lieu of the other stipulations they would be revocable if in a separate deed. But the provision here was a counter stipulation in favour of the husband's family, and irrevocable."

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On the whole matter, I am, for the reasons I have now stated, of opinion that Lord Ordinary's interlocutor ought to be recalled, and the defenders assoilzied in the conclusions of the action.

LORD JUSTICE-CLERK.—It is impossible to deny that this is a difficult and important case. Allowing all weight to the observations of my brother Lord Midale, which are strong and impressive, I prefer the result at which Lord Ford has arrived.

There are two questions in the case which stand essentially apart. The first whether this mutual settlement was, as far as the husband was concerned, a donation between husband and wife; in other words, whether the deed being substance and effect inequitable in respect of inadequacy of consideration, so a donation to the wife, the husband is entitled to revoke it. The second question is whether, supposing the deed to be a donation, and therefore revocable by the husband in regard to the wife, interests have been created in favour of both parties, which prevent the deed being revoked as regards them.

In the first question an important inquiry is involved, viz., at what period are the respective interests created by the deed to be compared. The case of *Hunter v. Dickson*¹ has been quoted by Lord Gifford as an authority for the proposition, that the adequacy or inadequacy of the considerations, in exchange for which the husband or wife gives up his or her legal rights, may be judged of when the deed comes into operation, that is, at the dissolution of the marriage, not merely at the date when the deed is executed. After the best consideration which I can give to the subject I think that if there is inequality at either of these dates the spouse whose interests are prejudiced by the deed is entitled to revoke it. It is sufficient that the husband or wife be inequitably affected by the deed, either as originally executed, or as it came into operation, to entitle the party to set aside the deed as a donation *inter virum et uxorem*. If the deed is plainly inequitable at the time, clearly the party injured has a right to revoke it, and nothing which subsequently emerges can affect that result. On the other hand, although there may be equality of consideration at the time, if the ultimate result produces inequality, the substance and effect of the deed must be regarded, and the spouse who is injured will in that case also be entitled to revoke.

Applying this rule to the present case, when this deed came into operation it was manifestly and palpably unequal. While the provisions made for the wife in the event of her survivance may have been reasonable, the husband, in the event which happened, got nothing whatever as the counterpart of the obligation under which he had come, of restricting himself to a life interest of his own property in favour of his own and his wife's relatives. The obligation to provide for a sufficient provision for his wife might have supported the deed to that extent; but, far as the settlement on the wife's heirs or representatives was stipulated

¹ *Hunter v. Dickson*, Sept. 19, 1831, 5 W. and S. 455.

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of the wife, it is difficult to come to the conclusion,—at least I feel it to be difficult,—that effect should be given to the pursuer's demands in the present action. I find it stated by the pursuer himself in article 5 of his condescendence that his own agent after his wife died "requested the trustees to accept of office, and to act therein as to dispossess the pursuer, after he had proved to be the survivor of the spouses, of the possession and contract of his own means and estate. And again in article 13 of his condescendence it is also stated by the pursuer that the trustees have, in virtue of the trust-disposition and settlement, taken infestment in his property in Carnoustie. The Lord Ordinary says that infestment was taken two years before the date of his interlocutor.

In these circumstances it appears to me that consistently with well established law the pursuer cannot now be held entitled to revoke the mutual disposition and settlement in question. The case of *Kidd v. Kidds*, 10th December 1866 (2 Macph. 227), seems to me to be very much in point in regard to all the questions which here arise. Excepting that the pecuniary interests involved were there more limited than they are here, and that the beneficiaries in whose favour a *jus quesitum* was created were the children of the marriage, in place as here, the brothers and sisters of the spouses, all the essential circumstances were very similar. The husband was to be restricted to a liferent, which was to terminate if he entered into a second marriage. Such a deed was all the husband had as it turned out that the husband survived his wife, then entered into a second marriage, and had more children. And yet his whole estate, capital and income, as it stood at the death of his first wife, passed entirely from him to his children by that wife.

The amount of the pecuniary interest involved in *Kidd's* case cannot, I think, affect the matter, and neither, do I think, can the circumstance of the husband being entitled to the ultimate benefit being the children of the first marriage. In regard to the latter point Lord Deas said,—“I agree in the observation that in this case the children, who are donees, are to be regarded as third parties to whom an interest has vested under the delivered deed, more especially as the wife had rights in respect of which she was entitled to bargain for behoof of her children,” just as the wife, in the present case, may be said to have had rights for which she was entitled to bargain for behoof of her brothers and sisters. It is, indeed, obvious from the report that the decision in the case of *Kidd* proceeds not on specialities, but on general principles applicable alike to all cases of this class to which it and the present case belong.

I must therefore hold it to have been settled in the case of *Kidd v. Kidds* that a mutual deed of settlement, such as that here in question, is not revocable by the husband, after his wife's death, on the ground of its being *mortis causa*, or on the principle of *donatio inter virum et uxorem stante matrimonio*, that revocation is barred in the present as it was in that case by the intention of vested interests creating a *jus quesitum tertio*. And if I am right in these propositions it necessarily follows that the deed is in all respects binding in giving the benefits intended by it for the brothers and sisters of the spouses. These interests are associated with, and made to depend in such manner upon the rights of the spouses themselves, which form the other objects of the mutual deed, as to render it impossible, I think, to deal with them as separate and independent legacies or interests. They are unmistakeably made to form an important part, and a very important part, of the counter considerations in reference to which the spouses contracted and agreed to execute the mutual deed. As

THE LORD ADVOCATE, Pursuer.—*Lord-Adv. Watson—Sol.-Gen. Macdonald* No. 126.
—*Rutherford.*

MRS E. M. BALFOUR OR SIDGWICK, Defender.—*Kinnear.*

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v. Sidgwick.

Succession-Duty Act (16 and 17 Vict. c. 51), sec. 17.—The 17th section of the *Succession-Duty Act* provides that “no bond or contract made by any person *in jure* for valuable consideration in money or money’s worth, for the payment of money or money’s worth, after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made.”

A lady on her husband’s death became entitled to payment of an annuity of £1000 provided to her by her husband’s father in her antenuptial contract of marriage. The Crown claimed succession-duty from the widow as successor to her father-in-law who had predeceased her husband. The widow claimed exemption under sec. 17, on the ground that the annuity had been granted for valuable considerations set forth in the marriage-contract, viz. (1) the settlement of £10,000 by her father upon the spouses and the children of the marriage, and her renunciation of *jus relictæ* and terce. *Held*, in sustaining the claim of the Crown (*diss.* Lord Deas), (1) that the provision by the lady’s father was a consideration for the granting of the annuity in the sense of the Act, and that the renunciation of *jus relictæ* and terce was not a valuable consideration, the husband, at the date of the marriage-contract, having neither heritable nor moveable estate.

Observed (per the Lord President) that in most marriage-contracts the consideration of each provision is the marriage.

THIS was a special case presented by the Lord Advocate, and Mrs Sidgwick, daughter and executrix of the late Lady Blanche Balfour, under the 8th section of the Court of Exchequer Act (19 and 20 Vict. c. 56). The question submitted to the Court was whether an annuity of £3000 provided to Lady Blanche in her marriage-contract was chargeable with succession-duty under the Act 16 and 17 Vict. c. 51, sec. 2.

The contract of marriage in 1843 between James Maitland Balfour, eldest son of James Balfour of Whittinghame, on the first part, the said James Balfour on the second part, and Lady Blanche Cecil and her father, the Duke of Salisbury, on the third part, Mr James Balfour, in contemplation of the marriage (which took place) between his son and Lady Blanche Cecil, bound himself and his heirs to entail the estates of Whittinghame, and other estates of great value, upon his son, and the issue of the marriage, and bound himself to pay his son an annuity of £1000 during their joint lives. Further, the father and son bound themselves and the heirs of entail to pay Lady Blanche an annuity of £500 in the form of pin-money, until her jointure of £3000 aftermentioned should become payable, but declaring that during James Balfour’s lifetime the interest of Lady Blanche’s fortune of £10,000 aftermentioned should be applied as payment *pro tanto* of the annuity of £500.

Further, James Balfour bound himself and the heirs of entail to pay to Lady Blanche after the death of James Maitland Balfour, her promised husband, an annuity or jointure of £3000, which should be a real burden upon the lands to be entailed.

Lady Blanche accepted these provisions in full of her terce and *jus relictæ*, for which causes and upon the other part Lord Salisbury bound himself to grant a bond for £10,000, bearing interest at 4 per cent, to the heirs—(1) During the lifetime of James Balfour for payment of the interest to Lady Blanche, to be imputed *pro tanto* to the annuity of £500; after James Balfour’s death to pay the interest to J. Maitland Balfour during his life; (3) after his death to pay the interest to Lady Blanche

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for by her, it was pure donation, for which, as the event has shewn, she gave and her husband received, nothing. The law would have given him all that received.

The second question is, whether, supposing that the deed was revocable regards the wife, it can now be revoked as regards the donees. It is as with some force, that as the deed has been delivered, and the trustees have entered into possession of the estate under the deed, it is now too late to exercise the right of revocation. There have been a variety of decisions on the subject both ways, but I have been unable to find any case in which a testamentary deed in favour of third parties, and purely gratuitous, has been held by delivery to create a *jus quaesitum*, so as to prevent the party making the settlement from revoking it. The case is quite different when there is reasonable equality on either side, so as to sustain it in a question between the granters. But if the deed be in itself only testamentary and gratuitous, it will not be saved from revocation by being delivered. I do not intend to go over the cases. They have been commented upon with great force in the recent case of *Spalding v. Spalding's Trustees*.¹ I shall only refer to one of these, *Somerville v. Somerville*, May 1819, F. C. In that case the deed was not only delivered, but a document to that effect was written upon it by the granter. The Court held that as the deed was testamentary and gratuitous, there was necessarily implied a right on the part of the granter to revoke it. The present is a strong case for the application of the same principle, because the settlement is not in favour of the children of the marriage, but in favour of the brothers and sisters of the truster and his wife. The case of *Kidd*,² which has been referred to, was a different case from the present. There the parties were in a humble rank of life, and the wife succeeded to a legacy of £300. The husband at once very properly made a contract with his wife in regard to this sum in favour of the children of the marriage. But, more especially as the fund came from the wife, the deed in favour of the children of the marriage was in no sense gratuitous, but was a reasonable fulfilment of a natural obligation. Here the bequest is in favour of third parties and is purely testamentary.

With the variation proposed by Lord Gifford, we shall adhere to the interlocutor of the Lord Ordinary.

THIS interlocutor was pronounced:—"Find that the trust-disposition and settlement referred to in the summons and record is revoked by the pursuer, in so far as it disposes of his own estate; but in terms of the minute No. 12 of process that such revocation be on the condition that he shall renounce all benefit under the disposition and settlement in the estate of his deceased wife, and refund, with interest, any part of said estate which he may have received under the same: With the above variation, adhere to the interlocutor of the Lord Ordinary: Find both parties entitled to their expenses out of the fund in the hands of the trustees," &c.

W. G. ROY, S.S.C.—FYFE, MILLER, FYFE, & IRELAND, S.S.C.—Agents.

¹ Dec. 18, 1874, *ante*, vol. ii. p. 237.

² *Kidd v. Kidds*, Dec. 10, 1863, 2 Macph. 227, 36 Scot. Jur. 112.

The Lord Advocate reclaimed, and argued;—To bring the case within No. 126. the exemption of the statute there must be a direct consideration in money

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obligation was truly the obligation of James Balfour, and became prestable by his son only as heir of entail. Had the latter predeceased his father the annuity would have been payable to Lady Blanche by James Balfour, not under the deed of entail, but in virtue of the personal obligation undertaken by him in the contract of marriage, and after his death it would have been payable by the next succeeding heir of entail, under an obligation imposed not by the husband, but by James Balfour in the deed of entail. And if the defendant's case had depended solely upon the contention now under consideration, I should have had great difficulty in sustaining her claim for exemption from succession-duty.

"But I think the defendant is entitled to prevail on the other ground pleaded by her, viz. that the annuity was settled for valuable consideration in money or money's worth in the sense of section 17 of the Act 16 and 17 Vict. 51. The part of the section on which this argument is based is expressed as follows, viz. :—'No bond or contract made by any person *bona fide* for valuable consideration in money or money's worth for the payment of money or money's worth after the death of any other person shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made.' The meaning of that section has been considered in various cases in England. In the case of *Floyer v. Bankes*, 9 Jur. (N. S.), p. 1255, which was cited for the Lord Advocate as his leading authority, the Lord Chancellor (Westbury) said,—"The essential requisites of a contract which is not to create a succession are clearly defined by the 17th section. First, it must be a contract by one person to pay money or money's worth to another; secondly, it must be made *bona fide* for valuable consideration existing in money or money's worth; thirdly, the contract creating personal liability between the contracting parties; and, finally, such a contract is prevented from creating a succession only as between the contracting parties, for all that the 17th section does is to declare that there shall be no relation of predecessor and successor between the person bound to pay and the person entitled to receive." Adopting this as the sound construction of the statute, I am of opinion that in the present case all these essential requisites are to be found. In the first place, there is a contract by James Balfour to pay money to another (Lady Blanche) on the death of a third person, viz. James Balfour. In the second place, the contract is made undoubtedly *bona fide* for the valuable consideration of £10,000 settled by the lady and her father, which creates personal liability between James Balfour and Lady Blanche; and, finally, the annuity on which succession-duty is claimed is, according to the Lord Advocate's own contention, a succession between these two contracting parties, viz. the person bound to pay and the person entitled to receive, but as between such parties the statute declares that there shall be no relation of predecessor and successor.

It is indeed maintained on behalf of the Lord Advocate that in the present case no valuable consideration in money or money's worth was given for the annuity. It is unnecessary in the view which I take of the case to hold that either the marriage itself or the renunciation by Lady Blanche of her terce and *jus relictis* constituted a valuable consideration in money or money's worth. The husband had apparently at the date of the contract no estate, heritable or moveable, in that respect the case closely resembles the case of *Floyer v. Bankes*, in which Lord Westbury, reversing the judgment of the Master of the Rolls, expressly decided that neither the marriage nor the renunciation by the wife of a third dowry out of the estates which her husband might never possess could be held to be considerations in money's worth. But in the present case I think it must be held that a valuable consideration in money was given for the annuity by the settlement in the marriage-contract of £10,000 by the Marquis of Salisbury for behoof of his daughter, Lady Blanche, and her husband, J. M. Balfour, the children of the marriage. It is said that neither the said sum of £10,000 nor any other sum of money was paid or provided to James Balfour; but that

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over and above her jointure; (4) after her death to pay the capital to the children of the marriage; (5) in the event of there being no children, pay the capital, if Lady Blanche predeceased her husband, to such persons as she should appoint, or, failing such appointment, to her husband if he survived, but if she should survive to herself in absolute property.

All the stipulations of the contract were fulfilled, and the entail Whittinghame was executed by James Balfour, in which the jointure of £3000 to Lady Blanche was made a real burden. He died in 1845. His son, James Maitland Balfour, succeeded to the estates, and died in 1851. He was survived by his widow, Lady Blanche Balfour, who thenceforth received her annuity of £3000 till her death in 1872.

The Lord Advocate maintained "that under the Act 16 and 17 V. cap. 51, the annuity of £3000 was a succession derived by Lady Blanche from James Balfour upon the death of her husband, and as such liable in succession-duty at the rate of one per cent; that the marriage of his son with Lady Blanche was the consideration on account of which James Balfour granted the annuity, and marriage, although a valuable consideration, was not a valuable consideration for money or money's worth in the sense of the Succession-Duty Act; that neither of the spouses conferred any provision on James Balfour, but he, besides the annuity of £3000 in question to Lady Blanche, granted to James Maitland Balfour an annuity of £3500 during their joint lives, and obliged him to grant the entails of Whittinghame and others, in which James Maitland Balfour was the substitute immediately after himself; that reciprocal provisions by the spouses in favour of each other could not be regarded as valuable consideration in money or money's worth to James Balfour, and they were not such with reference to the spouses themselves in the sense of the Succession-Duty Act."

The defender maintained "that the said annuity was not chargeable in succession-duty, in respect (1) that it was settled for valuable consideration in money or money's worth in the sense of section 17 of the Act 16 and 17 Vict. cap. 51, such valuable consideration being, first, the payment of £10,000 for the purposes of the marriage-contract, and secondly the discharge by Lady Blanche Balfour of *terce* and *jus relictæ*; and in respect (2) that the payment of the foresaid annuity was an obligation undertaken by the said James Maitland Balfour in favour of his wife, under the foresaid disposition and deed of entail, and as such was liable in succession-duty."

The Lord Ordinary pronounced this interlocutor:—"Is of opinion, finds, decerns, and declares that the annuity of £3000 provided to Lady Blanche Balfour, and referred to in the said special case, is not chargeable with succession-duty: Grants leave to the Lord Advocate to reclaim."

* Lady Blanche was one of four children who were entitled under her mother's marriage-contract to such share of a sum of £20,000 as their father might appoint. Lady Blanche, in consideration of the sum of £10,000 provided by her father in her marriage-contract, and paid to the trustees, gave discharge of her claim upon the above sum.

† "NOTE.—One of the grounds on which the defendant maintains that the annuity of £3000 provided to Lady Blanche Balfour in her marriage-contract is not liable to succession-duty is that the payment of said annuity was an obligation undertaken by her husband, James Maitland Balfour, in favour of her. But I do not think that the obligation was either in form or in substance a donation of that character. It is true that James Maitland Balfour, by his will, gave possession of the estate of Whittinghame on the death of his father, James Balfour, accepted the disposition and deed of entail thereof executed by his father, and thereby became bound to pay the said annuity as heir of entail. But

must look to the precise words of the Act as applicable to the legal relation constituted. 2. The lady's renunciation of her terce and *jus relictæ* was a valuable consideration in money or money's worth. The judgment of Lord Westbury in *Floyer* implied that if there had been present rights given up it would have been sufficient.

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At advising,—

LORD PRESIDENT.—The question raised in this special case, and disposed of by the Lord Ordinary's interlocutor, is, whether a certain annuity of £3000 provided for the late Lady Blanche Balfour in her contract of marriage is chargeable with succession-duty? There are, I think, three separate grounds upon which a defender maintains that it is not so chargeable.

In the first place, it is contended that payment of the annuity was an obligation undertaken by the husband in the marriage-contract—an obligation by the husband in favour of the wife—in consequence of a deed of entail (as I understand it), which settled the estate upon him and the issue of the marriage. Now, I am clearly of opinion with the Lord Ordinary that that is not a good ground for holding the annuity free of charge; because the obligation undoubtedly was a personal obligation undertaken by the husband's father, and not by the husband himself, in the marriage-contract, and although there was security given for the payment of the annuity over the estate which the father then agreed to leave upon his son and the issue of the marriage that obligation never became binding upon the husband except in his character of heir of entail. It was not before an obligation undertaken by him in the marriage-contract in favour of his wife, and so the annuity cannot possibly be excepted from chargeability as being a succession by the wife to the husband.

Then it is contended upon two separate grounds that the annuity is not chargeable with succession-duty, because it is exempted under the provisions of the 17th section of the statute 16 and 17 Vict. cap. 51. The provision of the Act applicable to the case is, that "no bond or contract made by any person in consideration of money or money's worth, for the payment of money or money's worth after the death of any other person, shall create a relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made." It is contended that a valuable consideration was given for this annuity in money's worth, because Lady Blanche Balfour in the marriage-contract renounces her right of terce and *jus relictæ*. I am not prepared to say that a renunciation of rights may not under some circumstances be a consideration in money or money's worth for something that is given for such renunciation. If there was a presently existing right of terce and *jus relictæ*—a right of present value received in consideration of an annuity—that might be quite intelligibly maintained to be a consideration in money's worth. But Mr Maitland Balfour, the husband of Lady Blanche, at the time of their marriage was not possessed of any real estate, nor of any moveable estate, and therefore there really was no valuable right in the person of Lady Blanche Balfour which she could renounce at that time. It was something quite prospective and visionary, and therefore never came under the description of money's worth. In that respect also I am in agreement with the Lord Ordinary.

His Lordship has held that there was another consideration in this case—given for this annuity, which is a substantial consideration in money or money's worth, and that raises a question undoubtedly of considerable importance

No. 126. and of some novelty. The scheme of the marriage-contract was that the father of the husband, Mr Balfour of Whittinghame, undertook, in contemplation of the marriage then about to be solemnised between his son and Lady Blanche, to settle his estate—a very large landed estate—upon his son and the heirs of the marriage in entail. He also bound and obliged himself to make payment to Lady Blanche during all the days of her lifetime after the death of her husband of an annuity or jointure of £3000 a-year, and this, as I have mentioned already, was made a burden upon the entailed lands. These were the chief obligations undertaken by Mr Balfour, the father of the husband. On the other hand, the Marquis of Salisbury, the father of the bride, bound and obliged himself to grant a bond or other deed or deeds required by the laws of England, and in the English form, for payment of the sum of £10,000 sterling on the 15th day of May 1844, to bear interest at the rate of 4 per cent per annum from and after the celebration of the said marriage, to certain persons, as trustees for the lady and her children. Now, the question comes to be, whether this obligation to pay £10,000 and the proceeds for behoof of the lady and her children is a consideration in money or money's worth given for the obligation of Mr Balfour to provide and pay an annuity of £3000 to Lady Blanche? The nature of the settlement, expressed in popular language, may be this: The lady's fortune was settled upon herself and her children; it was not a fortune which belonged to her previously, but it was a marriage portion provided to her by her father in pursuance of some previous family settlement to which it is needless specially advert. And, on the other hand, the obligation of the husband's father was to pay an annuity to the bride in the event of her surviving her husband. It is a very important question undoubtedly, whether, when there is a provision of an annuity on the one side, and a provision of a sum of money on the other—it is to say, when each of the proposed fathers-in-law contribute in that way a capital sum of money and an annuity respectively—the one of these is what the meaning of the statute the consideration of the other? It seems to me that when one thing is under a contract the consideration of another, it necessarily follows that if the consideration fail the obligation of which it is the consideration fails also; and if that test be applied to the present case I am afraid the necessary conclusion is that the one is not the consideration of the other. Suppose that from any cause the Marquis of Salisbury had failed to pay the £10,000—suppose he had been unable to do so—a very wild supposition, without doubt, in the case of the Marquis of Salisbury, but it might have occurred with other people—if he had become bankrupt and the provision was not paid, would the annuity provided by Mr Balfour to his daughter-in-law have failed also? Most assuredly not. He would have been just as fully bound to provide and pay the annuity to his daughter-in-law as if the Marquis of Salisbury, on the other hand, had fulfilled his obligation to pay the £10,000. I do not think there can be any doubt about that. Then, is it possible, if that be the case, to hold that the one is the consideration of the other?

It was represented that the consideration of the obligation might be partly the counter obligation and partly the marriage, and that even in that case there was a consideration in money or money's worth, because although the marriage was one consideration, the money provision was the other, and there was an exemption from charge under the 17th section of the statute. Now, it does not appear to me that that is the true view of a contract of this kind at all. I think that every one of the marriage provisions which we find here has an

propriate consideration under the contract, but one consideration only, and I think the consideration of each one of them is the marriage and nothing else. It appears to me that when the Marquis of Salisbury promises to pay £10,000 as the marriage portion of his daughter, he does that, not because of or in consideration of the provisions made on the other side, but because his daughter is going to be married, and for no other reason. And, on the other hand, when Mr Balfour makes his provision of an annuity for his intended daughter-in-law, he does that because she is to become his daughter-in-law, and for no other reason.

It may be that in conducting a marriage treaty a great deal may pass between the parties which in negotiation bears the appearance of giving money on one side, and consideration for money on the other. That is very true, and so, too, where parties differ about the amount of money to be given on the one side and on the other, there may be a failure of the treaty altogether. But suppose that one of the parties declines to give the money that is proposed—what is the result? Not that the other provision is withheld and that the marriage proceeds, but that the marriage does not take place. And here, again, we have a very clear indication of what lies at the bottom of the whole proceedings of the parties as the consideration upon which they are acting, and as the cause of everything that takes place. It is not because one man gives £10,000 on the one side that another man gives an annuity upon the other. The sole motive of the whole of the parties is the marriage which is about to be celebrated. And therefore I am of opinion that under this, as under most marriage-contracts, the sole consideration of each provision is the marriage; and if that be so, I am compelled to differ from the Lord Ordinary, because I hold it to be quite clear that the marriage is not within the meaning of the Act of Parliament a consideration in money or money's worth.

LORD DEAS.—By the contract of marriage of the Lady Blanche Cecil, afterwards Balfour, and James Maitland Balfour, in August 1843, the Marquis of Salisbury, father of the bride, bound himself, and his heirs, executors, and assignees, to grant a bond for payment, on the 15th May 1844, of £10,000 bearing interest from and after the celebration of the marriage), to trustees for purposes which I need not detail at length, but the result of which was, by relieving the intended husband and his father of their obligation to pay to Lady Blanche £500 per annum of pin-money, to give the husband the immediate benefit of the interest of the £10,000, and to provide the fee to the children, and, failing children, to carry that fee to the husband if he was the survivor, and a wife did not appoint otherwise. Lady Blanche, to the extent of any provision she might have claimed under her father and mother's marriage indenture, was a consenting party to the purposes of the trust thus created. Such is the money consideration on the one side. On the other hand, an annuity of £3000 a-year was, contingently, provided by James Balfour, the father of the intended husband, to the Lady Blanche, in the event of her surviving her husband,—which she did. The husband's father died in April 1845, and the husband himself died on the 23d of February 1856, when the lady's annuity of £3000 commenced to be payable, and the present claim for succession-duty, if it be well founded, became prestable. At the distance of twenty-one years payment that duty is now demanded.

The demand is founded upon section 2 of the statute 16 and 17 Vict. c. 51,

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No. 126. upon the footing that section 17 is not applicable to money considerations, although mutual, if contained, as they are here, in an antenuptial marriage-contract. That was the substance of the argument upon which the Lord Advocate v. Sidgwick. in his reply rested the claim of the Crown, and it just comes to this, that whatever money provisions, or provisions of money's worth, may be provided upon the one side and the other, and whatever personal liability may be thereby created between the parties, these provisions do not come under section 17 of the statute if they are contained in an antenuptial contract of marriage, the marriage itself being, it is contended, to be regarded as the sole consideration for all such provisions.

No precedent to that effect was cited to us, and I am not aware that there is any such precedent. It is a question raised long after the passing of the statute but which does not appear to have been hitherto decided either in the one way or the other. The only case referred to in which anything really bearing on the point is to be found is the case of *Floyer v. Bankes*, decided by Lord Westbury, a very high authority, and in which he reversed the judgment of the Master of the Rolls. It was there decided, and I cannot doubt rightly decided, that the consideration of marriage is not money or money's worth in the sense of section 17 of the statute. But it does not follow that there may not be money or money's worth provided on one side and the other in a marriage-contract in such terms as to come within the operation of the section. In the present case we have substantial sums of money provided on the one side and the other. The £10,000 provided by the Marquis of Salisbury on behalf of his daughter Lady Blanche was immediately payable, and paid, and forthwith bearing fruits. The annuity provided to the lady by James Balfour and his son was large—£3000 a-year—but it was not absolutely provided, but only in the event of her surviving her husband. It might only therefore come into operation after a long period of years, or it might never come into operation at all. It has not been pleaded to us that there was any such inequality between these two provisions as to make an exceptional case, if section 17 of the statute can be applied to money provisions in a contract of marriage. The case has been pleaded as raising the important general question, that, be the pecuniary considerations upon each side what they may, they cannot fall under section 17 of the statute if contained in a marriage-contract.

That is the doctrine contended for and avowedly desired to be established by the Crown in this case, and properly so desired if the Crown can make it out. I have considered that doctrine very attentively, and I have not been able to persuade myself that it is sound. It is said that the marriage is to be held to be consideration for everything. But where is the authority for that proposition? It has not been so decided, and I do not even find any *dicta* to that effect. No doubt marriage is an onerous consideration. It is one of the considerations in this contract. Is it the sole consideration? I am not able to see that it is so. There are many marriages where there is no other consideration. It would be very sad if this were not so. But there are also many marriages where bargains or mutual purchases are made with reference to estates of importance and money of great amount. It is not a matter of course, in adjusting a contract of marriage, that either of the parties shall provide estates or sums of money; but if upon the occasion of the marriage they make a mutual bargain of that kind it is not the bargain as to money or money's worth that it is contained in a contract of marriage. Laying out of view all money provisions, the consideration of marriage

is equally onerous on the part of each of the spouses. The one balances the other, No. 126. so far as that goes. The wife binds herself irrevocably to the husband, and the husband binds himself irrevocably to the wife. These mutual considerations are June 6, 1877. Lord Advocate v. Sidgwick.

equal to and satisfy each other. If to these there be superadded upon one side provision, say of £5000, in money, prestable on the death of one party, and a provision on the other side of £5000 in money's worth, prestable on the death of another party, shall there be held to be no bargain or purchase within the meaning of section 17 of the statute because the spouses have, in the same deed, contracted to become husband and wife? I find nothing to that effect in the words of the section. There is not a syllable in it to exclude the application of the enactment to marriage-contracts. The enactment is, on the contrary, general and absolute in its terms. Again, taxing enactments are not construed in favour of the Crown unless that is obviously their fair meaning. The rule is rather the other way. It is mere iteration to say that the sole consideration for all the mutual provisions is the marriage. That is the proposition to be proved.

It would be a waste of time to go into many of the cases which have been mentioned in the course of the argument, because they really come to nothing on this question. The case mainly requiring attention is the case of Floyer Bankes, to which I have alluded. The Master of the Rolls had there based his judgment on two grounds—1st, That the marriage itself was, in the sense of section 17 of the statute, a valuable consideration for the lady's annuity, requiring no money to be superadded to give it full force. Lord Westbury held that this ground of judgment was erroneous, and I think it plainly was so. 2d, That the lady's renunciation of dower, free bench, and the widow's right to one-third the personal estate of the husband on intestacy was money's worth. The answer to this was that, at the date of the contract, the rights renounced could

be regarded as money's worth, because the husband had no estate out of which these rights could arise. The judgment was therefore reversed. But Lord Westbury indicated no opinion favourable to the contention of the Crown in his case—that whatever may be the mutual provisions in money or money's worth section 17 will not be applicable if these provisions are contained in a contract of marriage. The inference from all that he said is rather the other way. For, what had been his opinion, he had only to have said so, and it was unnecessary to have said more. That ground, if a good ground, would have been sufficient for judgment. In place of that, he is at pains to detail the grounds upon which he goes, not one of which implies a recognition of the doctrine in question.

He says—"The essential requisites of a contract which is not to create a succession are clearly defined by the 17th section. First, it must be a contract by which a person to pay money or money's worth to another; secondly, it must be one *bona fide* for valuable consideration existing in money or money's worth, and the contract creating personal liability between the contracting parties; and, thirdly, such a contract is prevented from creating a succession only as between the contracting parties, for all that the 17th section does is to declare that there shall be no relation of predecessor and successor between the person bound to pay and the person entitled to receive."—9 (English) Jurist, N. S., p. 1256.

He then goes on to say—"This reduces the matter to the inquiry, is there a contract by Henry Bankes and William John Bankes to pay these annuities to Miss Nugent on her becoming the widow of George? Were they, or was either of them, to be in any way liable for such payment? The answer must

No. 126. be that there is nothing of the kind ; This was because Henry Bankes and William Bankes had merely exercised a joint power of appointment which they had by indentures, dated in 1810 and 1821, entitling them to burden certain hereditaments with rent charges, which they did, in favour of Miss Nugent ; in case she should survive her husband George Bankes, but without themselves coming under or ever having been under any personal liability whatever for these rent charges or any part thereof.

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The Lord Chancellor further says—" But if this could be held to be a contract to pay, which would be an abuse of language, a valuable consideration in money or money's worth would still be required ;" and as neither the marriage nor the renunciation of dower, &c., could be called such, and no other consideration on the lady's side was alleged, his Lordship came to the conclusion that section 17 of the statute did not apply to the case.

There is obviously, to say the least of it, nothing in all this to countenance the general doctrine that it is sufficient to exclude the applicability of section 17 that the provisions in money or money's worth are contained in a contract of marriage. If that doctrine is not to be set up by the judgment in the present case the case loses all its general importance. But while my opinion is against the soundness of that doctrine I do not say we can negative the pecuniary consideration of the Crown in the present case, unless the essential requisites pointed out by Lord Westbury are found to occur in it, viz., 1st, A contract by one person to pay money or money's worth to another ; 2d, a *bona fide* valuable consideration in money or money's worth, the contract creating personal liability between the contracting parties.

I am disposed, however, to think that both of these elements, which were wanting in the case of *Floyer v. Bankes*, are to be found in the present case.

1st, By the contract of marriage James Balfour and his son James Maitland Balfour bound and obliged themselves, and James Balfour bound and obliged the heirs under the entail, which he thereby undertook to execute, of the Whithorn estates, to make payment to Lady Blanche, if she survived her husband, of the annuity in question of £3000 a-year.

2d, On the other hand, the £10,000 provided by the Marquis, with the concurrence of Lady Blanche for her interest, for behoof of her husband and her and the issue of their marriage, in the terms already alluded to, was a *bona fide* valuable consideration in money or money's worth for the obligations undertaken by James Balfour and his son. The obligation of the Marquis is introduced by the words, " For which causes and on the other part "—the causes being the provisions made by James Balfour and his son along (I quite admit) with the marriage itself. The contract created, in the most express and absolute terms, a personal liability on the part of the Marquis to pay the £10,000 whatever might become of his wife's hereditaments and real estates, which were originally provided with £20,000 for provisions to their children by indenture made on the occasion of their marriage. The Marquis bound himself, his heirs, executors, administrators, and assignees to grant bond for the £10,000, payable at Whitsunday 1844, with interest from and after the celebration of the marriage. It is not stated in the case whether the bond was actually granted, but the principle applies that what should have been done is to be held as having been done. The stipulated interest was accordingly paid by the Marquis, and in 1860 he paid the capital itself to the trustees under the contract, whereupon the L

Blanche discharged all claim she might have had to a provision under the indenture just mentioned. No. 126.

In these circumstances it humbly appears to me that the conditions of section 17 of the statute must be held to have been satisfied, and I am therefore for adhering to the Lord Ordinary's interlocutor. June 6, 1877.
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LORD MURE.—I concur in thinking this an important and difficult question ; but after giving it the best consideration in my power I have come to the same conclusion as your Lordship in the chair, and substantially upon the same grounds. I shall therefore state my reasons very shortly.

It is not disputed that the duty here claimed is due under the 2d section of the Act, unless the succession is exempted in respect of the terms of the 17th section. Under that section it is provided that no bond or contract made by any person *bona fide* for valuable consideration in money or money's worth shall create the relation of predecessor and successor, so as to make the provisions of the 2d section applicable. Now, it seems to be settled in England, in the case of *Floyer v. Bankes*, that marriage itself is not a consideration in the sense of the statute, even where as here there is in the marriage-contract a renunciation of the dower or of all contingent legal rights on the part of the wife. That, no doubt, was not a judgment of the House of Lords, but it was a judgment of the Lord Chancellor of the day, altering a judgment of the Master of the Rolls, and therefore it is an interpretation of the statute which is entitled to great weight ; and I shall only say that I concur in the view which Lord Westbury there indicates, on the question whether marriage and a renunciation of the dower can, in the ordinary case, be held to be a consideration in the sense of this statute. I do not say that there may not be provisions so broad, and a contract of marriage entered into, as to fall under the provisions of the 17th section of the statute. But the question we have here to decide is, whether there is anything in this contract of marriage which can be said to be a consideration in money or money's worth in the sense of the Act?

Now, I can find nothing in the deed itself which says that the settlement of the annuity by Mr Balfour is to be dependent on the settlement of the £10,000 by Lord Salisbury. Looking at the contract in a general point of view it just comes to this, that the father of the gentleman undertakes to make a provision by way of annuity for his daughter-in-law on his son's death, and the father of the lady undertakes to settle a sum on her and the children of the marriage. The one does not appear to me to be given as an equivalent for the other, but because the son of the one party and the daughter of the other are about to enter into a contract of marriage. I therefore agree with your Lordship that it is in contemplation of the marriage that both these provisions were made, and I do not see anything in the terms of the marriage-contract to enable me to say that the one is a consideration in money or money's worth for the other. I think the language of the deed is not unimportant. It says that the said James Balfour, in contemplation of the marriage of his son, settles so and so. Now, it is not to be thrown out of view that in the ordinary case of marriage-contracts, where the one provision is intended to be a consideration for the other, there is generally to be found in addition to the words "in contemplation of the marriage," the words "and in consideration of the provisions made in her favour aftermentioned." These words are omitted here, and it is simply stated that the annuity is granted in contemplation of the marriage, without any reference

No. 126. to what may be done by the lady's father in the subsequent part of the deed. And when we come to the subsequent clauses we find that they simply provide certain things in contemplation of the marriage; but I do not see any words which lead me to suppose that the consideration which Mr Balfour had in view when he made that provision was the £10,000 which Lord Salisbury settled upon the children.

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LORD SHAND.—The claim of the Crown in this case is resisted on two grounds—in the first place, on the ground that the lady who got the benefit of the annuity gave valuable consideration for it, in respect she renounced her right of terce and *jus relicte*; and, in the second place, on the ground that in return for the annuity she gave a present payment to trustees of £10,000. In regard to the first of these points I think the case is substantially in the same position as that of *Floyer v. Bankes*, to which reference has already been made, and in which Lord Westbury in delivering judgment said—"The Master of the Rolls seems to have thought that the implied agreement by Mrs Georgina Bankes to release her dower or free blench would be a consideration in money's worth within the meaning of the 17th section. This perhaps might be so if it were shewn, which it is not, that George Bankes was at the time of the contract possessed of or entitled to any estate out of which his wife might become dowerable, but a bare possibility of future dower or free blench in non-existing estate would not have been a subject of value at the time of the agreement, and the release of such a possibility would not, in my judgment, answer and satisfy the words 'valuable consideration in money or money's worth.'" It will be observed that there is no opinion here expressed that the renunciation of such a right even if the lady would by the marriage have acquired a right in existing estate would be a consideration in money or money's worth sufficient to bring the case under section 17 of the statute. The statement is carefully guarded: it is "perhaps" it might be so; and I am not disposed in this case to put it higher. Here, so far as the right of terce is concerned, it appears to have been of no value, because by the very contract with which we are dealing we find that the husband's father stipulated that he should only be bound to entail the estate subject to the condition that there should be no right of terce attached to the estate, and as to the *jus relicte* it was entirely problematical whether that right should be of any value whatever. So that the case, so far as the *jus relicte* is concerned, is precisely the same as that of *Floyer*. But I am not prepared to say that the possession of either of these rights, even if there were existing estate, would be sufficient to operate an exemption of succession-duty under section 17 of the statute, for I think that in that state of the facts a somewhat similar question to that which we have now to determine in dealing with the second point would arise—viz., the question whether that renunciation is really a giving of money or money's worth for the provision which is secured, or whether it is not given really in consideration of the marriage, the marriage being the true consideration in respect of which the right would be renounced. I am far from saying that I think a renunciation of rights of terce or *jus relicte* even where the husband is possessed of estate, would be sufficient. But the case being in the same position as that of *Floyer*, I am of opinion that here the renunciation cannot be regarded as a valuable consideration, in respect that there were no existing rights.

The next point that arises is, whether the sum of £10,000 provided under

and by the lady's father can be regarded as a valuable consideration in money No. 126.
 money's worth, given for the annuity of £3000? And here a question might
 arise whether this sum was really given by the lady at all. If it was not given June 6, 1877.
 the lady, but was given by her father, the only result under the statute would Lord Advocate
 this, that as the lady's father in that view purchased the annuity by paying v. Sidgwick.
 £10,000, there would be no relation of predecessor and successor in refer-
 ence to the annuity as between Mr Maitland Balfour and his daughter-in-law,
 that relation would still subsist as between Lord Salisbury and his daughter,
 Lord Salisbury in that view became the purchaser of this annuity by paying
 £10,000. It is plain from the concluding words of section 17 that while
 relation of predecessor and successor would not arise directly between the
 son granting the annuity and the person in whose favour it was made, yet as
 statute provides that "any disposition or devolution of the money payable
 under such bond or contract, if otherwise such as to create a succession within
 provisions of this Act, shall be deemed to confer a succession," it follows
 that there would be a succession as regards the annuity purchased between Lord
 Salisbury, the purchaser, and his daughter. I am not satisfied by the documents
 in this case that the money was advanced by the lady. It appears that under
 father's marriage-contract there were provisions to the effect that if there was
 child there should be a payment of £10,000, if two or more children
 5,000, and if three or more £20,000, with a power of division in favour of
 parents or the survivor. So that if there were no division of this fund in
 case of the power, there having been five children of the marriage, this lady's
 share would have been £4000 only. The case does not state that there
 was any deed of division of the £20,000 in which the five children were each
 entitled to share. On the contrary, as I read it, the case is not only consistent
 with the view, but appears to me to bring out the view, that the father out of
 his own means very considerably supplemented what the lady was entitled to.
 In part of the marriage-contract does this money appear to have been put into
 possession as her own, and thereafter put by her into the common fund.
 The father undertakes a personal obligation to pay £10,000 on the marriage,
 as far as I can see, at all events to a very great extent, the fund pro-
 vided was his own. Therefore I should have difficulty here in holding that
 this is a consideration in money or money's worth provided by the lady. It
 appears to me to be a consideration given by the father; and if that be so
 the only result in a question with the Crown would be, that if it could be
 regarded as a transaction of purchase of the £3000 annuity, that annuity having
 been so purchased would still be subject to succession-duty as being provided
 by Lord Salisbury, who had purchased it.

But I do not think it necessary to decide the case on that ground, for
 I am of opinion with the majority of your Lordships that this £10,000—even
 supposing it to have been paid by the lady—is not a consideration that comes
 within the provision of section 17 of the statute. Upon that matter I again
 concur with what Lord Westbury says in the case of Floyer as to the general
 effect of the Succession-Duty Act with which we are dealing. His Lordship
 says—"In framing the Act the word 'succession' was adopted for the pur-
 pose of denoting any property passing upon death from one person to another
 by virtue of any gift or descent, or of any contract, not being a *bona fide* contract,
 purchase or loan. Money or property, the right to receive or possess which
 arises upon death, under a contract made *bona fide* in return for other

No. 126. money or property, was not, as between the contracting parties, to be treated as a succession. But it was not intended to exempt property arising upon death under contracts for valuable consideration generally. Marriage is by the law of England a valuable consideration for a contract, and that of the highest kind; but property arising under a contract in consideration of marriage is not excepted even in favour of persons coming directly within that consideration. A contract to be excepted must be *bona fide* made in consideration of money or money's worth, words which appear to have been selected for the purpose of excluding the consideration of marriage." Now, taking that to be, as I have no doubt is, a correct view of the effect of the statute, the question is,—the marriage being a valuable consideration within the meaning of the statute, can the £10,000 be represented to be so?

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Now, in the first place, at the best, and even on the argument maintained on behalf of the respondents, this payment of £10,000 is not represented as the sole consideration in respect of which the annuity was given. It is not admitted that the marriage was a very material part of the consideration. If it were disputed I think the argument would be a very hopeless one, for it is quite plain that the transaction was not a purchase of this annuity of £3000, and of the obligation of Mr Balfour to settle his estates, which were obviously of enormous value. It cannot be represented that the obligation for payment of £10,000 was a consideration at all equal in value to what Mr Balfour gave on the other side. The obligation was obviously given, in the view most favourable for the respondents, partly in consideration of money or money's worth and partly in consideration of the marriage; and if that be so, I am not prepared to say that section 17 of the statute applies. On the contrary, my opinion rather is that the section does not apply, for, I think, the general meaning and effect of the statute is, that money or estate, whether left by settlement *mortis causa* or provided by marriage-contract, if it be money settled upon parties to accrue to them after the death of the settlor, or some other person in life at the date of the deed, shall not be liable in duty, and that the exception is, where the right is a purchased right, such as a contract of insurance, in which a person pays full value for the obligation undertaken by the insurance company, or a bond of annuity in which full price is paid for the annuity. In short, it is, in my opinion, a bona fide purchase that is made the subject of exception. I am not prepared to hold that if it could be shewn that a certain consideration was given in money, and that the leading consideration, however, being the marriage, this section of the statute applies. My opinion, on the contrary, is, that the section only covers the case of a proper purchase of the right; and so I should not be prepared to hold that on the argument submitted to us on the concession (which cannot be withdrawn) that the marriage was at least partly the consideration here, that section applies.

But I agree with your Lordship in the chair, and generally on the grounds which have been already stated, in thinking further that it is not a sound view of the effect of this marriage-contract to hold that the annuity of £3000 given in consideration of the obligation by Lord Salisbury, or of the agreement by his daughter, to pay £10,000. No doubt the parties had met, and the preliminaries of the marriage had been arranged. In arranging those preliminaries the parties interested required to see where the funds on each side were to come from, and in order to bring about the marriage relatives on each side of the family agreed to put so much money into the common fund. But when they came

on the marriage-contract and to grant the obligations contained in it, the money No. 126.
 obligations were truly granted, not by the one giving so much money because
 and in consideration of the other giving so much money, but in contemplation June 6, 1877.
 the marriage, and because of the marriage, and to provide a fund for the Lord Advocate
 married persons. The marriage is the true consideration in the minds of the v. Sidgwick.

tries; and it is clear on the statute that marriage is not a consideration to be
 taken into view. It would be remarkable if it were otherwise, for parties might
 then readily evade succession-duty on a great part of their succession. I suppose
 that almost as much money is dealt with and settled by marriage-contracts as by
 deeds of settlement, and at least an enormous amount of property is so dealt with.
 It is clear that it was not intended to exempt marriage-contract provisions from
 succession-duty. I think your Lordship applied a sound test on this point as to
 whether the marriage is not truly the consideration, by the question, Would it
 be an answer to one of the parties to this settlement when called on to fulfil
 the stipulations to pay so much money, that he should say he was not bound to
 pay it because the parent on the other side had been unable to fulfil his obliga-
 tion or had not done so? If the one be a consideration of the other, he would
 necessarily be entitled to say that because no money was given on the other side
 he was not bound to fulfil his obligation. But the answer is, it is not in con-
 sideration of this other fund being given that you have granted your obligation
 undertaken to make a provision—the true consideration is the marriage itself
 that has taken place, and you are bound to pay the money.

It has been represented that the argument on behalf of the Crown here is,
 that because you find this stipulation in a marriage-contract the clause does not
 apply. I can only say that I do not understand that to be the contention of the
 Crown, and it is certainly not that contention that I adopt. It is not because
 the provision is in a marriage-contract that the clause of exemption does not
 apply, but because being in a marriage-contract, as we find the clauses there, the
 obligation to settle so much money on the one side is not the true counterpart of
 obligation on the other. The marriage is the counterpart of the obligation
 on both sides. The marriage is the moving cause and consideration. One
 might quite well suppose a case of an obligation occurring in a marriage-contract,
 where a wife purchased an annuity at so much money from a third person by a
 similar transaction of purchase and sale, and in the same deed—the marriage-
 contract—the parties concluded the transaction. Although the obligations were
 contained in the marriage-contract the clause of exemption would apply if the
 obligations were truly a proper transaction of purchase for money or money's worth,
 in which this is not.

I may notice, before concluding, the inconveniences to which the argument
 on the respondents would necessarily lead if it were sustained. It is said that
 obligations upon one side are to be regarded as a counterpart of the other,
 and therefore you have money's worth given for this annuity. Suppose a mar-
 riage takes place in which one of the parties has very little means indeed, and
 the other a large fortune,—it may be that all the husband offers is an insurance
 on his life as against £30,000 or £40,000 advanced and settled on the other side.
 The argument maintained here would be sound, then if the husband is able to ad-
 vance £1000 only, or merely to effect an insurance on his life, it might just as
 well be said this is a valuable consideration given for the settlement of the larger
 of £30,000 or £40,000; and the settlement of that sum having thus been
 purchased, the amount shall be free from succession-duty. It would surely be

No. 126. very difficult to maintain that £2000 or £3000 was a valuable consideration for three times the amount. And so a Court might be put in every case to balance the considerations in each contract, and to say, is it or is it not the counterpart of the other—is it a valuable consideration in money or money's worth?

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Again, it is said, if you find obligations on one side and another, they are to be regarded as counterparts of each other. The father or the relative of the lady gives certain sums of money, the father or relative of the husband gives other sums of money, and these are to be regarded as purchased not from the contracting spouses themselves, but from relatives intervening. Observe what is the effect of that view if sustained under the statute: It is not to exempt these sums from duty, because if the purchase is made by a relative it is plain the result is to make what he purchases his estate, and that estate, so made his, still becomes the subject of succession-duty. An illustration of that occurs in the case *re Jenkinson*, 1856, 24 Beavan's Reps. 64; and it is plain that it is so from the statute. That view of the statute therefore leads to this anomalous, and, to my mind, extravagant result, that if you have counter provisions of that kind in a marriage-contract, the succession-duty is payable, not with reference to the degree of relationship of the person who settles the money, but with reference to the relationship of the other party, the person who has purchased the settlement and who has thus settled the money. That might make a very serious difference to the parties, depending on the degrees of relationship of the relations who have intervened. I cannot read the statute as introducing anything so roundabout the way of regulating the rules of succession, and providing what I should regard as a very remarkable element,—an element of chance in fixing the rate to be paid, because it varies according to the degree of relationship between the purchaser of the right and the person benefited. I think it is much more reasonable to hold the money or estate provided in a marriage-contract as money or estate settled by the person who gives it, not money or estate purchased. I think there is nothing in the statute to lead to a different result. On these grounds—and I cannot say I entertain any very serious difficulty about it—am of opinion that this annuity is liable to succession-duty.

THE following interlocutor was pronounced:—"Recall the said interlocutor: Find and declare that the annuity of £3000 per annum provided to the late Lady Blanche Balfour as in the special case stated is chargeable with succession-duty, and remit to the Lord Ordinary to proceed in accordance with the above finding," &c.

THE SOLICITOR OF INLAND REVENUE—GIBSON & STRATHERN, W.S.—Agents.

No. 127. ANDREW HEITON, Pursuer.—*Lord-Adv. Watson—Guthrie Smith—Andrew*
WAVERLEY HYDROPATHIC COMPANY (Limited), Defenders.—*Frasers—*
Balfour—Strachan.

June 6, 1877.
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Company.

Sale—Contract—Revised Draft.—In an action concluding for declaration certain fields had been sold to the pursuer it was proved that after a long correspondence the parties were agreed on the subject sold, and the price, and the only question unsettled was what servitudes should be imposed on the subject to secure the amenity of the sellers' adjoining property, and that a conveyance prepared by the buyer's agent had been sent to the sellers' agent and returned revised, with a letter stipulating that the sellers should have an opportunity of going over and considering the draft, "in case we have over-

conditions which should be inserted in it." Held that there was no concluded contract of sale. No. 127.

Joint Stock Company—Companies Act, 1862, secs. 50 and 51, 25 and 26 June 6, 1877.
Art. c. 89—Powers of Directors to bind the Company.—Opinions (per Lord Pre-Heiton v. Waverley
 sident and Lord Shand) that persons dealing with the directors of joint stock Hydropathic
 companies, although they must be held to have made themselves acquainted Company.
 with the provisions of the statutes and articles of association under which the
 companies are incorporated are entitled to assume that all notices of meetings
 and notices of resolutions to be proposed at such meetings have been properly
 given, and that shareholders cannot repudiate the actings of directors on the
 ground that no notice of a resolution conferring power on the directors had been
 given.

THIS was an action at the instance of Andrew Heiton, Esq. of Darnick 1st DIVISION.
 Melrose, against the Waverley Hydropathic Company (Limited), Heiton v.
 Melrose, concluding for declarator that the defenders had sold a field and Ld. Craighill.
 orchard adjoining their establishment to the pursuer, and for decree M.
 at the defenders should execute and deliver a conveyance of these lands
 to the pursuer, with entry at the date thereof. There was also an alterna-
 tive conclusion for damages.

On 17th March 1874 the secretary of the Waverley Hydropathic Com-
 pany (Limited), which was incorporated under the Companies Acts,
 1862* and 1867, sent circulars to the shareholders, calling an extra-
 ordinary general meeting of the company to be held on 25th March. The
 notice stated that the meeting was called for the purpose of altering,
 amending, and revising the articles of association, and for certain other
 business. No mention was made of any proposal to sell any property
 of the company.

" 50. Subject to the provisions of this Act, and to the conditions contained
 in the memorandum of association, any company formed under this Act may,
 at any general meeting, from time to time, by passing a special resolution in manner
 hereinafter mentioned, alter all or any of the regulations of the company
 contained in the articles of association or in the table marked A in the first
 schedule, where such table is applicable to the company, or make new regula-
 tions to the exclusion of or in addition to all or any of the regulations of the
 company; and any regulations so made by special resolution shall be deemed to
 be regulations of the company of the same validity as if they had been originally
 contained in the articles of association, and shall be subject in like manner to
 alteration or modified by any subsequent special resolution.

" 51. A resolution passed by a company under this Act shall be deemed to be
 a special resolution whenever a resolution has been passed by a majority of not less than
 three-fourths of such members of the company for the time being entitled, ac-
 cording to the regulations of the company, to vote as may be present, in person
 or by proxy (in cases where by the regulations of the company proxies are
 allowed), at any general meeting of which notice specifying the intention to pro-
 pose such resolution has been duly given, and such resolution has been confirmed
 by a majority of such members for the time being entitled, according to the
 regulations of the company, to vote as may be present, in person or by proxy,
 at any subsequent general meeting of which notice has been duly given, and held
 at an interval of not less than fourteen days, nor more than one month from the
 date of the meeting at which such resolution was first passed: At any meeting
 mentioned in this section, unless a poll is demanded by at least five members,
 a declaration of the chairman that the resolution has been carried shall be
 deemed conclusive evidence of the fact, without proof of the number or pro-
 portion of the votes recorded in favour of or against the same: Notice of any
 meeting shall, for the purposes of this section, be deemed to be duly given, and
 the meeting to be duly held, whenever such notice is given and meeting held in
 accordance with the regulations of the company."

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At this meeting on 25th March a letter from Mr Heiton of Darnie Tower with reference to the purchase of the field and orchard was read when the meeting, as the minute bore, "remitted the whole matter to the directors, with power to sell or not the ground, and if a sale be resolved on by them the meeting unanimously empowered the directors to sell the ground at such a price and on such terms and conditions as the directors shall deem advisable."

The meeting also passed the following articles of association:—"Proceedings at general meetings.—36. Five days' notice at the least, specifying the place, the day, and the hour of meeting, and in case of special business, the general nature of such business, shall be given to the members in manner hereinafter mentioned, or in such other manner, if any, may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting." "40. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, and the consideration of the accounts, balance-sheets, and the ordinary reports of the directors." "67. . . . With the consent of the shareholders at a general meeting they (the directors) may also sell, dispose, and convey the heritable property of the company, or any part thereof."

These articles were confirmed at an extraordinary general meeting, held on 9th April 1874.

The original articles of association gave the directors no power to sell the heritable property.

A meeting of the directors was held on 25th May 1874. The minute bore—"The sale of the fields to Mr Heiton was brought under consideration, and after explanations received from Mr Ferguson on the subject and his interview with Mr Heiton, the meeting agreed to sell the fields and instructed the law-agents to enter upon negotiations with the view to protecting the company's interests, and appointed the finance committee to meet and advise with the law-agents in carrying through the sale. The meeting were of opinion that there should be no higher price than £1650 asked from Mr Heiton."

On the following day, 26th May, Messrs Watt and Anderson, S.S., the agents of the company, wrote Mr Heiton, who referred them to the law-agents, Messrs Freer and Dunn. A long correspondence between the agents followed, at an early stage of which the price to be paid for the fields was fixed at £1650, but the question remained what services were to be imposed with a view of protecting the amenity of the establishment. A draft-disposition, in which the date of entry was the date of signing, was prepared by Messrs Freer and Dunn, and sent on 27th March 1875 to Messrs Watt and Anderson, who on 5th June returned and stipulated that they should have an opportunity of going over the draft, "in case we may have overlooked conditions which should be inserted in it." On 15th June 1875 Messrs Watt and Anderson wrote that the negotiations for the sale of the fields were suspended, and called upon Mr Heiton to remove certain sheep and trees, which they alleged had been placed in one of the fields without any authority from the company. The pursuer in reply stated that he had got possession with the knowledge and consent of the company. The correspondence and proceedings of the parties sufficiently appear from the opinion of Lord Deas.

At an extraordinary general meeting of the company, held on 6th June 1875, the shareholders passed a resolution instructing the directors to cease from all further negotiations with Mr Heiton.

Mr Heiton thereupon raised the present action against the company.

The pursuer averred that he gave power to two of the directors of the company, Mr Ferguson and Mr Maughan, to offer £1650 at a meeting of directors to be held on 25th May 1874, on condition that it should at once be accepted. "The offer of £1650 was accordingly made at the meeting of the defenders, and was then and there accepted by them, or on their behalf, and the offer and acceptance were duly minuted by the directors, it being understood and agreed to that the servitudes to be stipulated for over the fields should form matter for subsequent arrangement." (Cond. 4) That on 6th July 1874 the pursuer's agents sent a formal written offer of £1650. (Cond. 6) That a correspondence followed between the agents; that after a letter of Messrs Watt and Anderson, the company's agents, to the pursuer's agents, of 6th March 1875, in all material respects parties were agreed as to the provisions affecting the proposed servitudes. (Cond. 7) That at a meeting of directors on 2d March 1875 a draft disposition containing conditions as to the servitudes as approved of, and a resolution to sell, subject to these conditions, was agreed to. The finance and works committee were appointed to carry through the transaction, and the draft returned to the company's agents to have the transaction completed. (Cond. 8) "The transaction being thus arranged, the directors, or some of them, after some negotiations, induced the pursuer to agree to let the orchard to the company for a year at the rent of £7. On 31st March 1875 Mr Macpherson, the house steward at the said establishment, on behalf of the company, wrote the pursuer agreeing to take the orchard on the above terms. Mr Macpherson, in his letter, stated that he expected the orchard would be properly needed to keep out sheep. The pursuer thereupon, as was well known to the company and the directors and those acting on their behalf, caused a proper fence to be put up for that purpose at the orchard, and thereby incurred considerable expense." (Cond. 9) "At or about the same time, and with the knowledge of the company or the directors, or others acting for them, the pursuer let the fields to two tenants, Messrs Robert Lockie and Thomas Wight, at the rents of £18 and £5 respectively, for the year The fields are seen from the windows of the establishment, and the tenants' sheep were daily seen in the fields by the officials of the company."

The defenders denied that the directors gave any authority to Mr Macpherson to take the orchard from the pursuer, or that they had any knowledge that this had been done. They also denied that the tenants' sheep were seen by the officials of the company.

The pursuer further averred—(Cond. 10) In April 1875 he was assured the agents of the company that the servitudes had been arranged, and at the deed of conveyance was "waiting to be extended;" that he therefore, "with the knowledge and approval of the company, or the directors, or others acting for them," proceeded to plant trees, and to fence the fields and carry out other improvements. The defenders denied that the agents had given any such assurance, or that the planting, &c., was done without their knowledge or approval.

The pursuer pleaded;—1. In respect that there was a concluded and valid agreement for the sale and purchase of the lands in question, as between the pursuer and the defenders, they are bound to grant a conveyance in his favour in terms thereof. 2. *Separatim*, the contract of sale alleged is validated *rei interventu*. 3. The defenders having agreed to sell the said lands at the price offered by the pursuer, on the footing that the terms of servitudes should be afterwards arranged, and there being no dispute between parties regarding these terms, the pursuer is entitled to decree in terms of the first conclusion of the summons.

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The defenders pleaded ;—1. There being no contract or agreement of sale of the subjects in question specified in the summons, the conclusions of the action cannot be maintained. 2. The pursuer's statements are irrelevant. 3. The resolution with reference to the fields in question, adopted at the meeting of the company on 25th March 1874, having been passed in violation of the provision of the statute and the articles of the association, anything done under the remit contained therein was *ultra vires* of the directors, and committee of directors, and is not binding on the company. 4. No concluded contract or agreement of sale having been entered into between the pursuer and defenders at the date libelled, or any other time, the action is groundless, and cannot be maintained. 5. The pursuer is not entitled to found to any extent or effect on any alleged possession of the said fields on his part, in respect (1) that there was no concluded contract or agreement between the parties, and (2) that such possession was taken by him at his own hand, and without the knowledge or sanction of the defenders.

The Lord Ordinary allowed a proof before answer.

The defenders reclaimed, and the Court granted a diligence for recovery of the documents on which the pursuer founded, and having heard counsel they recalled the Lord Ordinary's interlocutor allowing a proof before answer, and remitted to the Lord Ordinary to allow the pursuer a proof before answer of the averments contained in articles 8, 10, 12, and 14 of the condescendence containing the pursuer's averments with regard to his possession of the ground, and to the defenders a conjunct probation.

The result of the proof appears from the opinion of Lord Mure.

The Lord Ordinary pronounced this interlocutor :—" In the first place, finds that the pursuer's statements on the record are insufficient as the averments of a concluded contract between the pursuer and the defenders for the sale to the pursuer of the lands described in the summons : In the second place, finds that the writs referred to on the record, in conjunction with those of which copies are in the print, No. 80 of process, assuming the latter to be authentic and the other writs which have been recovered since that print was prepared, do not prove a concluded contract for the sale to the pursuer of these lands, but on the contrary, shew that the negotiations for a sale which had been opened and so far carried forward, were stopped before a contract was concluded : In the third place, finds (1) that the pursuer did not get possession of said lands from the defenders ; (2) that the defenders neither expressly nor by implication consented to his taking possession ; (3) that the pursuer took possession not as under a completed contract, but, on the contrary, only upon the expectation that the negotiations then in progress would result in a contract which as already found was an expectation not realised : Therefore sustains the defences, assoilzies the defenders, &c.*

* "NOTE.—The proof which was allowed by the Court by the interlocutor of 18th July last related only to *rei interventus*, and as it was before answer and the pleas on the record have till now been left untouched. The Lord Ordinary consequently felt a disinclination to deal with the constitution of the alleged contract as evidenced by writs which were founded on, although technically not proved. But his hesitation yielded to the desire expressed by both parties that the value of the writs referred to should be judged of on the assumption of their authenticity.

"1. The first question naturally is the relevancy of the pursuer's averments to set up, independently of *rei interventus*, a concluded contract. The Lord Ordinary

The pursuer reclaimed, and argued ;—(1) the documents proved a completed contract of sale ; the subject and the price were fixed ; the pursuer as willing to take the subject with the servitudes and restrictions imposed by the defenders ; the defenders were not entitled to rescind after having sent to the pursuer's agents a draft for his approval. (2) In all events, an informal agreement had been concluded which was validated by *rei interventus*.¹ (3) With reference to defenders' third plea

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ry thinks that these, read in the light of the relative documents, are insufficient. In the first place, it is not said that the minute of directors of 2d March 1875, which in the end came to be relied on, was intimated to the pursuer ; and, in the second place, it is plain from the statements in article 7 of the condescendence, in which that minute is libelled, taken in connection with those in the immediately preceding article, that there were things, and material things too, on which, at the date of that minute, parties were not agreed.

"2. The next thing is the question whether there is a concluded contract. At there were negotiations, and that in some things there was an agreement, undoubted, but it is at least as clear that upon other things, neither at 2d March 1875, nor at any time afterwards, was there an agreement. What are called 'servitudes' remained matters of controversy. The ground in question had been bought by the defenders for the amenity of their establishment, and if they were to sell, it was of vital importance that conditions by which that amenity would be secured should be made articles of the contract. These, in fact, were more important than a little more or a little less in the way of price. Consequently, they were always in the front, and the very first letter which was written by the agents of the defenders to the agents of the pursuer, after receiving instructions consequent upon the proceedings of 2d March 1875, recapitulated the conditions upon which the defenders were to insist. That the matter was then open both the agents of the pursuer and the pursuer shew in their subsequent letters, and before there had been an agreement, the shareholders interfered, and put an end to the negotiation. These things, the Lord Ordinary thinks, are demonstrated by the documents, and hence the relative finding in his allocutor.

"3. The pursuer founds on his alleged possession for two purposes. The first of these is to make out that even if at the middle of March 1875, when, as he says, he began to act as proprietor of the ground, some of the conditions as to servitudes had not been arranged, these are to be held as swept away by the fact that he got possession. Whether the relaxation for which he asked, or whether the restrictions on which the defenders insisted, are the things to be thus got rid of was not explained to the Lord Ordinary ; but this omission is immaterial, because both parties so conducted themselves in their subsequent communications and correspondence as to shew that the pursuer had not taken, and certainly had not been given, possession on the assumption that thereby everything hitherto undecided was determined. This is one of the things which distinguishes the present case from *Colquhoun v. Wilson's Trustees*, March 20, 1860, 22 D. 1035 (Scot. Jur. 468). The Lord Ordinary may add that there is another distinction afforded by the warnings, repeatedly given by the agents of the defenders, till there was an official intimation that the contract had been concluded, to use the words which occur in a subsequent letter, till there was a written intimation of the terms offered by the defenders, 'there cannot be a concluded

As regards the exclusion of *locus penitentie*, which is the purpose for which efficacy of *rei interventus* is usually invoked, the Lord Ordinary thinks that this so-called possession is unavailing in the circumstances of this case. The effect of form or authentication in the writings might be made up by *rei interventus*, but the want of consent necessary to the completion of a contract could be thus supplied."

Colquhoun v. Wilson's Trustees, March 20, 1860, 22 D. 1035, 32 Scot. Jur. 468.

No. 127. in law, although there might be some informality in the notice calling the meeting of 25th March 1874, that was not a matter into which third parties dealing with the directors were bound to inquire; third parties were entitled to deal with directors of a company on the understanding that they were authorised to act for the shareholders, and all actings of the directors within the powers contained in the articles of association were binding on the company.¹

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Argued for the defenders;—(1) There was no completed contract of sale as the parties had never come to an agreement as to the servitudes which were to be imposed. (2) Possession was taken by the pursuer at his own hand, without the authority of the directors, and did not amount to *interventus*. (3) Before the meeting of 25th March 1874 the directors had no power under the articles of association to sell the heritage belonging to the association. The articles of association were amended at that meeting and power to sell heritage was conferred on the directors, but the power was only conferred under certain conditions. These were that the consent of the shareholders should be obtained, and that five days' notice of intention to propose such a sale should be given in the circular calling the meeting. No such notice was ever given before the meeting on 25th March 1874. The directors were merely the agents of the shareholders and could not bind them, except in so far as they were authorised by the articles of association.²

At advising,—

LORD DEAS.—This is an action at the instance of Mr Heiton to have it found and declared that the Waverley Hydropathic Company, who have an establishment near Melrose, have sold to him certain fields adjoining that establishment and adjoining his estate. The negotiation took place with the directors of the company and the finance committee acting under their authority. I do not put in question the power of the directors nor the power of the finance committee to sell that property. The real question, I think, is whether there was or was not a concluded bargain? Now, it is matter of trite law that a bargain for the sale of heritable property in Scotland must be in writing. The writings of the directors or the writings of the finance committee are, in this case, quite sufficient in law if the import of them is clear. I do not think, however, that it is contended on the part of Mr Heiton that on the face of the writings there was a concluded sale. It is quite clear that there were points, and those of importance, in dispute to the end. These fields were of the greatest possible importance to the company for the amenity of their establishment, and it is not wonderful therefore that, from the first, there was a difference of opinion among the directors as to whether a considerable money price was a sufficient temptation to sell.

¹ Royal British Bank v. Turquand, June 2, 1855, 24 L. J., Q. B., 327; A. v. the Official Manager of the Athenæum Life Assurance Society, Jan. 26, 1853, 3 Scott's C. B. Reports, N. S., 725, 27 L. J., C. P. 95; Prince of Wales Assurance Society v. The Athenæum Life Assurance Society, 3 Scott's C. B. Reports, N. S., 756; *in re* The Athenæum Life Assurance Society, *ex parte* The Eagle Insurance Company, 9th July 1858, 4 Kay and Johnson's Reports, 549, 27 L. J., 829.

² Ernest v. Nicholls, Aug. 15, 1857, 6 Clark's House of Lords Cases, 44; Burns v. Pennell, June 16, 1849, 2 Clark's House of Lords Cases, 497; *Id.* v. Tamar, &c. Railway Company, June 8, 1867, L. R. 2 Exch. 158.

was of importance to them to have their reserved rights over the fields fixed, and it was likewise of importance that those reservations should go into the titles in such a way as to be binding in all time coming. This company might wish to give up the establishment to another similar company, or they might wish to sell it to a different kind of company—a lunatic asylum or an infirmary, or instance. There are various other kinds of establishments in selling to whom would make the greatest possible difference whether they could transfer, in a binding form, to the purchasers, the reservations in regard to the amenity of those fields. Now, it is quite clear upon the face of the correspondence that upon these reservations, in particular, the parties never came to be at one. On the contrary, they came to be quite opposed to each other upon the vital matter of some of these reserved rights, and as to whether they were to fly off or not in the event of a resale by Mr Heiton—reservations which were rightly regarded as of greater importance to the company even than the amount of the price. That was the state of matters when the agents came to think it might expedite matters to be preparing in the meantime the drafts of the deeds. I take it to be perfectly clear law that when parties come to this Court disputing whether there is or is not a concluded bargain, what we have to look at is not the drafts of the proposed deeds, but the documents themselves which formed the bargain. We must look to these, and according as we find these to stand we must direct the drafts of the deeds to be adjusted. That is the ordinary way. If that rule is most clearly applicable here, because we see, upon the face of the correspondence, that when it was proposed to have drafts of the deeds prepared it was not upon the footing that there was a concluded bargain, but simply at it might save time to be, tentatively, preparing drafts of the deeds in the meantime. And when those drafts were not finally adjusted, and were not proved of by the directors, as it was expressly stipulated in this correspondence that they should be before they were to be binding, I take it to be perfectly clear that what we have to do with is the question how the bargain stood on the face of the correspondence at the time when this tentative adjustment of the drafts was proposed and agreed to. If there was, at that time, a concluded bargain, we should order the deeds to be framed in conformity with that bargain; if there was then no concluded bargain, we are to find that there was none. As I have already said, Mr Heiton does not contend, and cannot contend, that upon the face of the documents when those drafts were proposed and prepared there was a concluded bargain. He cannot found upon those drafts as a concluded bargain, for the parties never came to one about them. They never were submitted to the directors of the company, and the only answer Mr Heiton makes to that is—"That is all very true, but I am in possession of the ground, and I must therefore be held to have conceded the disputed points in favour of the company." Now, to found that plea it is very clear to think, that he must have got possession from the parties entitled to give him possession, namely, the directors or the finance committee; but I do not think that he either got possession from the parties entitled to give him possession, or that those parties ever sanctioned that possession in a way to support that plea. What an individual director might do goes for nothing. The directors were by this time all at sixes and sevens on the subject. There were things not altogether adjusted in a bargain even of heritable property, in regard to which there may be an implication from the possession being in and taken that these had been conceded, but it would, to say the least of

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it, be a very serious question whether that could apply to things of such vital importance as were in dispute here. I only say that would be a question of difficulty, for the conclusive answer here is that possession was not given by those representing the company who alone could give possession, and therefore the question does not arise. With those views of the case, it is really not necessary to go into any great detail, but I may just glance over the documents in order to shew clearly that that is the result.

It is sufficient to begin with the letter of 6th July 1874, from Mr Heiton agents to the agents for the company, in which they say—"As we understand that the directors of the Waverley Hydropathic have agreed to sell to Mr Heiton the field he wishes at £1650, and have minuted a resolution to that effect on his behalf, we now beg to offer that sum, the conditions to be afterwards arranged, and we shall be glad to have your acceptance of this offer in connection along with a draft of the conditions which it is proposed by the directors to attach to the purchase." Now, it is perfectly plain that the offer of £1650 upon conditions to be afterwards arranged was not a binding offer at all, and that a mere agreement as to the price could not form a concluded sale. The conditions are everything in a bargain of this kind. The answer accordingly was (7th July 1874)—"The money consideration is not so important to our clients as the servitudes to be imposed over the field to prevent its being used to the prejudice of the Waverley Hydropathic Institution and grounds, and it has been suggested to us by one of the directors forming the committee having power to negotiate on this subject that a meeting should be held with the committee and Mr Heiton, whereat the various conditions, burdens, and servitudes may be considered and disposed of." Then we have another letter from the purchaser's agents, in which they say (8th July 1874)—"We have yours of yesterday, and understand from it that our offer of £1650 on behalf of Mr Heiton is accepted on conditions to be afterwards arranged." There is plainly no bargain there. Then the company's agents write to the purchaser's agents (22d July 1874)—"The price may be regulated by Mr Heiton's acquiescence or refusal of the other terms of sale, should it be effected; indeed every part of the bargain is still to be arranged, and it was with the view of more expeditiously knowing Mr Heiton's willingness to consent to terms that our clients wished a meeting with him in the first instance. It was irregular for any of the directors to inform you what had taken place at their meeting, and until you receive official information they may alter or annul any resolution which they may form. We do not agree with you therefore that the price has been fixed." Then we have the report of the directors on 29th September 1874—"The directors have agreed to sell the Darnick field to Mr Heiton at £1650, but the transaction has not been completed, as the servitudes to be retained in favour of the company have not yet been arranged." Then, again, the purchaser's agents write to the company's agents (18th December 1874)—"We understand that in the event of the establishment changing hands or being converted into other purposes these restrictions would cease." Then you have this letter (6th March 1875) from the agents for the company, in which they say they "may be disposed to modify the conditions and restrictions mentioned in the event of their selling the field to Mr Heiton." They do not say they do it, but only that they may be disposed to do it. Then you have this from the agents of the company (6th March 1875)—"All burdens, conditions, restrictions, and others shall be created in favour of the company, and of their successors and assignees, and also in favour of the

and their foressaids, as proprietors of the Waverley Hydropathic Establishment, No. 127. and of the grounds surrounding the same, and parts and pertinents." That is the understanding and conditions made by the company. Then you have the matter about the orchard brought in. I may just dispose of that at once by observing that it is perfectly clear that Mr Macpherson, who is said to have taken that lease, had no authority whatever to interfere in that matter, whatever he may have done. Now, in the letter of 25th March 1875 Mr Heiton's agents write—"When Mr Heiton was here the other day, on his way to Edinburgh, we advised him to call on you, and try and adjust in an interview the outstanding points, instead of prolonging a correspondence, and he writes us to-day that this has now been done." Thus there were admittedly outstanding points at that time, and it is for Mr Heiton to shew that these were ever finally adjusted. The agents for the company say (26th March 1875)—"We have your letter. Mr Heiton has given no acceptance of the terms of sale as contained in our several letters to you, and perhaps it will be better that a written acceptance be sent." That implies that there must be writing before the bargain is concluded, or they say—"You can, however, go on with the preparation of the draft disposition by the company to Mr Heiton, and send it to us with the titles in order that we may prepare the draft disposition by you to the company. Of course, until there be a written acceptance there cannot be a concluded sale." It is clear that this proposal to go on with the preparation of the drafts was a mere tentative proceeding, and not a proceeding upon the footing of a completed sale, or they say distinctly—"Of course, until there be a written acceptance there cannot be a concluded sale." Was there any written acceptance given? It was not only not given, but it was declined to be given, as we see from the next letter from Mr Heiton's agents to the agents for the company, in which they say (27th March 1875)—"We do not send a written acceptance of the terms of sale as asked for in your letter of yesterday, as we are not at one evidently as to the clause regarding the obligation to plant clumps of trees, having understood from Mr Heiton's last letter that the stipulation was departed from, and that all that our client was to be taken bound to do was to keep the obliquely-shaded portion in permanent grass. We have written him on this point to-day, and meantime you can be revising our disposition and drafting your own." Then you have Macpherson's letter about the orchard, which, as I have said, goes for nothing, he having no authority. Then the agents for the company send the drafts of the deeds, and say (5th June 1875)—"We return the whole titles and documents you sent us, and likewise draft disposition in favour of Mr Heiton and relative draft inventory, revised. We stipulate, however, that the Waverley Hydropathic Company (Limited) shall still have an opportunity to go over and consider the draft disposition now returned before being attended, in case that we may have overlooked conditions which should be inserted in it." That is the way in which matters stood when we come to the minute of meeting of the finance committee on 15th June 1875, which bears—"Mr Davie stated that trees had been planted in the Darnick fields, and that sheep had been grazing in them for several days, and considered that this use of the fields was illegal and without authority, because there was no concluded sale of them." And then—"The meeting consider that as the servitudes had not been finally arranged, and that there was no sale of the fields, and also in respect of the foressaid requisition, it would not be prudent to proceed further in the matter of the sale of the Darnick fields." They instruct their agents that the

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No. 127. negotiations should not be further proceeded with, but they agree that an extraordinary general meeting of the shareholders should be called to consider the propriety of selling or not selling the Darnick fields, and to authorise certain proposed additions and alterations to be made upon the company's establishment at Skirmish Hill. That extraordinary general meeting was called accordingly but before that meeting was held there is another letter (15th June 1875) from the company's agents to Mr Heiton's agents, in which they say—"With reference to the negotiations for the sale of these fields to Mr Heiton we are instructed by a committee of the directors of the Waverley Hydropathic Company (Limited) to intimate, as we now do, that in the meantime these negotiations are suspended." And then they ask if the trees have been planted, &c., in accordance with Mr Heiton's orders, and so on. Then the agents for the company again write on 16th June 1875—"The essential parts of the proposed sale, viz, the conditions, servitudes, &c., have not been considered by the company, and are not finally adjusted. How you can say that the formal parts of the sale have only to be adjusted we do not understand." Then they say that the draft must be returned to them before it is extended on stamp in order that they may get the approval or disapproval of it by the company, or any alterations on it which the company may require. Then you have the result of this extraordinary general meeting, at which a motion is made—"That this meeting disapproves the whole proceedings of the directors as to the fields in question, and also disapproves of the proposed servitudes as being insufficient, and hereby cancels the apparent authority under which they—the directors—have been hitherto acting, and instruct them to cease from all further negotiation with Mr Heiton. And that is the end of the matter. Now, if according to the law of Scotland a concluded sale of heritable property can be spelled out of that, it is more than I can see or understand. I think it is perfectly clear that there was no concluded sale, and therefore that Mr Heiton cannot succeed in this action.

LORD MURE.—The only difficulty I have had in this case has been relative to the question of possession. I have felt no difficulty as to the power of the directors to sell in the circumstances here disclosed; and having regard to the minutes of meetings of the directors, and to the correspondence that followed relative to what were to be the conditions of the contract, it appeared to me that the directors, so far as they were concerned, had come under an agreement to sell. But then the conditions under which the sale was to be made were not first fixed, and until those conditions were fixed, or there had been some acceptance in writing on the part of Mr Heiton of the undertaking made to him in the resolution of the directors, there could be no concluded sale. Now, I think that in the correspondence the greater part of those conditions were arranged. But on the other hand, it is clear that at the end of March there were still some proposals outstanding as to which the parties were not at one. Because the two letters referred to by Lord Deas—one from Messrs Watt and Anderson on the 26th March, and the other from Messrs Freer and Dunn on the 27th of the same month—each allude to the fact of there having been no written acceptance of the proposal the directors had made; and Messrs Freer and Dunn give us the reason why they did not send a written acceptance, that the parties were not at one as to some of the conditions. It was, however, maintained to us that ultimately the parties came to be substantially at one, and that the pos-

sion which had been had by Mr Heiton was sufficient to get the better of the No. 127.
want of any written acceptance.

Now, I am very clear upon the correspondence that there was here no written agreement of sale. There is the defect of there being no acceptance on the part of the company. In his own evidence he says

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Mr Heiton of the proposal of the company. In his own evidence he says that subsequent to the 26th March he had some communications with Messrs Watt and Anderson, and made some proposals to accept the offer, but that these were not carried out. If the matter had stood here it is quite clear there was no concluded transaction. The only difficulty, as I have said, which was raised in my mind, was with reference to the question of possession—as to whether there had been such possession as could be held to be *rei interventus*, and to show that a concluded contract had in that way been established. But when one looks at the nature of this possession, and at the way in which it was taken by Mr Heiton—not given by the directors as a body—I do not think it is sufficient to validate the agreement. The directors of the company no doubt authorised the carrying out of the transaction on the 2d March; and the finance committee were instructed to carry it out, as appears from the meetings of 2d March and 15th June. But three members of the committee never acted at all, and they never appear to have met together as a committee to consult as to what could be done in the matter. I think that the import of the evidence therefore regarding possession simply comes to this, that Mr Ferguson, one of the finance committee, but without the authority of that committee as a body, and without the authority of the directors as a body, seems to have arranged with Mr Macpherson, who had no power to do so himself, that he should take a lease of this land from Mr Heiton, and that Mr Heiton was allowed by Mr Ferguson to plant some shrubs. But I think that the possession and occupation so had by Mr Heiton cannot be held to have been possession given by the directors or given by the committee, so as to import that there was a concluded contract. The possession remained with the defenders in all essential respects, and upon that ground I have come to the same conclusion as Lord Deas.

LORD SHAND.—In answer to the contention on behalf of the reclaimer that there was a concluded contract of sale, it has been maintained by the respondents that the directors had no power to conclude a sale and, in the next place, that on the documents that passed between the parties there was no concluded sale. Upon the first of these points, viz., as to the power of the directors to conclude a sale, I have, as your Lordships have, no doubt. The argument for the respondents finally came to this, that although it was part of the constitution of this company, as finally fixed by the resolution at the meeting of the 25th March 1874, and approved of at the meeting of 9th April 1874, that the directors might, with consent of the shareholders, “sell, dispose, and convey the heritable property of the company,” and although it was conceded that the consent of the shareholders was given at the same meeting at which this power was made a part of the constitution of the company, yet the sale could not be carried through, because in the notices calling the meeting at which the power was given there was no intimation given to the shareholders that such a sale was to be the subject of consideration. I am clearly of opinion that that is not a good ground for challenging this sale, if it was made. The directors, with the consent of the shareholders, had the power to sell, and the shareholders had given their consent. The

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objection taken amounts to this, that a party dealing with a joint stock company of this kind is bound not only to look at the constitution of the company, and at the resolution which the company may have come to, but to investigate all the details with reference to the calling of the meeting at which the resolution was arrived at, and to see whether due notices have been given and circulars sent to the proper parties. I think that persons dealing with companies of this kind are entitled to assume that in matters of this description everything has been properly done. It would be a very serious thing if in regard to a company such as this the law were otherwise. I do not think it would lead to the disability of such companies to contract; but, if persons dealing with them were bound to examine into all these minute matters of detail before they could be satisfied that they had made a binding contract, it would be almost impossible to deal with such companies in safety; and it would be the worst result possible for such companies themselves, and a great injury to them, that the law should be declared in terms of the argument which we had at such great length from the respondents in this case. There is no doubt that there was power on the part of the directors to conclude contracts in those fields; but I agree with your Lordships in holding that there was here no concluded contract.

It is settled by the case of *Colquhoun v. Wilson's Trustees*, 22 D. 1035, on the principles of reason and expediency, that where you have open possession, followed in that case the possession was, by a number of actings of the parties, the person who has taken possession must be held to have passed from minor stipulations that he had made in the course of the negotiations for the contract, but which had been left open. But here the case is quite otherwise. We have to look at the correspondence, and I think also at the drafts of the deeds, which passed between the parties, in order to see what was the state of the negotiations between them. I quite agree with what has been said by Lord Deas that the drafts themselves, even though they come nearly up to a concluded contract, cannot be taken as finally closing it, but, on the other hand, they may be looked at to see how the parties were at one, and how far they differed from each other. In this case I think the drafts are useful, and shew that the parties had never come to a

I do not mean to go into detail on points which have been already gone over, but I may say that I am satisfied from the correspondence, in the next place, that the proposed sellers, through their agents, made it a condition of sale that there should be a formal written acceptance of the offer made. The pursuer's agents were made fully aware of this, and in one of their letters to the defenders' agents they say that they cannot send such a written acceptance because they were not agreed as to one of the stipulations. I think it would be extremely difficult to hold that the bargain had been concluded without such a written acceptance. But, in the next place, I think the documents shew that upon a matter which was of vital consequence to this company—the question of servitudes which were to be made burdens upon the ground to be sold—there was an important difference between the parties. I refer particularly to a piece of ground delineated upon the plan, upon which the pursuer wanted the liberty to put up buildings subject to restrictions. It appears from the correspondence to the last moment parties were directly at variance—the defenders insisted that any contract to be entered into must contain a stipulation that the buildings to be put up on that ground must be according to plans which they should approve of, while the pursuer, on the other hand, maintained that he should be at liberty

put down villas without either having plans submitted to or approved of by the defenders. I therefore take it that upon these two points, if there were nothing else—the absence of the acceptance stipulated for and the non-agreement with reference to the servitudes—there was no concluded bargain. I may further say that I entirely adopt the views stated by Lord Deas as to the alleged possession. I do not think there was here such possession given by the company taken by Mr Heiton as could make any contract between the parties on the footing that Mr Heiton abandoned all points on which he had differed in the negotiations.

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LORD PRESIDENT.—We had a very elaborate and earnest argument on the part of the defenders in support of their third plea in law, which is that “the resolution with reference to the fields in question, adopted at the meeting of the company on 25th March 1874, having been passed in violation of the provision of the statute and the articles of the association, anything done under the remit contained therein was *ultra vires* of the directors and committee of directors, and is not binding on the company.” Now, although I agree with all your Lordships holding that that plea is unfounded, I think it is necessary to take some notice of it in giving our judgment, because if the doctrine embodied in that plea were held to be sound or received any countenance, even by the appearance of its not being distinctly rejected by the Court, I think it might lead to very inconvenient and dangerous consequences. The fundamental doctrine of the law of partnership in the case of ordinary mercantile companies is, that every individual partner of the company may bind the company in all ordinary transactions, and each partner has an implied mandate to that effect. But in the case of a joint stock company, whether depending upon the common law or upon statute law, whether limited or unlimited, there is no room for such a presumption as that, because the very nature of the association renders it indispensable that there should be a directorial body to carry on the business of the company, and the constitution of the body of directors of course takes away at once the power of any individual member of the company to bind the company. But it does more than that, for it creates a presumption of a different kind—a presumption that the whole of the business of the company is to be done by the directors and by nobody else, and in no other way; and the public are entitled to expect that anything that the directors do shall be valid and binding upon the company. No doubt, in the case of statutory companies in particular, this presumption must yield to fact, and it may be made a fundamental condition of the company's contract of settlement, and a part of its constitution, that the directors shall have certain powers, and shall not have certain other powers, either by themselves or with the consent of a general meeting of the shareholders of the company. And there can be no doubt that it is right that a third party dealing with such a company is bound to make himself acquainted with the conditions of the contract of that company in so far as they are made public; and under the Companies Act, 1862, a third party dealing with such a company is bound to make himself master, not only of the statute under which the company is incorporated, but of its articles of association, which are registered for the very purpose of being made public. If, therefore, he finds in these articles of association that the directors have not the power to contract, he is given notice of that, and will contract at his own risk. Now, how does this matter stand in regard to the company in question? In

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the first place, it is provided by the articles of association that the directors may do everything in conducting the affairs of the company that the company itself could do at a general meeting, unless it be such things as are specially reserved to be done by the incorporation. That is the leading provision. But then it is said there is an exception to this in the case of a sale of heritable property, and an article of association is referred to in which the directors are given power to borrow and re-borrow within certain limits; and then these words follow—"And with the consent of the shareholders at a general meeting they may also sell, dispose, and convey the heritable property of the company, or any part thereof." I think it is very doubtful whether that regulation was in operation at the time when this sale was made, or at least when the authority was given for it. But assuming that it was so, the question comes to be whether the directors had not such authority; and when we come to the minutes of the extraordinary general meeting of shareholders on 25th March 1874 we find that that meeting expressly and unanimously empowered the directors to sell this ground at such a price and on such terms and conditions as they should deem advisable. The directors proceeded at their next meeting to take the matter into consideration. They fixed the price at which they were to sell, and they appointed a finance committee to meet and advise with the law-agents in the carrying out of the same. Now, the directors were entitled to act by a committee in carrying out the details of a transaction of this kind, having thus resolved to sell, and I think this remit empowered the finance committee to proceed with the adjustment of details.

But it is said the whole of this rests upon an unsound basis, because the extraordinary general meeting of the shareholders was not duly summoned, and in particular, that the notices calling the meeting did not specify that this business was to be taken up by the meeting. Now, that is no doubt in violation of one of the regulations of the company, and one of the regulations which form an article of association, and which is published to the world. But although third parties know that an extraordinary general meeting of the company may be summoned in that particular way, the question remains whether they are bound to inquire and to satisfy themselves whether a particular general meeting for the purpose of passing the resolution under which the directors are acting was so summoned. I hold it to be perfectly clear law that they are not bound so to inquire, but, on the contrary, that they are entitled to presume that everything has been regularly done in the summoning of the meeting of the company at which such resolution is passed. I think any other conclusion upon such a question as that would be attended with the most monstrous and inexpedient results. Therefore I am very clearly of opinion that the defence founded upon the want of due summoning of the extraordinary general meeting is entirely without foundation.

Upon the other question, whether there was a concluded contract made by the parties so empowered to contract, I entirely agree with all your Lordships. I think, in the first place, that the correspondence and the minutes do not themselves make a concluded written contract of sale, because some of the conditions subject to which that sale was to be made were not finally agreed to by both sides. I think, in the second place, with Lord Deas, and I understand with all your Lordships, that the mere attempt to adjust a draft disposition which was never finally approved of by both, could not have any such effect. I think, in the third place, that no possession of the ground was ever given by

e company, and that even such kind of possession as the pursuer took without the assent of the company, or anybody authorised by the company, was of far more equivocal a character to get the better of the imperfection of the written contract, even if it had been given by the company to the pursuer.

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I am therefore for adhering to the interlocutor of the Lord Ordinary, but I think it right to suggest that there is one finding in the interlocutor, viz., the finding, which is quite unnecessary for the judgment, and with regard to which I confess I entertain some little doubt—in which his Lordship finds that the statements of the pursuer are not relevant. There may be a doubt about that, but it is not in the least degree necessary for the judgment. I think, therefore, we had better recall that part of the finding, and assoilzie.

THE COURT pronounced the following interlocutor:—"Recall the finding, in the first place in the said interlocutor: Recall the said interlocutor also in so far as it sustains the defences; and in place thereof sustain the defenders' fourth and fifth pleas: *Quoad ultra* adhere to the said interlocutor: Find the defenders entitled to additional expenses, allow an account," &c.

ALEX. MORRISON, S.S.C.—WATT & ANDERSON, S.S.C.—Agents.

ADAM HOGG, Pursuer.—*Asher—Moncreiff.*
MRS ELIZABETH JAMIESON OR HAMILTON AND OTHERS, Defenders.—
Trayner—Rhind.

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Succession—Trust—Heritable and Moveable—Conversion—Reconversion.—The testator conveyed his estates, consisting of heritable and moveables, to trustees, who were directed, after payment of debts and a legacy, to divide the residue equally among the testator's four unmarried sisters. Power was given to the trustees to sell the heritable or make it over at a valuation to one of the beneficiaries. The eldest sister was the sole accepting trustee. The heritable was never sold, and the sisters possessed it in common, the eldest drawing the rents and dividing them. When one of the sisters was married a valuation of the heritable was made and one-fourth of the value was paid to her as her share, conveying to the others her whole interest in the estate. One of the unmarried sisters having died, *held* that her share of the heritable was heritable—Lord President, Lord Deas, and Lord Mure holding that there had been no conversion, Lord Shand (concurring with Lord Adam, Ordinary), holding that the deed implied conversion, but that the actings of the beneficiaries operated reconversion.

WILLIAM JAMIESON, surgeon, Bellshill, died in 1858, leaving a trust-
ment by which he conveyed to Margaret Jamieson, his sister, in
event of her surviving and remaining unmarried, whom failing, to
other unmarried sisters, Jane, Maria, and Jessie, in succession, and
two other trustees, who did not accept, the sister being a trustee *sine*
non, a plot of ground at Bellshill, containing 1 rood 27 falls, and all
other property, heritable and moveable. After directing payment of
debts, and a legacy to an old servant, the deed proceeded,—“Lastly, I
do hereby instruct, and enjoin my said trustees, . . . to divide and they
shall divide the whole free residue of my means and estate equally
amongst the said Margaret, Jane, Maria, and Jessie Jamieson, my un-
married sisters, share and share alike: . . . Farther declaring that my
said trustees shall have power to sell and dispose of my heritable property,
whether by public roup or private bargain, or they may have it valued by a
competent person, and either of my said unmarried sisters, and who shall
be unmarried at the time of my death, having priority of choice according
to seniority, shall have a right to purchase the same at such valuation.”

1ST DIVISION.
Lord Adam.
B.

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All the sisters were alive and unmarried at the date of the testator's death, and Margaret, the eldest, accepted the trust. The moveable estate amounted to about £1200, and was immediately divided among the beneficiaries. The heritage consisted of a villa and garden at Bellshill, and a tenement of workmen's houses. These subjects were let, and the rents were drawn by Margaret and divided among the beneficiaries till her death in 1866. In 1860 Jane was married. On that occasion a valuation was made of the heritage. It was valued at £2000. £500 was paid to Jane as her share, and a deed was executed by all the sisters, by which Jane, on the narrative of all that had taken place, granted a discharge for £500 as in full of her share of the heritage, and disposed, assigned, conveyed, and made over to her three sisters all her share, interest, right, and title in and to her brother's heritable and moveable estate. Jessie died unmarried and intestate in 1861.

Maria was married in 1864 to Adam Hogg, and died in 1873.

Margaret died in 1866, having shortly before her death assumed two additional trustees.

Adam Hogg having acquired right to the shares of his wife and of Margaret, and having also come to be in right of Jessie's heir in heritage, brought this action against Elizabeth Jamieson and others, her next of kin, and the trustees, concluding for declarator that he had the sole beneficial interest in the subjects, and that the trustees were bound to denude in his favour.

He pleaded;—(1) on a sound construction of the trust-settlement of the said William Jamieson, Jessie Jamieson's interest in the heritable subjects therein disposed was heritable, and on her death passed to her heir-at-law; and (2) *esto* that the said interest was originally moveable, it became heritable by reconversion, and was so *quoad* the said Jessie Jamieson's succession on her death, in consequence of her having elected to allow her share of the said heritable subjects to remain and be dealt with as heritage throughout her lifetime.

The defenders pleaded;—(2) On a sound construction of the trust-deed, and in the circumstances of the case, the interest which, at the time of her death, Jessie Jamieson had in her brother William's trust-estate, was moveable.

The Lord Ordinary pronounced this interlocutor:—"Finds and declares in terms of the first conclusion of the summons, and decerns; and *quoad ultra* continues the cause: Finds the defenders, Elizabeth Jamieson and Hamilton, &c., and Robert Brown Tennent and Alexander Pollock trustees of the deceased William Jamieson, liable in expenses," &c.*

* "NOTE.—The object of this action is to have it found and declared that the pursuer has the sole beneficial interest in, and right and title to, the heritable estate which belonged to the deceased William Jamieson, and to have his trustees decerned and ordained to denude thereof in his favour.

"It is not disputed that the pursuer is now in right of three-fourths of the heritable estate left by the truster, and the question at issue relates to the remaining fourth which was bequeathed by him to his sister Jessie Jamieson. The competition is between the pursuer, who is in right of the heir in heritage, Jessie Jamieson, and the defenders (other than the trustees), who are her next of kin. It is not disputed that if Jessie's share be heritable it now belongs to the pursuer.

"Two questions have arisen—1. Whether the heritable estate left by the truster is by force of the terms of his settlement to be treated as moveable *quoad* his succession; and, 2. Whether, assuming this to be so, his residuary legatee, of whom Jessie Jamieson was one, so dealt with the property left to them nevertheless, to make it heritable *quoad* their succession?"

(After narrating the facts)—"Had the case rested on the construction of the

The defenders reclaimed, and argued ;—Although there was no express direction to sell, an estate of the description left by the truster could not be divided, as directed by the trust-deed, without sale. Therefore sale is indispensable to the execution of the trust. There was therefore conversion, and the legal result was not affected by the fact that the truster did not carry out the directions of the truster.¹ The provision that one sister might take the property at a valuation shewed that the truster contemplated that the shares should be paid in money. The pursuer argued ;—The estate was heritage in the person of the truster, and it continued to be so after his death, and has never been converted. It therefore lay on the defenders to shew how conversion was effected. There was no direction to sell. Therefore it must be shewn that it was necessary to sell in order to carry out the purposes of the trust.² But that was not the case. It was settled that a conveyance *pro indiviso* might satisfy a direction to divide.³ Conversion was a question of intention. And the preservation of the estate as heritage in the way that had actually been done was quite in conformity with the truster's intention as expressed in his deed. It is not advising.—

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LORD PRESIDENT.—(After stating the facts)—Certain things are very clear on the face of the deed. The sisters who were unmarried at the date of the truster's death were to have equal shares. The trustees have power to sell, but there is no direction to sell. Then there is an imperative direction to divide the estate equally among the unmarried sisters. That is the only part of the deed which

disposes of the estate as above, the Lord Ordinary is inclined to think that its terms would have operated as a conversion of the truster's heritable estate into moveable *quoad* his succession. There is no direction to sell, but the trustees are directed 'to divide' the residue of his means and estate equally among our sisters. Having regard to the amount and condition of the means and estate which fell to be divided, the division could not have been made, except by the conversion of the heritable estate into money. A conveyance of the heritable estate to be held by the residuary legatees *pro indiviso* would not appear to be sufficient compliance with the truster's direction 'to divide' the residue—*Ervingham's Trustees v. Paterson*, July 2, 1873, 11 Macph. 848 ; and the truster therefore must be held to have intended a sale of the subjects—*Buchanan v. Angus*, May 15, 1862, 4 Macqueen, 374.

But it appears to the Lord Ordinary that the residuary legatees, who were only parties interested, elected that the heritable estate should not be sold but divided among them. When Jane was married in 1860, and required payment of her share, the necessity then arose of dealing with the heritable estate, of selling it and dividing the proceeds. The estate, however, was not sold ; in order to avoid a sale the other three residuary legatees bought up Jane's share in it. It appears therefore to the Lord Ordinary that the estate was not sold because the three remaining residuary legatees resolved, as they had a right in being the only persons interested, that it should remain invested as it was. In question therefore as to their succession the Lord Ordinary thinks that it should be regulated according to the nature of the subject, and, being heritable, Jessie's right to a share went to her heir in heritage, whom the pursuer represents—*Williamson v. Paul*, December 15, 1849, 12 D. 372 ; *Grindlay v. Grindlay's Trustees*, Nov. 9, 1853, 16 D. 27."

Buchanan v. Angus, May 15, 1862, 4 M'Q. 374, 34 Scot. Jur. 502 ; *Advocate-General v. Blackburn's Trustee*, Nov. 27, 1847, 10 D. 166 ; *Fotheringham's Trustees v. Paterson*, July 2, 1873, 11 Macph. 848, 45 Scot. Jur. 578. *Grindlay v. Grindlay's Trustees*, Nov. 9, 1853, 16 D. 27, 26 Scot. Jur. 29 ; *Wighton's Trustees*, Jan. 9, 1874, *ante*, vol. i. 358. *Wald v. Anderson*, Dec. 8, 1876, *supra*, p. 211.

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requires construction, and it must be taken in connection with the power of sale, which might or might not be exercised, and might be exercised in different ways. The property might be sold to a third party by private bargain, or by auction to the highest bidder, or it might be valued over to any one of the sisters, the eldest for the time being having a preference.

Now, it is contended, in substance, that where there is an imperative direction to divide a mixed estate, that necessarily implies conversion of the heritage because it is impossible to operate a complete and equal division without the heritage being previously sold. I do not think the term "divide" has such a restricted meaning. It admits of the same kind of construction as the term "pay," which is often read in settlements of this description as equivalent to "convey" or "transfer," according to the nature of the property, and may often mean "dispose" in the case of heritable estate. Accordingly the word "divide" settles nothing by its mere use as to the testator's intention in the matter of conversion. It is merely equivalent to pay or transfer to a plurality of beneficiaries, and that may be done not only by converting the property into money, but by giving shares of equal value to the beneficiaries or in other ways. The term divide advances one a very little way in solving the question whether it was the intention of the testator to convert his heritage into moveables by the operation of his trust.

If that be so, the only element left for consideration is the power of sale. That has never been held to operate conversion. There must either be a direction to sell or some equivalent, such as that the general provisions of the trust and the circumstances of the estate create a necessity to sell in order to carry out the purposes of the trust. As there is no direction to sell here, the plea of conversion for conversion must shew a necessity to sell.

In dealing with that matter a great deal of light is afforded by what was actually done by the trustees and by the beneficiaries. The only accepting trustee was Miss Margaret, and she and the other beneficiaries all lived together. They divided the moveables among them; but how did they deal with the heritage? They did not sell it; they simply kept it and lived on the rents, which Margaret collected and divided among herself and her sisters in equal shares. And when one of the sisters was married in 1860, two years after their brother's death, they entered into an arrangement by which any necessity for selling the heritage was easily avoided. They took a hint from the trust-deed itself, which provided that with a view to ascertaining the respective interests valuation might be resorted to. They found the value to be £2000, and they said to Jane—We shall pay you £500, and you convey to us your whole right and interest. And the deed was executed by Jane and accepted by the other three upon that footing.

From that time forward the three sisters go on to possess the estate, and becomes, so far as I can see, their heritable estate in every sense of the term. It matters little that one of them was a trustee. It would have been easy for her, if she desired it, to divest and convey to herself and her sisters. But the practical effect was the same as if she had done so. They enjoyed the property just as three joint proprietors. Now, was there anything in that inconsistent with the settlement of their brother? On the contrary, I think it was in perfect conformity with his wishes and intentions.

I am therefore not disposed to divide the case into two parts as the Lord Ordinary has done. The estate was not directed to be sold, and was not necessarily converted by the terms of the deed, and that was practically shewn

ut was done. I therefore hold that there was no conversion, and that in No. 128.
 int of law as well as fact the estate remained heritable in the persons of the
 ee sisters after Jane had executed the deed of 1860. We are dealing here ^{June 7, 1877.}
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 h the succession of Jessie, that part of it which still remained under the trust
 r the moveable estate was divided, and, I think there is not the least doubt
 t nothing has been done to alter its character as it descended from the
 ster. It was then heritage, and never ceased to be so, and was so in the
 son of Jessie.

ORD DEAS.—The late William Jamieson died without issue on 25th June
 8, leaving a *mortis causa* disposition and settlement, whereby he conveyed
 villa of Bellshill, in which he resided, and generally his whole property,
 table and moveable, to trustees, for the following purposes :—(1) Payment of
 ts ; (2) payment of a legacy of £10 to his servant, Margaret Pettigrew ; and
 ly, he desired, instructed, and enjoined his trustees “to divide, and they
 i divide, the whole free residue of my means and estate equally amongst”
 four maiden sisters, Margaret, Jane, Maria, and Jessie Jamieson, “share and
 e alike, declaring that should any of my said sisters predecease me or be
 ried at the time of my death then the share or shares of such decesser or
 asers, or of such as may be married at the time of my death, shall be
 sible equally amongst the survivors who shall be unmarried at the time of
 leath, or if only one shall survive me and be unmarried then she shall be
 ded to the whole of the free residue of my whole means and estate : Farther
 ring, that my said trustees shall have power to sell and dispose of my herit-
 property, either by public roup or private bargain, or they may have it
 ed by a competent person, and either of my said unmarried sisters and who
 be unmarried at the time of my death, having priority of choice according
 ority, shall have a right to purchase the same at such valuation, the pur-
 r always paying the expense of the conveyance, so that the share in my
 sion may not be thereby diminished.”

he only heritable estate left by the truster besides Bellshill consisted of some
 plots of ground purchased by him subsequent to the date of his deed of
 ment, with workmen's houses erected thereon. The moveable estate,—
 to have amounted to £1200 or thereby,—was divided equally among the
 sisters who survived him, after removing the furniture from Bellshill to a
 ent house, in which they lived in family together. The heritable subjects
 ined unsold, but in 1860, the second sister Jane being about to be married,
 d of agreement was entered into by the whole four, whereby, on the narra-
 that a valuation had been obtained of the heritable estate, which shewed
 s fourth share to be worth £500, Jane, in consideration of that sum then
 to her, disponed and assigned her share and interest in the heritable and
 able estate to her three sisters, each to the extent of one-third, Jane bind-
 erself to grant all deeds necessary for carrying out that agreement, and
 arging all farther claims, except an eventual claim to a share of the furni-
 if the family arrangement thereby sanctioned, that those of the sisters who
 ned unmarried were to have the use of it rent free, should afterwards be
 n up.

sie Jamieson died unmarried and intestate on 1st December 1861. Mar-
 died, likewise unmarried and intestate, on 28th December 1866. John
 son, the truster's brother, was heir-at-law to both of them, and as such ob-

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negotiations should not be further proceeded with, but they agree that an extraordinary general meeting of the shareholders should be called to consider the propriety of selling or not selling the Darnick fields, and to authorise certain proposed additions and alterations to be made upon the company's establishment at Skirmish Hill. That extraordinary general meeting was called accordingly but before that meeting was held there is another letter (15th June 1875) from the company's agents to Mr Heiton's agents, in which they say—"With reference to the negotiations for the sale of these fields to Mr Heiton we are instructed by a committee of the directors of the Waverley Hydropathic Company (Limited) to intimate, as we now do, that in the meantime these negotiations are suspended." And then they ask if the trees have been planted, &c., by Mr Heiton's orders, and so on. Then the agents for the company again write on 16th June 1875—"The essential parts of the proposed sale, viz, the conditions, servitudes, &c., have not been considered by the company, and are not finally adjusted. How you can say that the formal parts of the sale have only to be adjusted we do not understand." Then they say that the draft must be returned to them before it is extended on stamp in order that they may get the approval or disapproval of it by the company, or any alterations on it which the company may require. Then you have the result of this extraordinary general meeting, at which a motion is made—"That this meeting disapproves the whole proceedings of the directors as to the fields in question, and also disapproves of the proposed servitudes as being insufficient, and hereby cancels the apparent authority under which they—the directors—have been hitherto acting, and instruct them to cease from all further negotiation with Mr Heiton. And that is the end of the matter. Now, if according to the law of Scotland a concluded sale of heritable property can be spelled out of that, it is more than I can see or understand. I think it is perfectly clear that there was no concluded sale, and therefore that Mr Heiton cannot succeed in this action.

LORD MURE.—The only difficulty I have had in this case has been relative to the question of possession. I have felt no difficulty as to the power of the directors to sell in the circumstances here disclosed; and having regard to the minutes of meetings of the directors, and to the correspondence that followed relative to what were to be the conditions of the contract, it appeared to me that the directors, so far as they were concerned, had come under an agreement to sell. But then the conditions under which the sale was to be made were not first fixed, and until those conditions were fixed, or there had been some acceptance in writing on the part of Mr Heiton of the undertaking made to him in the resolution of the directors, there could be no concluded sale. Now, I think that in the correspondence the greater part of those conditions were arranged. But on the other hand, it is clear that at the end of March there were still some proposals outstanding as to which the parties were not at one. Because the two letters referred to by Lord Deas—one from Messrs Watt and Anderson on the 26th March, and the other from Messrs Freer and Dunn on the 27th of the same month—each allude to the fact of there having been no written acceptance of the proposal the directors had made; and Messrs Freer and Dunn give us the reason why they did not send a written acceptance, that the parties were not at one as to some of the conditions. It was, however, maintained to me that ultimately the parties came to be substantially at one, and that the po

session which had been had by Mr Heiton was sufficient to get the better of the want of any written acceptance. No. 127.

Now, I am very clear upon the correspondence that there was here no written agreement of sale. There is the defect of there being no acceptance on the part of Mr Heiton of the proposal of the company. In his own evidence he says that subsequent to the 26th March he had some communications with Messrs Watt and Anderson, and made some proposals to accept the offer, but that these were not carried out. If the matter had stood here it is quite clear there was no concluded transaction. The only difficulty, as I have said, which was raised in my mind, was with reference to the question of possession—as to whether here had been such possession as could be held to be *rei interventus*, and to show that a concluded contract had in that way been established. But when one looks at the nature of this possession, and at the way in which it was taken by Mr Heiton—not given by the directors as a body—I do not think it is sufficient to validate the agreement. The directors of the company no doubt authorised the carrying out of the transaction on the 2d March; and the finance committee were instructed to carry it out, as appears from the meetings of 2d March and 15th June. But three members of the committee never acted at all, and they never appear to have met together as a committee to consult as to what could be done in the matter. I think that the import of the evidence therefore regards possession simply comes to this, that Mr Ferguson, one of the finance committee, but without the authority of that committee as a body, and without the authority of the directors as a body, seems to have arranged with Mr Macnab, who had no power to do so himself, that he should take a lease of this orchard from Mr Heiton, and that Mr Heiton was allowed by Mr Ferguson to plant some shrubs. But I think that the possession and occupation so had by Mr Heiton cannot be held to have been possession given by the directors or given by the committee, so as to import that there was a concluded contract. The possession remained with the defenders in all essential respects, and upon that ground I have come to the same conclusion as Lord Deas.

LORD SHAND.—In answer to the contention on behalf of the reclaimer that there was a concluded contract of sale, it has been maintained by the respondents that the directors had no power to conclude a sale and, in the next place, that on the documents that passed between the parties there was no concluded sale. Upon the first of these points, viz., as to the power of the directors to conclude a sale, I have, as your Lordships have, no doubt. The argument for the respondents finally came to this, that although it was part of the constitution of this company, as finally fixed by the resolution at the meeting of the 25th March 1874, and approved of at the meeting of 9th April 1874, that the directors might, with consent of the shareholders, “sell, dispose, and convey the heritable property of the company,” and although it is conceded that the consent of the shareholders was given at the same meeting at which this power was made a part of the constitution of the company, yet the sale could not be carried through, because in the notices calling the meeting at which the power was given there was no intimation given to the shareholders that such a sale was to be the subject of consideration. I am clearly of opinion that that is not a good ground for challenging this sale, if it was made. The directors, with the consent of the shareholders, had the power to sell, and the shareholders had given their consent. The

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objection taken amounts to this, that a party dealing with a joint stock company of this kind is bound not only to look at the constitution of the company, and at the resolution which the company may have come to, but to investigate all the details with reference to the calling of the meeting at which the resolution was arrived at, and to see whether due notices have been given, and circulars sent to the proper parties. I think that persons dealing with companies of this kind are entitled to assume that in matters of this description everything has been properly done. It would be a very serious thing if in regard to a company such as this the law were otherwise. I do not say it would lead to the disability of such companies to contract; but, if persons dealing with them were bound to examine into all these minute matters of detail before they could be satisfied that they had made a binding contract, it would be almost impossible to deal with such companies in safety; and it would be the worst result possible for such companies themselves, and a great injury to them, that the law should be declared in terms of the argument which we had at such great length from the respondents in this case. I have no doubt that there was power on the part of the directors to conclude a sale of those fields; but I agree with your Lordships in holding that there was here no concluded contract.

It is settled by the case of *Colquhoun v. Wilson's Trustees*, 22 D. 1035, on principles of reason and expediency, that where you have open possession, followed as in that case the possession was, by a number of actings of the parties, the person who has taken possession must be held to have passed from minor stipulations that he had made in the course of the negotiations for the contract, but which have been left open. But here the case is quite otherwise. We have to look at the correspondence, and I think also at the drafts of the deeds, which passed between the parties, in order to see what was the state of the negotiations between them. I quite agree with what has been said by Lord Deas that the drafts themselves, even though they come nearly up to a concluded contract, cannot be taken as finally closing it, but, on the other hand, they may be looked at to see how far the parties were at one, and how far they differed from each other. In this case I think the drafts are useful, and shew that the parties had never come to one.

I do not mean to go into detail on points which have been already so fully gone over, but I may say that I am satisfied from the correspondence, in the first place, that the proposed sellers, through their agents, made it a condition of the sale that there should be a formal written acceptance of the offer made. The pursuer's agents were made fully aware of this, and in one of their letters to the defenders' agents they say that they cannot send such a written acceptance because they were not agreed as to one of the stipulations. I think it would be extremely difficult to hold that the bargain had been concluded without such a written acceptance. But, in the next place, I think the documents shew that upon a matter which was of vital consequence to this company—I mean the servitudes which were to be made burdens upon the ground to be sold—there was an important difference between the parties. I refer particularly to a piece of ground delineated upon the plan, upon which the pursuer was to have liberty to put up buildings subject to restrictions. It appears to me that up to the last moment parties were directly at variance—the defenders holding that any contract to be entered into must contain a stipulation that the villas to be put up on that ground must be according to plans which they should approve of, while the pursuer, on the other hand, maintained that he should be entitled

put down villas without either having plans submitted to or approved of by No. 127.
defenders. I therefore take it that upon these two points, if there were no-
ing else—the absence of the acceptance stipulated for and the non-agreement
th reference to the servitudes—there was no concluded bargain. I may fur-
er say that I entirely adopt the views stated by Lord Deas as to the alleged
session. I do not think there was here such possession given by the company
d taken by Mr Heiton as could make any contract between the parties on the
ting that Mr Heiton abandoned all points on which he had differed in the
otiations.

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LORD PRESIDENT.—We had a very elaborate and earnest argument on the part
the defenders in support of their third plea in law, which is that “the resolu-
a with reference to the fields in question, adopted at the meeting of the com-
y on 25th March 1874, having been passed in violation of the provision of
statute and the articles of the association, anything done under the remit cou-
ed therein was *ultra vires* of the directors and committee of directors, and is
binding on the company.” Now, although I agree with all your Lordships
holding that that plea is unfounded, I think it is necessary to take some
ice of it in giving our judgment, because if the doctrine embodied in that
were held to be sound or received any countenance, even by the appearance
its not being distinctly rejected by the Court, I think it might lead to very
onvenient and dangerous consequences. The fundamental doctrine of the law
partnership in the case of ordinary mercantile companies is, that every indivi-
l partner of the company may bind the company in all ordinary transactions, and
each partner has an implied mandate to that effect. But in the case of a joint
k company, whether depending upon the common law or upon statute law,
whether limited or unlimited, there is no room for such a presumption as that,
ise the very nature of the association renders it indispensable that there
uld be a directorial body to carry on the business of the company, and the
stitution of the body of directors of course takes away at once the power of
individual member of the company to bind the company. But it does more
that, for it creates a presumption of a different kind—a presumption that
whole of the business of the company is to be done by the directors and by
dy else, and in no other way; and the public are entitled to expect that
ything that the directors do shall be valid and binding upon the company.
doubt, in the case of statutory companies in particular, this presumption
t yield to fact, and it may be made a fundamental condition of the com-
r’s contract of settlement, and a part of its constitution, that the directors
l have certain powers, and shall not have certain other powers, either by
selves or with the consent of a general meeting of the shareholders of the
pany. And there can be no doubt that it is right that a third party dealing
such a company is bound to make himself acquainted with the conditions
he contract of that company in so far as they are made public; and under
Companies Act, 1862, a third party dealing with such a company is bound
ake himself master, not only of the statute under which the company is in-
orated, but of its articles of association, which are registered for the very
ose of being made public. If, therefore, he finds in these articles of associa-
that the directors have not the power to contract, he is given notice of that,
will contract at his own risk.
ow, how does this matter stand in regard to the company in question? In

No. 127.

June 6, 1877.
Heiton v.
Waverley
Hydropathic
Company.

the first place, it is provided by the articles of association that the directors may do everything in conducting the affairs of the company that the company itself could do at a general meeting, unless it be such things as are specially reserved to be done by the incorporation. That is the leading provision. But then it is said there is an exception to this in the case of a sale of heritable property, and an article of association is referred to in which the directors are given power to borrow and re-borrow within certain limits; and then these words follow—"And with the consent of the shareholders at a general meeting they may also sell, dispose, and convey the heritable property of the company, or any part thereof." I think it is very doubtful whether that regulation was in operation at the time when this sale was made, or at least when the authority was given for it. But assuming that it was so, the question comes to be whether the directors had not such authority; and when we come to the minutes of the extraordinary general meeting of shareholders on 25th March 1874 we find that that meeting expressly and unanimously empowered the directors to sell this ground at such a price and on such terms and conditions as they should deem advisable. The directors proceeded at their next meeting to take this matter into consideration. They fixed the price at which they were to sell, and they appointed a finance committee to meet and advise with the law-agents in the carrying out of the same. Now, the directors were entitled to act by a committee in carrying out the details of a transaction of this kind, having thus resolved to sell, and I think this remit empowered the finance committee to proceed with the adjustment of details.

But it is said the whole of this rests upon an unsound basis, because the extraordinary general meeting of the shareholders was not duly summoned, and in particular, that the notices calling the meeting did not specify that this business was to be taken up by the meeting. Now, that is no doubt in violation of one of the regulations of the company, and one of the regulations which form an article of association, and which is published to the world. But although third parties know that an extraordinary general meeting of the company may be summoned in that particular way, the question remains whether they are bound to inquire and to satisfy themselves whether a particular general meeting for the purpose of passing the resolution under which the directors are acting was so summoned. I hold it to be perfectly clear law that they are not bound so to inquire, but, on the contrary, that they are entitled to presume that everything has been regularly done in the summoning of the meeting of the company at which such resolution is passed. I think any other conclusion upon such a question as that would be attended with the most monstrous and inexpedient results. Therefore I am very clearly of opinion that the defence founded upon the want of due summoning of the extraordinary general meeting is entirely without foundation.

Upon the other question, whether there was a concluded contract made by the parties so empowered to contract, I entirely agree with all your Lordships. I think, in the first place, that the correspondence and the minutes do not themselves make a concluded written contract of sale, because some of the conditions subject to which that sale was to be made were not finally agreed to by both sides. I think, in the second place, with Lord Deas, and I understand with all your Lordships, that the mere attempt to adjust a draft disposition which was never finally approved of by both, could not have any such effect. I think, in the third place, that no possession of the ground was ever given by

the company, and that even such kind of possession as the pursuer took without the assent of the company, or anybody authorised by the company, was of far too equivocal a character to get the better of the imperfection of the written contract, even if it had been given by the company to the pursuer.

I am therefore for adhering to the interlocutor of the Lord Ordinary, but I think it right to suggest that there is one finding in the interlocutor, viz., the first, which is quite unnecessary for the judgment, and with regard to which I confess I entertain some little doubt—in which his Lordship finds that the statements of the pursuer are not relevant. There may be a doubt about that, but it is not in the least degree necessary for the judgment. I think, therefore, we had better recall that part of the finding, and assoilzie.

THE COURT pronounced the following interlocutor:—"Recall the finding, in the first place in the said interlocutor: Recall the said interlocutor also in so far as it sustains the defences; and in place thereof sustain the defenders' fourth and fifth pleas: *Quoad ultra* adhere to the said interlocutor: Find the defenders entitled to additional expenses, allow an account," &c.

ALEX. MORRISON, S.S.C.—WATT & ANDERSON, S.S.C.—Agents.

ADAM HOGG, Pursuer.—*Asher—Moncreiff.*

MRS ELIZABETH JAMIESON OR HAMILTON AND OTHERS, Defenders.—*Trayner—Rhind.*

No. 128.

June 7, 1877.
Hogg v.
Hamilton, &c.

Succession—Trust—Heritable and Moveable—Conversion—Reconversion.—The testator conveyed his estates, consisting of heritage and moveables, to trustees, who were directed, after payment of debts and a legacy, to divide the residue equally among the testator's four unmarried sisters. Power was given to the trustees to sell the heritage or make it over at a valuation to one of the beneficiaries. The eldest sister was the sole accepting trustee. The heritage was never sold, and the sisters possessed it in common, the eldest drawing the rents and dividing them. When one of the sisters was married a valuation of the heritage was made and one-fourth of the value was paid to her as her share, she conveying to the others her whole interest in the estate. One of the unmarried sisters having died, *held* that her share of the heritage was heritable—Lord President, Lord Deas, and Lord Mure holding that there had been no conversion, Lord Shand (concurring with Lord Adam, Ordinary), holding that the terms of the deed implied conversion, but that the actings of the beneficiaries did operated reconversion.

WILLIAM JAMIESON, surgeon, Bellshill, died in 1858, leaving a trust-settlement by which he conveyed to Margaret Jamieson, his sister, in the event of her surviving and remaining unmarried, whom failing, to his other unmarried sisters, Jane, Maria, and Jessie, in succession, and two other trustees, who did not accept, the sister being a trustee *sine a non*, a plot of ground at Bellshill, containing 1 rood 27 falls, and all his other property, heritable and moveable. After directing payment of debts, and a legacy to an old servant, the deed proceeded,—“Lastly, I desire, instruct, and enjoin my said trustees, . . . to divide and they all divide the whole free residue of my means and estate equally amongst the said Margaret, Jane, Maria, and Jessie Jamieson, my unmarried sisters, share and share alike: . . . Farther declaring that my said trustees shall have power to sell and dispose of my heritable property, either by public roup or private bargain, or they may have it valued by a competent person, and either of my said unmarried sisters, and who shall be unmarried at the time of my death, having priority of choice according to seniority, shall have a right to purchase the same at such valuation.”

1st Division.
Lord Adam.
B.

No. 128.

June 7, 1877.
Hogg v.
Hamilton, &c.

All the sisters were alive and unmarried at the date of the testator's death, and Margaret, the eldest, accepted the trust. The moveable estate amounted to about £1200, and was immediately divided among the beneficiaries. The heritage consisted of a villa and garden at Bellshill, and tenement of workmen's houses. These subjects were let, and the rents were drawn by Margaret and divided among the beneficiaries till her death in 1866. In 1860 Jane was married. On that occasion a valuation was made of the heritage. It was valued at £2000. £500 was paid to Jane as her share, and a deed was executed by all the sisters, by which Jane, on the narrative of all that had taken place, granted a discharge for £500 as in full of her share of the heritage, and disposed assigned, conveyed, and made over to her three sisters all her share, interest, right, and title in and to her brother's heritable and moveable estate. Jessie died unmarried and intestate in 1861.

Maria was married in 1864 to Adam Hogg, and died in 1873.

Margaret died in 1866, having shortly before her death assumed two additional trustees.

Adam Hogg having acquired right to the shares of his wife and of Margaret, and having also come to be in right of Jessie's heir in heritage, brought this action against Elizabeth Jamieson and others, her next of kin, and the trustees, concluding for declarator that he had the sole beneficial interest in the subjects, and that the trustees were bound to denude in his favour.

He pleaded;—(1) on a sound construction of the trust-settlement of the said William Jamieson, Jessie Jamieson's interest in the heritable subjects therein disposed was heritable, and on her death passed to her heir-at-law; and (2) *esto* that the said interest was originally moveable, became heritable by reconversion, and was so *quoad* the said Jessie Jamieson's succession on her death, in consequence of her having elected to allow her share of the said heritable subjects to remain and be dealt with as heritage throughout her lifetime.

The defenders pleaded;—(2) On a sound construction of the trust-deed, and in the circumstances of the case, the interest which, at the time of her death, Jessie Jamieson had in her brother William's trust-estate, was moveable.

The Lord Ordinary pronounced this interlocutor:—"Finds and declares in terms of the first conclusion of the summons, and decerns; and *quoad ultra* continues the cause: Finds the defenders, Elizabeth Jamieson, Hamilton, &c., and Robert Brown Tennent and Alexander Pollock trustees of the deceased William Jamieson, liable in expenses," &c."

* "NOTE.—The object of this action is to have it found and declared that the pursuer has the sole beneficial interest in, and right and title to, the heritable estate which belonged to the deceased William Jamieson, and to have his trustees decerned and ordained to denude thereof in his favour.

"It is not disputed that the pursuer is now in right of three-fourths of the heritable estate left by the truster, and the question at issue relates to the remaining fourth which was bequeathed by him to his sister Jessie Jamieson. The competition is between the pursuer, who is in right of the heir in heritage of Jessie Jamieson, and the defenders (other than the trustees), who are her next of kin. It is not disputed that if Jessie's share be heritable it now belongs to the pursuer.

"Two questions have arisen—1. Whether the heritable estate left by the truster is by force of the terms of his settlement to be treated as moveable *quoad* his succession; and, 2. Whether, assuming this to be so, his residuary legatees of whom Jessie Jamieson was one, so dealt with the property left to them as nevertheless, to make it heritable *quoad* their succession?"

(After narrating the facts)—"Had the case rested on the construction of the

The defenders reclaimed, and argued ;—Although there was no express direction to sell, an estate of the description left by the truster could not be divided, as directed by the trust-deed, without sale. Therefore sale was indispensable to the execution of the trust. There was therefore no conversion, and the legal result was not affected by the fact that the trustee did not carry out the directions of the truster.¹ The provision that one sister might take the property at a valuation shewed that the truster contemplated that the shares should be paid in money. The pursuer argued ;—The estate was heritage in the person of the truster, and it continued to be so after his death, and has never been converted. It therefore lay on the defenders to shew how conversion was effected. There was no direction to sell. Therefore it must be shewn that it was necessary to sell in order to carry out the purposes of the trust.² But that was not the case. It was settled that a conveyance *pro indiviso* might satisfy a direction to divide.³ Conversion was a question of intention. And the preservation of the estate as heritage in the way that had actually been done was quite in conformity with the truster's intention as expressed in his deed. It is not necessary to advise the court in advising,—

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THE LORD PRESIDENT.—(After stating the facts)—Certain things are very clear on the face of the deed. The sisters who were unmarried at the date of the truster's death were to have equal shares. The trustees have power to sell, but there is no direction to sell. Then there is an imperative direction to divide the estate equally among the unmarried sisters. That is the only part of the deed which

disposition and settlement above, the Lord Ordinary is inclined to think its terms would have operated as a conversion of the truster's heritable estate into moveable *quoad* his succession. There is no direction to sell, but the trustees are directed 'to divide' the residue of his means and estate equally among the four sisters. Having regard to the amount and condition of the means and estate which fell to be divided, the division could not have been made, except by the conversion of the heritable estate into money. A conveyance of the heritable estate to be held by the residuary legatees *pro indiviso* would not appear to be sufficient compliance with the truster's direction 'to divide' the residue—*Gringham's Trustees v. Paterson*, July 2, 1873, 11 Macph. 848 ; and the truster therefore must be held to have intended a sale of the subjects—*Buchanan Angus*, May 15, 1862, 4 Macqueen, 374.

But it appears to the Lord Ordinary that the residuary legatees, who were only parties interested, elected that the heritable estate should not be sold and divided among them. When Jane was married in 1860, and required payment of her share, the necessity then arose of dealing with the heritable estate, of selling it and dividing the proceeds. The estate, however, was not sold ; in order to avoid a sale the other three residuary legatees bought up Jane's share in it. It appears therefore to the Lord Ordinary that the estate was not sold because the three remaining residuary legatees resolved, as they had a right, being the only persons interested, that it should remain invested as it was. The question therefore as to their succession the Lord Ordinary thinks that it must be regulated according to the nature of the subject, and, being heritable, Jessie's right to a share went to her heir in heritage, whom the pursuer represents—*Williamson v. Paul*, December 15, 1849, 12 D. 372 ; *Grindlay v. Grindlay's Trustees*, Nov. 9, 1853, 16 D. 27."

Buchanan v. Angus, May 15, 1862, 4 M'Q. 374, 34 Scot. Jur. 502 ; *Advocate-General v. Blackburn's Trustee*, Nov. 27, 1847, 10 D. 166 ; *Fotheringham's Trustees v. Paterson*, July 2, 1873, 11 Macph. 848, 45 Scot. Jur. 578. *Grindlay v. Grindlay's Trustees*, Nov. 9, 1853, 16 D. 27, 26 Scot. Jur. 29 ; *Wight v. Wighton's Trustees*, Jan. 9, 1874, *ante*, vol. i. 358. *Wright v. Anderson*, Dec. 8, 1876, *supra*, p. 211.

No. 128. requires construction, and it must be taken in connection with the power of sale, which might or might not be exercised, and might be exercised in different ways. The property might be sold to a third party by private bargain, or by auction to the highest bidder, or it might be valued over to any one of the sisters, the eldest for the time being having a preference.

July 7, 1877.
Hogg v.
Hamilton, &c.

Now, it is contended, in substance, that where there is an imperative direction to divide a mixed estate, that necessarily implies conversion of the heritage, because it is impossible to operate a complete and equal division without the heritage being previously sold. I do not think the term "divide" has any such restricted meaning. It admits of the same kind of construction as the term "pay," which is often read in settlements of this description as equivalent to "convey" or "transfer," according to the nature of the property, and may often mean "dispose" in the case of heritable estate. Accordingly the word "divide" settles nothing by its mere use as to the testator's intention in the matter of conversion. It is merely equivalent to pay or transfer to a plurality of beneficiaries, and that may be done not only by converting the property into money, but by giving shares of equal value to the beneficiaries or in other ways. The term divide advances one a very little way in solving the question whether it was the intention of the testator to convert his heritage into moveables by the operation of his trust.

If that be so, the only element left for consideration is the power of sale. That has never been held to operate conversion. There must either be a direction to sell or some equivalent, such as that the general provisions of the trust and the circumstances of the estate create a necessity to sell in order to carry out the purposes of the trust. As there is no direction to sell here, the party contending for conversion must shew a necessity to sell.

In dealing with that matter a great deal of light is afforded by what was actually done by the trustees and by the beneficiaries. The only accepting trustee was Miss Margaret, and she and the other beneficiaries all lived together. They divided the moveables among them; but how did they deal with the heritage? They did not sell it; they simply kept it and lived on the rents, which Margaret collected and divided among herself and her sisters in equal shares. And when one of the sisters was married in 1860, two years after their brother's death, they entered into an arrangement by which any necessity for selling the heritage was easily avoided. They took a hint from the trust-deed itself, which provided that with a view to ascertaining the respective interests valuation might be resorted to. They found the value to be £2000, and they said to Jane—We shall pay you £500, and you convey to us your whole right and interest, and the deed was executed by Jane and accepted by the other three upon that footing.

From that time forward the three sisters go on to possess the estate, and it becomes, so far as I can see, their heritable estate in every sense of the term. It matters little that one of them was a trustee. It would have been easy for her, if she desired it, to divest and convey to herself and her sisters. But the practical effect was the same as if she had done so. They enjoyed the property just as three joint proprietors. Now, was there anything in that inconsistent with the settlement of their brother? On the contrary, I think it was in perfect conformity with his wishes and intentions.

I am therefore not disposed to divide the case into two parts as the First Ordinary has done. The estate was not directed to be sold, and was not necessarily converted by the terms of the deed, and that was practically shewn by

that was done. I therefore hold that there was no conversion, and that in
 int of law as well as fact the estate remained heritable in the persons of the
 ne sisters after Jane had executed the deed of 1860. We are dealing here
 with the succession of Jessie, that part of it which still remained under the trust
 er the moveable estate was divided, and, I think there is not the least doubt
 it nothing has been done to alter its character as it descended from the
 ster. It was then heritage, and never ceased to be so, and was so in the
 son of Jessie.

No. 128.
 June 7, 1877.
 Hogg v.
 Hamilton, &c.

LORD DEAR.—The late William Jamieson died without issue on 25th June
 18, leaving a *mortis causa* disposition and settlement, whereby he conveyed
 villa of Bellshill, in which he resided, and generally his whole property,
 table and moveable, to trustees, for the following purposes :—(1) Payment of
 ts ; (2) payment of a legacy of £10 to his servant, Margaret Pettigrew ; and
 ly, he desired, instructed, and enjoined his trustees “to divide, and they
 I divide, the whole free residue of my means and estate equally amongst”
 four maiden sisters, Margaret, Jane, Maria, and Jessie Jamieson, “share and
 e alike, declaring that should any of my said sisters predecease me or be
 ried at the time of my death then the share or shares of such decessor or
 asers, or of such as may be married at the time of my death, shall be
 sible equally amongst the survivors who shall be unmarried at the time of
 death, or if only one shall survive me and be unmarried then she shall be
 led to the whole of the free residue of my whole means and estate : Farther
 ring, that my said trustees shall have power to sell and dispose of my herit-
 property, either by public roup or private bargain, or they may have it
 ed by a competent person, and either of my said unmarried sisters and who
 be unmarried at the time of my death, having priority of choice according
 uiority, shall have a right to purchase the same at such valuation, the pur-
 r always paying the expense of the conveyance, so that the share in my
 sion may not be thereby diminished.”

he only heritable estate left by the truster besides Bellshill consisted of some
 plots of ground purchased by him subsequent to the date of his deed of
 ment, with workmen's houses erected thereon. The moveable estate,—
 o have amounted to £1200 or thereby,—was divided equally among the
 sisters who survived him, after removing the furniture from Bellshill to a
 ent house, in which they lived in family together. The heritable subjects
 ned unsold, but in 1860, the second sister Jane being about to be married,
 d of agreement was entered into by the whole four, whereby, on the narra-
 that a valuation had been obtained of the heritable estate, which shewed
 a fourth share to be worth £500, Jane, in consideration of that sum then
 to her, disposed and assigned her share and interest in the heritable and
 ble estate to her three sisters, each to the extent of one-third, Jane bind-
 erself to grant all deeds necessary for carrying out that agreement, and
 rying all farther claims, except an eventual claim to a share of the furni-
 if the family arrangement thereby sanctioned, that those of the sisters who
 ned unmarried were to have the use of it rent free, should afterwards be
 n up.

sie Jamieson died unmarried and intestate on 1st December 1861. Mar-
 died, likewise unmarried and intestate, on 28th December 1866. John
 son, the truster's brother, was heir-at-law to both of them, and as such ob-

No. 128. tained a decree of general service on 16th April 1867. He conveyed his right by disposition and assignation, dated 29th February 1868, to the pursuer and his wife, Maria Jamieson (to whom he had been married in 1864), and the survivor of them. Maria died on 1st December 1873, and the pursuer thus became entitled to the whole outstanding estate, if it was heritable, and in May 1874 he brought this action against the trustees under the deed of settlement to have them ordained to convey the estate to him. The trustees stated in defence that Jessie Jamieson's next of kin had interpellated them from complying with the demand, on the footing that her interest in the estate was moveable, and had passed to them and not to the heir-at-law. Jessie Jamieson's next of kin were thereupon called into Court by a supplementary action, and the direct question at issue (as explained by the Lord Ordinary) thus came to be tried with them as to Jessie's original fourth share and one-third of her sister Jane's share made over to her by the deed of 1860. In the meantime the title to the estate continued to stand, in an heritable form, in the persons of the trustees, and latterly in the eldest sister, Margaret, as sole trustee, and it does not appear to be disputed that, up to a recent date before the pursuer raised this action, the rents had been distributed and paid over upon the footing that the rights of the beneficiaries were of an heritable nature.

The Lord Ordinary has decided in favour of the pursuer, but it appears from his note that he has done so on the footing that the residuary legatees, who were the only parties interested, had elected, by the deed of 1860, that the estate should not be sold, and that if the question had depended on the construction of the trust-settlement his Lordship would have held that its terms operated conversion from heritable to moveable. It is important to the law that the ground of judgment, in a case of this kind, should not be doubtful, and I therefore think it right to express my opinion that, without an actual sale, there could in this case, be no conversion.

The deed contains a power of sale, but not a direction to sell. Such a direction would have been conclusive in favour of conversion. No doubt there is a direction to "divide." But a direction to divide admits of construction more clearly, I should say, than a direction to "pay over," which, in *Buchanan v. Angus* (4 Macqueen, 372) was held, in the House of Lords, to admit of being construed as a direction to transfer the subjects as they stood at the date of the truster's death. If at the date of the truster's death the estate is heritable in its nature the words used as to what is to be done with those subjects are, I think, to be construed with a presumption in favour of keeping them in their then existing form rather than of changing them into personalty.

As we held in the recent case of *Auld v. Anderson* (4 Rettie, 211), there may be various ways of dividing heritable subjects without a sale, a *pro indiviso* conveyance being one of these ways if the circumstances raise no special objection to that course being adopted. As to the case of *Fotheringham* (11 Macph. 542) that was a very special case. The truster there directed the rents of a specified subject to be paid to Andrew Richardson and his wife, and the survivor of them during life, and the rents of another specified subject to be paid to James Thomas during his life. He then directed his trustees to divide the residue of his heritable and moveable property into nine equal shares or divisions, and to dispose, assign, and pay over one of these shares to his sister, Catherine Hay, for life, and one to each of eight other persons named, in fee, and their heirs, executors, and assignees respectively. He farther directed his trustees, on the

ath of the said Andrew Richardson and his wife, and of the said James No. 128.
 homas respectively, to dispoⁿe, assign, and pay over to his own and his wife's
 lations "the parts of my heritable property so severally liferented by the said June 7, 1877.
 atherine Hay, Andrew Richardson and his wife, and James Thomas." A Hogg v.
 use was added, empowering the trustees, after payment of the debts and of a Hamilton, &c.
 quest to the Perth Infirmary, and the falling in of the above liferents, "to
 ing the whole or such part of my heritable property to sale as they may think
 oper, and to grant absolute dispositions to the purchasers should they be of
 ion that such sale is advisable for more effectually carrying the purpose of
 is settlement into execution."

In these circumstances the Second Division held that there was a practical
 cessity for a sale in order to carry out the will of the truster, and it must be
 mitted that the management of the subjects, in a *pro indiviso* form, in the
 nds of a liferenter and eight fiars, without the concurrence of all of whom
 thing could be done, could hardly be expected to go on advantageously
 hout a trust or the appointment of a judicial factor, and might reasonably
 igh be regarded as not in accordance with the intention of the truster.

But that a *pro indiviso* conveyance is not an incompetent mode of complying
 h a direction to divide must be held, I think, to have been substantially
 blished by the case of Buchanan v. Angus. The direction in that case was to
 ay over" the residue of the truster's means and estate, or the prices and
 duce thereof, to Major Archibald Smith, the truster's brother, and Mrs
 rgaret Smith or Heugh, his sister, equally betwixt them, share and share
 e, and their heirs and assignees whomsoever." That was just a direction to
 ide the residuary estate, or the prices and produce thereof, equally betwixt
 se two parties, and to which the observation I have already made was applic-
 e, that it would have been more difficult to construe the words to "pay
 r," as meaning "to transfer," than it is to construe the words divide
 qually betwixt them, share and share alike," as having that meaning. The
 d Chancellor (Westbury), however, spoke of what was directed there as
 e division to be made between his (the truster's) brother and sister," and
 further said expressly that the words "equally betwixt them share and share
 e" are "words which would be clearly applicable to a disposition of the pro-
 y when given to two persons in the character of tenants in common," (4 Mac-
 en, 382), which words just correspond to what we would call in Scotland
 position to two persons *pro indiviso*. Accordingly, the judgment proceeded
 the footing that what Archibald Smith and Mrs Heugh would have been en-
 d to if both had been alive would have been to have obtained from the
 tees a conveyance *pro indiviso* of the heritable subjects equally betwixt
 n. Mrs Heugh survived her brother Archibald, but as she made up no title
 is heir it was found and declared that no right to his *pro indiviso* half ever
 ed in her, but that it remained in *hereditate jacente* of Archibald, and went
 er cousin, Archibald Buchanan, as his heir-at-law.

The heritable estate in the present case stood, I think, at the truster's death,
 position precisely similar to that in which the heritable estate stood at the
 ter's death in the case of Angus v. Buchanan. There was a power of sale,
 no direction to sell, and no necessity for a sale. The direction to divide
 lied no such necessity. There were ample funds to pay the debts and the
 uniary bequest, leaving a substantial sum for division among the four sisters.
 ollows that unless and until some necessity for a sale should arise, or some-

No. 128. thing was done to operate conversion, there was no conversion of the heritable estate.

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The law applicable to such a case cannot be better expressed than in the words of the Lord Chancellor in the case of *Buchanan v. Angus*. After observing that an absolute and unconditional trust for sale, either expressed or necessarily implied, operates conversion, he says (4 Macqueen, p. 379),—"But if, instead of an absolute and unqualified trust or direction for sale the right to sell is made to depend on the will or discretion of the trustees, or is to arise only in the case of necessity, or is limited to particular purposes, as, for example, to pay debts, or is not, in the appropriate language of Lord Fullerton in the case of *Blackburn*, indispensable to the execution of the trust, then, in any of these cases, until the discretion is exercised, or the necessity arises and is acted on, or after the particular purposes are answered, or if the sale is not indispensable, there is no change in the quality of the property, and the heritable estate must continue to be held and transmitted as heritable."

In the case we are now dealing with no necessity for a sale ever emerged, and nothing was done to effect conversion. On the contrary, until August 1866 the four sisters having continued to live together as the truster had intended them to do, the rents were divided among them or applied for their common purposes, the feudal title made up by the trustees was continued in the person of the eldest sister Margaret, as the accepting and surviving trustee, and the successive trustees and beneficiaries treated the subjects in all respects as heritable estate. The same principle was acted on and carried out in August 1866 when one of the sisters, Jane, being about to be married, she expressed a wish to be paid out of the trust, and accordingly discharged her interest in it on receiving the value of her share of the heritable estate in money.

But this transaction did not proceed upon the footing of conversion of the heritable estate, but only on the footing of diminishing the number of beneficiaries interested in that estate. In place of resorting to a sale the four sisters, one of whom (*viz.*, Margaret), by that time, as I have said, held the title to the subjects as trustee, acting upon the spirit of the clause, which I have quoted from the trust-deed, as to valuation and purchase, obtained a valuation of the heritable estate, which shewed Jane's fourth share to be worth £500, and having paid her that sum they all subscribed a formal deed, whereby the subjects were disposed and conveyed to the three other sisters, and survivors or survivor of them, and the heirs of the survivor, as trustees for themselves and their respective heirs, executors, or assignees, each to the extent of one-third.

It was not this transaction, however, which made Jessie's share of the subjects heritable. Her share was thereby enlarged, but the whole four shares were at that date heritable, as they had been at the truster's death; and Jessie's enlarged share, which is now directly in dispute, remained heritable at her death. It is upon these grounds, and not because of any supposed change upon the character of the estate operated by the deed of 1860, that I am for adhering to the interlocutor of the Lord Ordinary. I think it was not necessary to the result that the parties should elect not to sell. It was enough that they did not elect to sell under the discretionary power of sale conferred by the trust-deed, and so long as they did not do so the subjects remained heritable. If the right of all four had not been heritable prior to and at the date of the deed of 1860 a different kind of question would have arisen, which it is unnecessary here to consider.

LORD MURE.—The Lord Ordinary has dealt with two separate questions in No. 128. this case, first, whether the succession was moveable by force of the terms of the testator's settlement, and secondly, assuming it to have been moveable, whether it has been made heritable by the actings of the beneficiaries. On the first point his Lordship appears to have been of opinion that the interests of parties were moveable by the terms of the trust-deed. If it were necessary to separate the questions I should have had considerable hesitation in concurring with this view, and for these reasons : the deed contains no express direction to sell ; and it was not, I think, indispensable to the administration of the trust that there should be a sale. The fact that the property has been managed and enjoyed since 1858, without difficulty or dispute, and without having recourse to a sale, goes far to shew that sale was not indispensable. In the case of *Auld v. Mabon*, *supra*, p. 211, the question was raised as to the propriety of the trustees granting a *pro indiviso* right to the beneficiaries ; and it was held that that would be within the power of the trustees under the clause of the deed in that case. We have not exactly the same clause here, but I see no reason to doubt that the trustees had a discretion which would have entitled them to take that or any other course with a view to a division which they considered most advantageous for the beneficiaries.

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But, even assuming that the succession was moveable at the date of the testator's death, I concur in thinking that under the actings of the parties during the administration of the trust their respective interests were stamped with an heritable character ; and they have been so dealt with, more particularly at the date of the transaction with the sister who was married.

LORD SHAND.—I agree in thinking that this interlocutor should be adhered to, but I do not concur in all the grounds of judgment expressed in your Lordships' opinions. Every case of this kind, where we have to consider not only the construction of a deed, but the actings of parties afterwards, necessarily, in my opinion, raises two questions, first, whether the terms of the deed itself imply conversion ; secondly, whether the acts of the parties have made any change in the legal character of the estate as heritable or moveable to which they have acquired right as beneficiaries. In this case the second question is, assuming that the deed produced conversion, whether the succession is to be treated as converted because the parties have agreed to accept it in the form of heritage. That there must be two questions is apparent, because the first arises as soon as the trustor dies, and the answer to it cannot be affected by anything that is done afterwards. It is merely a question as to the effect of the deed. I do not express a confident opinion on the first question dealt with by the Lord Ordinary or what has fallen from your Lordships, but I am inclined to agree with his Lordship's view.

There is no doubt that the words, "divide the residue," do not necessarily imply conversion. But I think they rather indicate, when the subject is mixed estate, to be given in shares to a number of different objects, that conversion is to be presumed. Everything depends on the nature of the subject, and the number of the beneficiaries. When a trustor leaves two properties, a villa and garden, and a block of workmen's houses to be divided among four people, it is hardly to be suggested that they are to be divided *in forma specifica*. The exercise of the power of sale seems to be indispensable for the execution of the trust, unless indeed the parties enter into some special arrangement, such as here

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occurred, and so avoid a sale. The provision that one sister, in this case, might get the property at a valuation, tells, I think, in favour of conversion, the arrangement contemplated being that one beneficiary was to take the property and the other three to get money. It is not said to have been decided by the recent case of Auld that in all circumstances a conveyance *pro indiviso* would satisfy a direction to divide, and I see no authority in that case for holding that in the present case the trustees would have been entitled, against the wishes of any one beneficiary, to convey the estate undivided, or that any single beneficiary would have had right, against the wishes of the others, to have a conveyance *pro indiviso* executed in favour of all.

But I think there is a clear ground of judgment upon which the Lord Ordinary's interlocutor is rested. The ladies' actings amount to this, that the succession has been treated by them as heritage. They might have required the trust to be wound up, in which case, I think, there would have been realisation by sale and division, and so conversion. But they divided the money, and left the heritage untouched for several years, and when they came to settle with one of the sisters they did so on the footing that the heritable property was to remain with the others. In short, the case falls, I think, under the same principle as that of Grindlay, referred to by the Lord Ordinary.

LORD DEAS.—With permission of your Lordship, and my brother Lord Shand, I would wish to observe that it would be misleading the profession to affirm that he has done (inadvertently I presume), that all questions of conversion must be decided as at the trustee's death. A trite example, to the contrary, is a power of sale to trustees. If they sell under it, there is conversion. If they do not, there is none.

The defender's counsel moved that the Lord Ordinary's interlocutor should be altered, in so far as it found the trustees liable in expenses, and they had stated no separate defence.

THIS interlocutor was pronounced :—"Recall the interlocutor in so far as it finds R. B. Tennent and A. Pollock, trustees of the deceased William Jamieson, liable in expenses: *Quoad ultra* adhere."

J. Y. GUTHRIE, S.S.C.—ALEX. MORISON, S.S.C.—Agents.

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DUKE OF HAMILTON, Pursuer.—*Gloag—Asher.*
ANDREW BUCHANAN, Defender.—*Fraser—Lorimer.*

Landlord and Tenant—Lease—Missive Offer—Rei interventus.—In an action by a landlord against a tenant concluding for declarator that the defender was bound to execute a formal lease in terms of a written offer made by him for a farm, dated 12th September 1873, which had been followed by possession, otherwise that no valid contract of lease had been completed, it was proved that two written offers had been made by the tenant, dated respectively 14th August and 12th September, and that there was no written acceptance, and that the tenant had entered into possession of the farm in the belief that the terms of the lease were to include stipulations in the first as well as the second offer, while the landlord had given possession on the faith of the second offer alone.

Held that there having been no *consensus in idem placitum* there was no contract of lease.

1ST DIVISION.

Lord Ruther-

ford Clark.

B.

SEQUEL of case reported *supra*, p. 328.

The proof allowed by the Court was taken before Lord Shand on 12th March, and the result of it sufficiently appears from his Lordship's opinion. The pursuer was allowed to add the following conclusion to the statement of facts:

mons :—" Or otherwise, and in the event of decree in terms of the foresaid conclusions or any of them not being pronounced it ought and should be found and declared by decree foresaid that no valid contract of lease of the said lands has been constituted, and that the defender has no right or title to possess the said lands;" and there was also a conclusion for removing. A plea was also added in terms of this conclusion.

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The defender was allowed to add this plea:—" The defender is not bound to enter into a lease in terms of the offer of 12th September 1873 alone, in respect (1) the defender's two offers of 14th August and 12th September 1873 are binding on the pursuer; or otherwise (2) if the offer of 14th August 1873 is not binding there is no contract between the parties."

Argued for the pursuer;—The result of the proof was to shew that the first offer never was accepted by the pursuer, and that possession was given on the second offer alone.

Argued for the defender;—The contract consisted of both offers. The proof shewed that the defender and the pursuer's factor both understood that these offers were to be taken together. At all events both these documents were in the possession of the landlord's factor, and he must be held to have acted on them.¹ If that were not so, there was so great a misunderstanding that the Court could not frame a lease without doing injustice to one or other of the parties.

At advising,—

LORD SHAND.—(After stating the conclusions of the summons and the averments of parties)—Substantially the question between the parties as presented in the original record is, whether, as maintained by the pursuer, the contract is to be found in the offer of 12th September and the conditions of let, or whether, as maintained by the defender, the three documents, viz, the letters of 14th August and 12th September and the conditions of let are to be taken together as containing the agreement between the parties. There was no written acceptance of the tenant's first offer any more than of the second. If there had been, the acceptance would have described the offer accepted, and there would have been a completed written contract. The possession which followed on the documents referred to is said to establish the contract. Both parties appeal to the ordinary rule of law that where possession follows upon a written offer the lease is effectual and binding on the terms expressed in the writing.

But when the parties met in Court it appeared that they were at variance, and had been so from the first, upon the question as to the writing or writings on the date of which possession was taken. The pursuer maintained that the possession followed upon the letter of the 12th September and the relative conditions; the defender, that it followed upon these and also upon the previous letter of 14th August.

The Lord Ordinary gave effect to the first of these contentions without proof, but upon a reclaiming note that interlocutor was recalled, and the parties were allowed a proof of their averments. I find in the report (p. 331) that your Lordship in the chair then stated—" The pursuer, therefore, hereby undertakes to prove that possession was given, and taken, and afterwards held under and in terms of the second offer, as distinguished from the first—in fact, that the possession was

¹ Carruthers v. Thomson, Feb. 11, 1836, 14 S. 464, 8 Scot. Jur. 302; Wilson v. Lord Breadalbane, 14th June 1859, 21 D. 957, 31 Scot. Jur. 525; Steuart's Trustees v. Hart, Dec. 2, 1875, ante, vol. iii. p. 192; Freeman v. Cook, July 11, 1848, 18 L. J. Exch. 114.

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given and can be ascribed only to the latter offer. That averment, in point of fact, is absolutely essential to the success of the pursuer. On the other hand, he fairly enough represents in the next article that while that was his view, the defender's allegation was that the possession was specially referable to the offer of 14th August also, or to that offer alone."

The proof has been taken, and it only remains to be mentioned that in the course of the discussion which followed the pursuer has added an alternative conclusion and a plea in law to meet the case of its being now held that there was no concluded contract, while the defender has added a plea to a similar effect.

We have now to consider the result of the proof, and I shall state what seems to me to be its import. It appears that the farm was advertised in August 1873, and that the defender, having seen the advertisement, inspected the farm, and either in the course of that inspection or at its close had an interview with Mr Stewart Robertson, the Duke's chamberlain. At that interview the defender stated that there were certain things he would desire to have done if he became tenant, and he immediately afterwards sent to the chamberlain the offer of 14th August, to which allusion has been made. This letter, it is quite obvious contains special stipulations on matters which the pursuer thought were of importance. It was followed by an application for references, on the footing that it was to be submitted for consideration to the Duke of Hamilton's trustees. It was not returned to the defender, but was retained and has been produced by the pursuer. Afterwards there followed a letter requesting the tenant to attend a meeting at the chamberlain's office. The meeting took place upon 12th September, when the offer of that date was signed by the defender. The parties are not quite at one about what took place at that meeting, but it is clear that the business was very hurriedly transacted. Neither time nor opportunity was given or taken for discussion of the details of the lease. Mr Robertson's account of what took place is unsatisfactory. I am quite satisfied that at his examination he was ready to tell all he knew, but he had little if any recollection on the subject. The defender's account of the meeting shews that it was very hurried, and I am satisfied he is correct in saying that his offer of 14th August which led to his being there, was not even referred to.

After this meeting the tenant obtained possession. Mr Robertson says in his understanding was that possession was taken upon the last offer, while the tenant states that he would not have entered the farm on the terms of the last offer only, and that his act of possession had reference to both offers. Possession was given of the land under tillage at Martinmas 1873, and of the house six months thereafter at Whitsunday 1874. Before the latter of these dates Buchanan in conversation with the landlord's representative had referred to the offer of 14th August as an offer which he considered binding. It is important to notice this, and that Mr Barr (the cashier in the chamberlain's office) in his evidence expressly states that Buchanan in asking to have the byre altered, and other changes effected, did so as matter of right, and referred to his letter of 14th August. By a letter dated 30th April 1875 Barr acknowledged receipt of a copy of that very letter. It is quite apparent that before that time Buchanan was maintaining his right to a lease in terms of the offer of 14th August.

It thus appears from the evidence that when possession was given the landlord gave it upon the faith of the letter of 12th September, and of that letter and the general conditions of let of the estate alone. It is equally clear, not only from the tenant's own evidence, but from other sources of proof, that he

possession on the faith of the previous offer in addition to the other documents above mentioned. There is no written contract, and possession is necessary *in rebus*, in order to make a completed binding agreement. But as possession was given on one footing and taken upon a totally different footing, as there was thus an essential misunderstanding in the acts of giving and taking possession, it appears to me that there is no concluded contract between parties. There is a want of that *consensus ad idem* which is necessary to complete an agreement.

It is maintained that the tenant having signed the latter offer, and having entered into possession after its date, must be held to be barred from pleading that he took possession upon any other. There is no absolute inconsistency, however, between the two offers, and a written acceptance might fairly have embraced both. In the first offer there are certain stipulations made for additional buildings, and that the existing buildings should be put into better condition. On the face of the articles of lease of the estates there is a provision indicating that there might be a separate agreement about the important matter of houses. The offer of the 14th August had been entertained and retained by the commissioner, and it was natural that the tenant should believe, as he says he did, at and after the hurried signing of 12th September, that both offers were to enter into the contract. In order to arrive at a different conclusion we must assume that on 12th September the tenant meant to give up, and gave up, all the stipulations he had made in his letter of the 14th August, and this without a word being said on the subject. There is nothing to shew that that is so, and it appears to me to be impossible to suppose, in the absence of any reason to the contrary, that he meant to take the farm upon these conditions; and there is no difficulty therefore in holding that he took possession upon the footing I have mentioned. It is unfortunate that the Lord did not draw the tenant's attention to the missive which was in his hands. It may reasonably be said it was for Mr Robertson to call the tenant's attention to the fact that his previous offer was to be entirely laid aside and superseded. On the other hand, the tenant cannot be acquitted of blame in having signed the second offer without inquiry as to the effect to be given to the first. It was complete in itself, and the defender should not have signed it without a clause relating into it his first offer.

It was suggested that the Court might still adjust a lease between the parties on the footing that a good deal had been already done to carry out the stipulations of the 14th August, and that there was evidence that others of them had departed from. But there is no averment and no plea to that effect. The pursuer has never taken up the position that some things had been done and others abandoned, and there is no proof upon that matter. There was evidence of the details of the transaction, including the actings of the defender and of the chamberlain, and of the servants of the Duke of Hamilton, but this was only admitted for the purpose of ascertaining how far the defender thought the stipulations he had made were material. If the evidence had shewn that he thought these stipulations immaterial, that fact would have gone far to shew that the defender did not think the offer of the 14th August important, or deem it part of the contract. Assuming that these stipulations were in his view part of the contract, nothing has subsequently occurred to deprive him of his right to have the offer made effectual; and if evidence of actings had been offered, in order to enable the Court now to settle a lease on that footing, giving up these stipulations, I would have rejected it, as dealing with a matter which had not been brought to probation.

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In this case, which I take to be a very special one, it is clear, on the whole, that possession was given and taken upon different views held by the two parties respectively, and so under a mutual misunderstanding. I think it follows that there is no valid or binding contract of lease. I therefore am of opinion that decree should be given in terms of the declaratory conclusion of the summons to that effect. With regard to the conclusion for removing, which must also receive effect, it would be desirable that it should if possible be made the subject of arrangement without further litigation. The defender having laid down the crops of the present year must be allowed to reap them. There are mutual claims to be adjusted, for rent on the one hand, and beneficial expenditure of a permanent nature on the land on the other, and all these matters would very properly form the subject of a judicial reference.

LORD DEAS.—As Lord Shand has said, this is a peculiar case, which can hardly be a precedent for any other. In ordinary circumstances, if there are documents of any kind between landlord and tenant shewing the subject let, the rent, and the endurance of the lease, and possession has followed, a lease may be framed at the sight of the Court.

But the peculiarity here is, that there are two documents, either of which, if it had existed alone and been followed by possession, would have founded a good claim for a lease. There is a further peculiarity that these two documents are inconsistent with each other. A lease might be framed on either of them, or both combined. Both of these documents were in the possession of the landlord's chamberlain when his interview with the tenant took place. One was shown before the parties, and the other was hanging on a file in the chamberlain's office, and it was in these circumstances that we allowed a proof, to endeavour to ascertain whether possession had followed on both, or on either of these documents.

To say the least of it, the landlord's chamberlain went very loosely to work. I do not question the candour of his testimony, but he has no distinct or reliable recollection of what passed at the interview between him and the tenant, and it seems to me impossible to say that there was any specific bargain between the parties to which effect can now be given. There seems to have been, on the contrary, an entire misunderstanding on the subject, for which both parties have been to blame; and, I think, the only thing we can do, with any effect, is to give effect to the declaratory conclusions of the summons, to the effect of finding that there was no concluded bargain.

LORD MURE concurred.

LORD PRESIDENT.—The great peculiarity of this case is, that there were two offers made for the farm by the intending tenant, neither of which was accepted or rejected in writing. Accordingly, the two offers, standing together, were a proposal or proposals on the part of the tenant, and nothing more. In order to convert these, or either of them, into a complete and binding contract, it was necessary that possession should follow. Nothing else could give effect to this one side of an inchoate contract. Possession did follow, but the question is, on which of the offers did it follow, for neither was accepted and neither was rejected? The landlord says that it followed on the second offer, which view superseded the first offer. The tenant says that possession followed on both offers, that neither was rejected, and that both are necessary to the completion of his right.

The object of allowing a proof was to endeavour to ascertain which of the two was true—whether the possession had reference to the one offer or to both. The result is, to shew that the landlord's representative ascribed the possession to one offer, the latter of the two, and believed that the tenant was acting on the same understanding. The tenant, on the other hand, ascribed the possession to both offers, and believed that the landlord's representative understood he was doing so. If I disbelieved the statements of either party I could then see no way to hold that there was a concluded contract, as I could then decide in either view I was to give credence. But I am in the position of believing both to be perfectly honest. I think the landlord or his representative forgot at the first offer, and I am just as ready to believe that the tenant had both in his mind, and regarded both as of importance. The legal inference from that statement of fact is irresistible. There was no *consensus in idem placitum*, and therefore no mutual contract was concluded. The contract is said to have been completed not by writing alone, but by writing on one side, followed by possession on the other. But the possession here is ambiguous as to be no substitute for writing. On that state of the facts the legal inference is that there was no contract. I therefore concur with yourships that we ought to give decree in terms of the declaratory conclusion of the summons.

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THE COURT pronounced the following interlocutors :—

5th June 1877.—“ Find, declare, and decern, in terms of the second (alternative) declaratory conclusion of the summons as amended, and appoint parties to be heard on the conclusions for removing.”

4th July 1877.—“ Decern in terms of the conclusion of removing, and, of consent of both parties, fix the terms of removing at the terms of Martinmas 1877 as to the arable land, and Whitsunday 1878 as to the houses and grass, reserving to the defender all claims which may be competent to him in the premises in connection with his possession of the farm of Flemington, and decern, and find no expenses due.”

TODD, MURRAY, & JAMIESON, W.S.—H. & A. INGLIS, W.S.—Agents.

AND N. LOCKHART, Pursuers and Appellants.—*M'Laren—Johnston.*

MOODIE AND COMPANY, Defenders and Respondents.—*Trayner—*

M'Kechzie.

ROBERT MACKENZIE, Defender.

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Lockhart v.
Moodie & Co.

Partnership—Joint Adventure—Sale.—A and B entered into a joint adventure to purchase, bleaching, and resale of 10,000 spindles of yarn. A authorised purchase the yarn at a price not exceeding 1s. 11d. per spindle. B then used the yarn at 1s. 11½d. in his own name from L, and granted bills for the without disclosing to him the existence of the joint adventure. An action brought against A for the price, after B had become bankrupt, that A was liable to L for the price to the extent to which he had authorised to pay for the yarn—(*disc.* Lord Mure, who held on the evidence that purchased the yarn from L on his own individual credit, and had then run into the joint adventure as his contribution, and that A was not liable for the price).

An action was raised in the Sheriff Court at Dundee by N. and N. 1ST DIVISION.
Part, flax-spinners, Kirkcaldy, against D. Moodie and Company, Sheriff of For-
fers, Dundee, and Robert Mackenzie, merchant, Dundee, concluding farshire.
M.

No. 130. for payment of £992, being the price of 10,240 spindles of yarn, at 1s. 11½d. per spindle. Mackenzie, who had become bankrupt, did not defend the action.
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The pursuers stated that they sold the yarns in question to Mackenzie on 8th February 1875, on account of a joint adventure previously agreed on between him and Moodie and Company, and that Mackenzie granted a promissory-note at four months for the price, but before the promissory-note was payable he became bankrupt, and the promissory-note was dishonoured.

The defenders, Moodie and Company, stated that Mr Mackenzie agreed to supply the yarns to the joint adventure at the price of 1s. 11½d. per spindle; that they, in settlement of this agreed-on price, granted two bills on 11th and 17th February 1875 to Mackenzie; and that these bills were discounted, and the proceeds received by him. Moodie and Company further stated that they had paid and retired these bills.

Moodie and Company pleaded;—There having been no bargain or transaction between the pursuers and the present defenders, or any one acting on their behalf, either as partners of the joint adventure mentioned in the foregoing defences, or otherwise in relation to the yarns specified in the account sued for, the defenders are entitled to absolver, with expenses.

A proof was led in the Sheriff Court. The facts proved fully appear from the opinions of the Judges, particularly from the opinion of Lord Deas.

The Sheriff-substitute (Cheyne) pronounced this interlocutor:—"Finds as matters of fact (1) that the yarns mentioned in the account annexed to the summons were sold by the pursuers at the rate specified in the said account to Mr Robert Mackenzie, a defender in this action, against whom decree in absence has of this date been pronounced, and that the price has not been paid; but (2) that the pursuers have failed to prove that in purchasing the said yarns the defender, Mr Robert Mackenzie, was acting for or on behalf of a joint adventure entered into between him and the other defenders, Messrs D. Moodie and Company, as alleged in the summons: Finds, therefore, as matter of law, that the defenders, Messrs D. Moodie and Company, are not liable to the pursuers for price of said yarns, but are entitled to be absolved from the conclusions of the action: absolves them therefrom accordingly: Finds them entitled to expenses" &c.

The Sheriff (Maitland Heriot) adhered.

The pursuers appealed, and argued;—The result of the evidence was to shew that the purchase was made on account of the joint adventure. It did not matter that Lockhart and Company relied solely on the credit of Mackenzie in selling. If the purchase was made for behoof of the joint adventure all the joint adventurers were liable *in solidum*.¹

Argued for the defenders, Moodie and Company;—Mackenzie made the purchase on his own account alone. Moodie and Company were not liable unless they expressly authorised the purchase. Joint adventure and partnership differed in so far that one joint adventurer must have the express authority of the other in order to bind him effectually. If Mackenzie had made the purchase on behalf of the joint adventure there w.

¹ Logy v. Durham, Dec. 30, 1697, M. 14,566; Gouthwaite v. Duckworth, June 1, 1810, 12 East, 421; White v. M'Intyre, Jan. 12, 1841, 3 D. 334. Scot. Jur. 145; Cunningham v. Kinnear, March 27, 1765, 2 Paton's A. 114; British Linen Company v. Alexander, Jan. 14, 1853, 15 D. 277, 25 S. Jur. 180; 2 Bell's Com. (5th ed.), 649, 651.

reason why he should not have disclosed it, as at the time he was in No. 130.
 and credit. The difference of price shewed that the purchase was not
 the joint adventure.

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At advising,—

LORD DEAS.—Moodie and Company on the one hand, and Mackenzie on the other, were traders in Dundee, but with the exception of two successive joint ventures in yarns they do not appear to have been connected in business. The yarns on both occasions were what are favourably known in the trade as Lockhart's spin, and were purchased by Mackenzie from Messrs Lockhart, who were spinners in Kirkcaldy. The first transaction was in October 1874, and the first account was entered in the books of Moodie and Company as relating to 3000 spindles. In that account, under the head "from whom purchased," they have "N. and N. Lockhart per Rob. Mackenzie, on joint account with him." It is clear that the next transaction, which is the one now in dispute, was understood, both by Moodie and Company and Mackenzie, to be a transaction of the same kind, and under the same conditions as the transaction of 1874. They have that under the hand of Mackenzie in the memorandum of 11th February 1875. "Dundee, 11th February 1875.—I wait on you with (1) Duplicate of order which I have sent to N. B. R. Co. for yarn from Lockhart; (2) Comment invoice on joint a/c. of yarn covered by above order; (3) Statement of account shewing due to me by joint a/c. £480, 8s. 8d.; (4) My draft on your selves for that sum, which be good enough to accept and return to me. These are all in accordance with arrangements as carried out last time, excepting Mr M. (as he explained to you) has not been able to arrange an extra $\frac{1}{2}\%$." At this time Mackenzie had made a purchase of the yarns from Lockhart, and ordered them to be sent to him by the North British Railway. But they never actually came into Mackenzie's possession. When they were at the station in Dundee he sent this notice:—"Dundee, 11th February 1875.—Please deliver to Messrs D. Moodie and Company the whole of the yarn lying with you on my account from Messrs N. and N. Lockhart, Kirkcaldy.—ROBT. MACKENZIE." The yarns were sent in separate parcels, but were all delivered by the railway company to Moodie, who managed both transactions for himself and his partner, and, as the two had only one share between them, it will simplify the statement to treat of Mackenzie and Moodie as the two joint adventurers. The deliveries were made in parcels in the same way as in 1874. "Dundee, 17th October 1875.—Lockhart has sent on our joint a/c. 3072 sps. $3\frac{1}{2}$ -lbs. tow, which I have directed the railway company to deliver to you." But on the second occasion there was no entry at all in the books of Moodie and Company of any purchase of yarn from Mackenzie. The only explanation given of this is that it was an omission.

It is true, however, that neither on the first nor on the second occasion was Mackenzie made aware that Moodie or Moodie and Company had anything to do with the purchase. Lockhart trusted entirely to the credit of Mackenzie. The facts are clear, but the question of liability is one of law. We have the law very fully laid down by Mr Bell in the second volume of his Commentaries, 5th ed. p. 649. Speaking of joint adventure as a limited partnership he says,—“If parties have formed their agreement, and arranged their joint interest, and the adventure authorise goods to be purchased, they will be liable for the price. It is a purchase by the society, whatever credit may

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have been relied on. This is the settled doctrine both of Scottish and of English law." For English law, he refers to what was thus laid down by Lord Ellenborough:—"If all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same for this purpose (responsibility) as if the names had been announced to the seller, and therefore all are liable for the value of them." There is, indeed, no doubt about the law, and there is nothing to the contrary in the opinion which has been referred to of Lord Fullerton in *White v. M'Intyre*, 3 D. 334. In that case there was a purchase of ground by one party, who afterwards sold it to another and they then entered into a joint adventure, which was not to consist in the building of houses on the ground, but in the profit or loss which might result from selling the houses after they were built. One of the parties undertook to build the houses for a fixed sum of £4000, and he entered into contracts with third parties for the erection of the houses, and, *inter alia*, into a contract for the brick work. His profit or loss on the building contract had nothing to do with the joint adventure in regard to a subsequent sale of the houses, and the case does not at all infringe on the general law of joint adventure as stated by Mr Bell.

In the present case, however, it is said that on the second occasion (and the same must be said as to the first occasion also) Mackenzie first purchased, and then sold to Moodie. No such transaction was entered in the books, and that is not the construction which the law must put on the facts. There is no doubt of the material facts as appearing upon the documents. The joint adventure was agreed upon before Mackenzie purchased from Lockhart. It had not only been talked about, but finally agreed upon. The joint adventure was to be a purchase of "Lockhart's spin," and that Mackenzie should go into the market and purchase it. I am quite aware that there is some discrepancy in the evidence as to whether the joint adventure had been finally adjusted before the purchase, but I hold the import of the proof to be that it had not only been previously agreed that there should be a joint adventure, but also what the subject of the joint adventure should consist of, and by which of the joint adventurers it should be purchased. All this I think had been fixed before the purchase was made. This was not the case of a co-adventurer contributing what he had, and the other contributor or co-adventurer contributing something else. It is a conclusive fact in the case that the yarn was to be and actually was the whole subject-matter of the joint adventure. The expense of bleaching and otherwise finishing the yarn was to be borne by the joint adventurers, and their profit was to consist in the advance of price which would be got for it when so bleached and finished. I do not think it is in Moodie's mouth to say that he dealt with the yarn as a purchase from Mackenzie. He had no right to deal with it. That would have been to give him a chance of profit upon the yarn of Lockhart, or of whoever might have been the direct seller, without incurring any responsibility to that seller for the price. There may have been here an innocent mistake on Moodie's part as to the law; very possibly there was so. But the policy of the law is opposed to the facilities for fraud which non-liability to the seller in such a case would afford.

The only puzzle in the case has arisen from the fact that Mackenzie purchased the yarns from Lockhart at one farthing per spindle more than the price at which Moodie debited himself and his partner in settling with Mackenzie.

The Sheriff-substitute says, in his very distinct note, that but for this difference of a farthing per spindle he would have decided for the pursuer. The difference

is, however, of no importance, except in its bearing upon the question whether there was a separate and independent sale by Mackenzie to Moodie. At first sight there appears to be something in it as touching that point, but the yarn was not entered in the books as a purchase from Mackenzie, and the more we look into the circumstances the less important the difference of price becomes. Moodie would not go into the transaction unless the yarn could be got at 1s. 11d. per spindle, fearing no doubt that a higher price would not leave a profit. Mackenzie was plainly very anxious, for his own purposes, that the joint adventure should go on. He was obviously in want of money, and by the transaction, as it was arranged, he got bills which he could and did discount, and by the renewal thereof he kept himself in funds, leaving his bill to Lockhart unpaid at the late when he became bankrupt. Rather than that the proposed joint adventure should be abandoned he chose to exceed his mandate by $\frac{1}{4}$ d. per spindle, which difference he thereby took upon himself.

On the whole, I am of opinion that this is a case of joint liability, although Lockhart certainly did not know of the joint adventure at the time of the purchase, or rely on the responsibility of Moodie and Company.

LORD MURE.—The difficulties of this case are upon the evidence ; but I do not think that there is much, if any, difficulty upon the law, which was in my opinion very distinctly laid down in the case of *White v. M'Intyre* to be this : that where goods are purchased by one member of a joint adventure on his individual credit and afterwards find their way into the joint adventure under a separate transaction, the fact that they have thus become *in rem versum* of the adventure will not of itself subject the other members of the adventure in liability if the goods can be shewn to be substantially the purchaser's contribution to the adventure. The opinion of Lord Fullerton in the case of *White* has been so referred to by both sides. But there were other opinions then delivered which appear to me to be of equal if not greater weight and more directly applicable to the present case. Thus, Lord President Hope, in a short but very distinct opinion, states the law as follows :—"There is no doubt that the work which forms the foundation of the action was *in rem versum* of the joint adventure. But then it was ordered by and furnished to Reid as an individual. It is not said that he pledged the credit of the company, nor even that he told at there was any joint adventure at all, or that the defender was any way concerned with the contract. If I buy goods on my own credit and afterwards use them for the purposes of a joint concern the seller's only claim is against me." Lord Gillies concurred with the Lord President, and referred to Mr Bell as an authority in support of his view (2 Com., p. 653), being a different passage from that just quoted by Lord Deas, Lord Mackenzie concurring on substantially the same grounds ; and there is one passage in Lord Fullerton's opinion which seems to me to point directly to the same result, where he says (p. 342),—"But there is another class of cases to which that principle will clearly not apply, which are the cases referred to by some of your Lordships, in which a party to a joint adventure has agreed to put into the common stock a certain quantity of goods or a certain sum of money, and in order to fulfil this agreement to his partners has a separate dealing with a third party in his own name and on his own credit, from whom he gets the goods or money. In such cases the individual partner is neither ostensibly nor really acting for the joint concern, as may be at once seen by considering that the joint adventure has no interest

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No. 130. whatever in the terms of that dealing. In such cases I think there is no principle for holding the *socii* jointly liable, as the dealing of the individual is not joint in point of law."

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The question we have to decide is whether the evidence in this case brings it within the rule thus authoritatively laid down in White's case. I am of opinion that it does, and I have not been able to come to the conclusion that the Sheriff and the Sheriff-substitute have taken a wrong view of the evidence for the transaction as disclosed in the proof appears to me to amount shortly to this: Mackenzie and Moodie having arranged to go into a joint adventure Mackenzie undertook to secure a certain quantity of yarn of "Lockhart's spin." He was to bring that in as his contribution to the joint adventure at a certain fixed price. But it was necessary before the yarn was resold that it should be bleached, and that, accordingly, Moodie, who was a bleacher, undertook to have done at his bleachworks. That, on the other hand, was his contribution to the concern, and the profits were to consist in the advance of price which was expected to be got from the yarn when sold, and were, as I understand, to be shared by the adventurers in proportion to their respective contributions. That was, I think, the subject-matter of the adventure, and it is very important to keep in view that Mackenzie might have bought Lockhart's yarn whenever he chose. If he could have got the yarn in Dundee he was not bound to go to Lockhart for it, and he might have bought it at any price, but was bound to put it into the joint adventure at 1s. 11d. per spindle. If he could not get the yarn at that price he was nevertheless bound to put it into the adventure at that price, and if he got it at a lower price the additional gain would be his. As the case turned out he in point of fact paid more than 1s. 11d. a spindle, and was a loser to that extent. Now, this price was paid by Mackenzie to Lockhart in the ordinary course of business as the full value of the goods at the time. He granted a bill at four months to Lockhart, and took payment from Moodie by a bill at three months. In that state of matters Lockhart knew nothing of Moodie, and dealt with Mackenzie on his individual credit, as he had done in the former transaction for the purchase of yarns by Mackenzie which were also the subject of a joint adventure with Moodie. As Mackenzie's bill had been paid in the former transaction Lockhart had no hesitation in again taking his bill, and the case, therefore, in this respect, comes under the ordinary rule of a sale of goods in which the seller trusts to the individual credit of the purchaser. Mackenzie here got the goods on his own credit and then sold them to the joint adventure, and that is just the case referred to by Lord President Hope. The goods no doubt never came into the actual possession of Mackenzie. But that arose from the fact that they were sent by railway to Dundee, and were then sent on by the railway company under Mackenzie's orders direct to Moodie's works, and does not, in my opinion, alter the character of the transaction. Neither does the fact that the joint adventure appears to have been arranged before the yarn was actually purchased, as in several of the cases cited the joint adventure had been arranged before the purchase was made by the joint adventurer on his own credit, notwithstanding which the joint adventurers as well as the one who made the purchase were held free from liability.

LORD SHAND.—This is a question of some delicacy. I have considered the case very carefully, and I think that the legal considerations dwelt upon by Lord Deas are of great importance. I have come to the conclusion that:

proved there was a joint adventure, and that Messrs Lockhart are entitled to payment from Moodie and Company of the price of the yarns. The yarns were sold to Mackenzie on his own individual credit without any reliance by the sellers on the credit of Moodie and Company. If that fact were sufficient to free the defenders from liability there would be an end of the case. But it is clear that, although a merchant may be dealing with another, trusting to the credit of the ostensible buyer alone, he is not limited to that credit if the buyer is not dealing for himself only but for others who are really concerned in the transaction. The question is whether Mackenzie was acting for himself alone, with the view of afterwards selling the yarn as his own property to the joint adventure, or was really acting for the joint concern in making the purchase. Upon the evidence I have come to the conclusion that in making the purchase he acted for the joint adventure. I think all the parties have been honest, and the difference in their evidence has arisen from their different views of the law which should apply to the transaction as appearing on the documents rather than to any real conflict about the facts. The transaction took such a shape as led the defender to think that it was out of the category of joint adventure.

The case is not one in which each of the members of the joint adventure contributed something separately to the joint adventure as his share of it. In such a case the probability is that each adventurer has bought for himself, and on his own credit. If so, having put in his purchase as his contribution, it cannot be properly represented that in making the purchase he acted for the joint adventure. Here both contributed and united to contribute the whole object of the joint adventure. Even in Moodie's view that is so, because he says that they purchased the yarn from Mackenzie and then put it into the joint adventure. The yarn was obviously put in by the parties, Moodie and Company, and Mackenzie, on joint account, and the means of meeting the price was raised by bills to which they were both parties, though Mackenzie, unfortunately for Moodie and Company, failed to pay for the goods.

A good deal of light is thrown on the February transaction by what happened in October. The transaction in February is admitted to have been on the same footing as that in October. The entry in Moodie and Company's books referred to by Lord Deas appears to me to be of great importance, for it records a transaction of joint adventure in express terms. That entry, I see, was brought under the notice of Mr Moodie, and he stated,—“As I read the first entry it records a sale from Mr Mackenzie to joint account,—at least I intended it to bear that meaning.” When it is shewn to Mackenzie he takes a different view of it, for he says,—“The entry does not correctly record the transaction. According to my understanding the yarns were purchased from me for the joint account, and the said entry represents them as purchased by me for the joint account. If Moodie's books, in my judgment, as regards that entry, are incorrect.” There is another document, however, which shews that Mackenzie must have regarded this as a purchase on account of the joint adventure, viz., a memorandum, dated Dundee, 17th October 1874, from Mackenzie to Moodie, in which he says,—“Lockhart has sent on our joint a/c. 3072 sps. 3½-lbs. tow, which I have instructed the railway company to deliver to you.” Thus we have Moodie's books on the one hand recording the transaction as a joint adventure, and the memorandum by Mackenzie on the other stating the transaction in the same way, and both of these pieces of evidence were written at the time when the October purchase was made.

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As to the February transaction itself, I think the evidence shews that before Mackenzie made the purchase it was arranged between him and Moodie and Company that he should buy the quantity of the particular article, "Lockhart's spin," which he did buy, and that the terms were agreed on at which he was to make the purchase. The documents do not so expressly bear that that was a joint transaction as those relating to the October purchase do. But in place of invoices, as on a resale by Mackenzie, the goods were sent on with invoices of yarn "consigned," and the defenders' acceptances were forwarded to Mackenzie with notes stating these as "advances" on joint account.

The circumstance that Mackenzie agreed to pay an extra farthing per spindle seems to have led the Sheriffs to a different conclusion from that to which I have come, but this circumstance cannot, I think, affect the transaction so as to alter its character as one of joint adventure. The truth appears to be that Mackenzie saw that he could not get the yarn for less, and thought it worth his while to go on and pay the extra farthing, somewhere about £11 in all, out of his own pocket, which he could all the more readily do as he had arranged for a period of credit in payment of the price. The result is that Lockhart is, I think, entitled to decree, but not for a larger sum than Mackenzie was authorised to pay as agent for the joint adventure.

LORD PRESIDENT.—There is no doubt as to the law, but the question here is attended with difficulty. I have, after serious consideration, come to be of the same opinion as the majority of your Lordships. The question is, whether there were two sales here, or only one. The idea of Mackenzie having put in the yarn as his contribution is out of the question. If Mackenzie, in dealing with Lockhart, was acting for the joint adventure, the pursuer is entitled to prevail. The result of the evidence is, that the arrangement as to joint adventure was made between Moodie and Mackenzie before Mackenzie approached Lockhart and that Mackenzie received instructions to buy yarns at the limited price of 1s. 11d. I think the fair result of the evidence is that Mackenzie was to act as agent for the joint adventure in making the purchase, and I do not think that the circumstance that he agreed to give a farthing more than he was authorised to give deprives him of the character of agent. If an agent exceeds his instructions that does not alter the character of the transaction. He may not bind his principal to a greater amount than he was authorised to bind him, but he will not make himself anything but an agent. The alteration of price, therefore, is immaterial, although the Sheriffs make it the sole ground of their judgment.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff-substitute and the Sheriff, dated respectively the 30th May and the 7th August 1876: Find that the yarns, the price of which is sued for in this action, were purchased by the defender Robert Mackenzie (against whom decree has been pronounced in absence) from the pursuers (appellants) at the rate specified in the account libelled, viz. 1s. 11½d. per spindle: Find that the said purchase was made by the said Robert Mackenzie for behoof of a joint adventure previously arranged between the defender Robert Mackenzie and the other defenders D. Moodie and Company, that the said yarns formed the sole subject of the joint adventure, and that they were subsequently used by the defenders for the purpose of the joint adventure: Find that the said Robert Mackenzie was authorised by his co-adventurers, D. Moodie

and Company, to pay 1s. 11d. per spindle for the said yarns, but was not authorised to pay more, and the said Robert Mackenzie contracted to pay the pursuers at the rate of 1s. 11½d. per spindle without the knowledge or consent of the defenders D. Moodie and Company: But find that the said Robert Mackenzie did not disclose to the pursuers either that he was purchasing for behoof of a joint adventure or that he was restrained by the instructions of his co-adventurers from paying more than 1s. 11d. per spindle for the said yarns: Find that in these circumstances the defenders are in law liable to the pursuers in the price of the said yarns; but find, of consent of the pursuers, that the same is limited to the rate of 1s. 11d. per spindle: Therefore decern against the defenders D. Moodie and Company for payment to the pursuers of the sum of £981, 6s. 8d. sterling, being the price of the yarns in question at the said rate, together with interest on the said sum at the rate of five per centum per annum from the date of citation till payment: Find the pursuers entitled to expenses in both the inferior Court and this Court; allow accounts thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

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MACARA & CLARK, W.S.—WILLIAM ARCHIBALD, S.S.C.—Agents.

JOHN SPIER AND OTHERS (Trustees under Mr and Mrs Gibson's Mutual Trust-Disposition and Settlement), AND OTHERS.—*Lorimer.* No. 131.
JAMES BARCLAY GIBSON AND OTHERS.—*M'Laren—Balfour.*

June 8, 1877.
Gibson's
Trustees v.
Gibson, &c.

Husband and Wife—Mutual Settlement—Revocation by Husband.—In 1876 the late Bowman Gibson, proprietor of the farm of Snypes, and his wife, who had married without an antenuptial contract, and who had children, executed a mutual trust-disposition and settlement of their estates, by which, in the event of Mrs Gibson's survivance, she was to receive the residue of the moveable estate as her absolute property, and to have the liferent use of the heritable property. The fee of the heritable estate was destined to J. B. Gibson, or the heirs of his body, and to B. G. Milop, and his heirs, equally. The spouses reserved power to alter or revoke during their joint lives with the knowledge and approbation of the other.

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In 1876 Mr Gibson died, survived by his wife, having in 1873 executed a settlement, to which his wife was not a party, by which he revoked all former settlements executed either by himself or mutually with his wife. The provisions to Mrs Gibson in the event of her survivance were not very different from those contained in the mutual settlement, the chief difference being that her liferent of the farm of Snypes was enfeoffed upon by an option given to a legatee to become tenant thereof at a rent somewhat below the true value of the farm. The trustees under the later deed were not identical with the trustees named by the mutual settlement, and the destination of the heritable estate, after the widow's death, was to J. B. Gibson, and the heirs of his body, whom failing, to James Gibson.

Mr Gibson's estate chiefly consisted of the small farm of Snypes, entered in the valuation-roll as of the value of £45 a-year, and which he occupied himself. At the date of the mutual settlement his moveable estate was not more than sufficient to pay his debts; but at the date of his death his free moveable estate amounted to about £300. Mrs Gibson's estate was inconsiderable.

In a special case presented by all parties interested in Mr Gibson's

No. 131. succession, the Court *held* (1) that it was not a sufficient ground for holding the mutual settlement to be revocable by the husband as a donation *inter virum et uxorem* that the smaller provision in favour of the wife contained in the subsequent unilateral settlement by the husband might have been regarded as a reasonable provision to her; that the provisions in favour of the widow in the mutual settlement were not in the circumstances excessive; that they were consequently not revocable, and must receive full effect; (2) in accordance with *Mitchell v. Mitchell's Trustees*, *supra*, p. 800, that there was no onerosity in the mutual settlement except what arose from the widow's claim to a reasonable provision, and therefore that while the revocation could not affect these provisions the later deed of Mr Gibson must otherwise receive effect, and, in particular, that it effectually regulated the ulterior destination of the heritable property, and that the trust-estate fell to be administered by the trustees named in that deed.

D. J. MACBRAIR, S.S.C.—A. KIRK MACKIE, S.S.C.—Agents.

No. 132. SIR FREDERICK J. W. JOHNSTON of Westerhall, Bart., Complainer.—
Lord-Adv. Watson—Mackintosh.
June 8, 1877. JOHN THOMSON, Respondent.—*Trayner—Hunter.*
Gibson's Trustees v. Gibson, &c.

Landlord and Tenant—Removing—Tacit relocation—Suspension and Interdict.—*Held* that an application for interdict by a landlord to prevent a tenant in possession of a farm, who alleged tacit relocation, from continuing to cultivate it, and from interfering with the landlord's cultivation, was not a competent process for putting an end to a tenant's possession.

Observed, that suspension and interdict was only appropriate when the tenant was not in possession.

Bill-Chamber. JOHN THOMSON was tenant of the farm of Solwaybank belonging to
1st Division. Sir Frederick Johnston, on a lease for fifteen years. This lease expired
Ld. Curriehill. as to the arable lands at Candlemas, the meadow land on 1st April, and
B. the houses and grass at Whitsunday 1877. The tenant was taken bound to remove at these respective periods, "and that without any warning or process of removing, otherwise the said John Thomson binds and obliges himself and his foresaids to pay £160 sterling per annum and additional rent until removed, . . . without prejudice to the landlord's right to insist in a process of removing." Mr Sherry, factor for Sir Frederick, and Mr Thomson, had a correspondence about a renewal of the lease, which lasted from November 1876 to 20th February 1877. The farm was repeatedly advertised to let, and it was stated that the present tenant would not be an offerer. No arrangement having been made as to the renewal the farm was let to another tenant, and Mr Thomson refused to allow the new tenant to enter upon possession, on the ground that he had received no statutory warning to leave the farm.

In these circumstances Sir Frederick brought the present suspension and interdict, praying the Court "to interdict, prohibit, and discharge the said John Thomson from ploughing, sowing, manuring, labouring, or in any way interfering with the said farm of Solwaybank, or any of the fields thereof; and further, to interdict, prohibit, and discharge the said John Thomson from preventing, or in any way interfering with the complainant or any one authorised by him, entering upon and ploughing, sowing, manuring, labouring, and cultivating the said farm of Solwaybank, or any of the arable fields thereof, and also having such use of the farm-steadings as may be necessary for the stabling and lodging of the animals employed by them in such cultivation."

The respondent pleaded ;—(1) The statement of the complainer is not relevant or sufficient to warrant the prayer of the note, and the same should be refused. (2) The respondent having had no legal notice or warning to remove from the farm in question, the note should be refused. (3) The farm in question having been let to the respondent by tacit relocation for a year beyond the term to which his written lease extended, the note should be refused.

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The Lord Ordinary pronounced this interlocutor :—“ Refuses the note, and decerns : Finds the complainer liable in expenses to the respondent : Appoints an account thereof to be lodged, and remits,” &c.*

The complainer reclaimed.

Argued for the reclamer ;—(1) Notice to remove was not necessary.¹ The correspondence and the advertisements of the farm gave the respondent sufficient notice that he was bound to remove.* (2) Suspension and interdict was the only available remedy to the landlord, because the season for ploughing and sowing would be past before an action of removing could be carried through. Suspension and interdict was a competent process to remove a person in possession whose right to possess had ceased.²

The respondent's counsel was not called on.

LORD PRESIDENT.—This tenant was bound to remove at the termination of his lease at three different terms in 1877, viz.—As to the arable land, Candlemas ; as to the meadow ground, 1st April following ; and as to the houses and grass,

* “ NOTE.—Under the Sheriff Court Act, 1853, which comes in place of the regulations of the Act of Sederunt, 1756, formal notice of removal in one or other of the forms prescribed by the statute ought to have been given by the complainer at least forty days before Candlemas, in order to entitle him to remove the respondent from the farm ; but no such notice was given, and the tenant was therefore entitled to regard the farm as relet to him for one year by tacit relocation. In November 1876 and January 1877 some negotiations took place in writing between the complainer and respondent as to a renewal of the lease for a term of years, but no arrangement was effected. In the meantime the farm was advertised repeatedly to be let, with entry to the arable lands as at Candlemas 1877, and it has been let to another tenant conditionally on the respondent being found to have no right to continue in possession. The complainer maintains that by these proceedings on the part of the tenant he has waived his right to retain the farm by tacit relocation, or to object to remove on the ground of want of formal statutory notice. I do not think the contention is well founded, because, although the complainer may have had ground for believing that the respondent considered his tenancy at an end at Candlemas 1877, he was nevertheless bound, if he desired to ensure his tenant's removal, to give him the statutory notice. There must, in my opinion, be either a letter from the landlord delivered or posted to the tenant forty days before the day requiring him to remove, proved by a certificate of a messenger or Sheriff-officer, or an acknowledgment by the tenant, indorsed on the lease. Nothing equivalent to either of these is to be found in this case. The case seems to me to fall under the rule laid down by the Court in the case of the Magistrates of Perth, 20th February 1798, Hume, p. 562.

“ The note of suspension and interdict must therefore be refused, with expenses.”

¹ 2 Hunter's Landlord and Tenant, N. F. 31 ; Heron v. Rollo, June 28, 1825, S. 118 ; Macnair v. Blantyre's Tutors, July 9, 1833, 11 S. 935, 5 Scot. Jur. 83.

² Bain v. Ferguson, Feb. 8, 1840, 2 D. 546, 12 Scot. Jur. 331.

³ Borrows v. Colquhoun, May 25, 1852, 14 D. 791, 24 Scot. Jur. 443, 1 F. & C., 691, August 11, 1854, 26 Scot. Jur. 641 ; Kelso School Board v. Hunter, Dec. 18, 1874, ante, vol. ii. p. 228.

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Thomson.

at Whitsunday following. It is perhaps not very common that there should be three different issues of a lease, but there is nothing more common than that there should be two, and in giving warning it is quite established that the warning must be given forty days before the first term of removing. In this case there was no warning given, and nothing done of a formal kind to terminate the tenant's possession until after Candlemas. It is maintained by the landlord that certain communications passed between his factor and the tenant which were equivalent to an obligation on the tenant to remove. I assume that that is so, in dealing with a question of competency. Now, what was the landlord's proper remedy? If that obligation was of a definite character it would have founded an action for ejection, but if there was need of some inquiry into the constitution of the obligation then a more formal process would perhaps be necessary; but one or the other was necessary to terminate the tenant's possession. The tenant's possession is not terminated by the expiry of the term of his lease—that is only the commencement of a new term of possession by tacit relocation, just as valid and effectual as his possession under the original lease. Tacit relocation had begun here before any steps were taken by the landlord to terminate the possession of the tenant. The question that is necessarily raised in these circumstances is—Is the tenant in possession by tacit relocation, or is he there in spite of an agreement made by himself forty days before Candlemas to remove at the term? That is a question to be tried in an action of removing. I never saw it tried in any other way, and it is highly undesirable that it should be tried in any other way. Above all, I am clear that the question cannot be tried by a process of suspension and interdict. That is a process only appropriate if the tenant is not in possession. Now, he is *de facto* in possession, and *de jure* says he has a right to be in possession. That is a question that can only be tried by a removing or by a process of ejection.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT pronounced this interlocutor:—"In respect the application for interdict is incompetent, adhere to the said interlocutor, and refuse the reclaiming note: Find the reclaimer liable in additional expenses; allow an account," &c.

WELSH, FORBES, & MACPHERSON, W.S.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—
Agents.

No. 133.

June 9, 1877.
Lindsay v.
Walker's
Trustees.

JAMES COCHRANE LINDSAY, Pursuer.—*Asher—Strachan.*
THOMAS DUNCAN AND OTHERS (Walker's Trustees), Defenders.—*Balfour—Mackintosh.*
Et c contra.

Process—Review—Joint Minute—Reference to Lord Ordinary.—Terms of joint minute by the parties in a cause which held (diss. Lord Ormisdale) not to exclude review of the Lord Ordinary's judgment.

2d DIVISION.
Lord Young.
R.

In counter actions arising out of disputes in connection with the payment of the price of certain heritable subjects, James Cochrane Lindsay the purchaser, and Thomas Duncan and others, trustees of Alexander Walker, the sellers, came to an understanding as to the settlement of the price, and there only remained undecided certain points as to the amount of interest to be paid, and the manner in which the expenses of process were to be borne.

On 14th March 1877 Mr Morison, S.S.C., the agent for Walker's No. 133. Trustees, wrote to Mr Gordon, S.S.C., Lindsay's agent, as follows :—" With reference to what took place before Lord Young, I am now in a position June 9, 1877. ^{Lindsay v. Walker's Trustees.} to settle the whole matter, leaving the Lord Ordinary to decide the question of expenses. . . . I accordingly enclose the draft of a minute which you can be good enough to revise and return to me to-night or to-morrow, so that we may finally get the case taken out of Court on Saturday."

On the same day Mr Gordon wrote to Mr Morison,—“ If we cannot agree as to the question of interest the principal sum may be settled, leaving this question as well as the expenses to be settled by Lord Young.”

A joint minute in the following terms was put into process :—" Strachan the said James Cochrane Lindsay, and Mackintosh for the said Alexander Walker's trustees, stated, that the parties had arranged as to the element of the price of the subjects in question, and the delivery of deeds, and that the only questions remaining were as to the rate of interest payable by the said James Cochrane Lindsay, and the expenses process ; and the parties agreed to these questions being disposed of by

Lord Ordinary on the correspondence in process and the following terms, the said James Cochrane Lindsay getting the whole rents from Sunday 1875." . . .

The Lord Ordinary having, on 9th April 1877, disposed of these referred questions in favour of Walker's trustees, Lindsay reclaimed against the interlocutor to the Inner-House.

At the hearing Walker's trustees objected to the competency of the reclaiming note, on the ground that the joint minute had the effect of making the Lord Ordinary an arbiter, it having been the intention of the parties, as appeared from the correspondence, to make his Lordship's judgment final.

It was argued for Lindsay ;—The right of a litigant to obtain review of a Lord Ordinary's judgment was not to be taken away without something more pressing than appeared in the minute.¹ The true effect of the minute was merely a renunciation of probation.

LORD JUSTICE-CLERK.—It is a great pity that when the parties had the question of reference or no reference before them they did not put their intention clearly into words.

It may have come to be of opinion that the terms of this minute did not limit the Lord Ordinary's jurisdiction, so as to make him an arbiter merely. The minute may bear the construction that under it the parties only intended to renounce objection and to leave the process to run its ordinary course as to the question of expenses. As that is so I think the reclaiming note is competent.

It would be inadvisable to exclude review in any case, unless there were very clear expressions by the parties to that effect, and nothing could be easier than to have made the intention unquestionable had that been their desire.

LORD ORMDALE.—I approve entirely of the views expressed by your Lordship in regard to the general principle that the jurisdiction of a Court of Session cannot be held to be excluded except on very clear grounds.

It is there can be no doubt that the parties to an action may, if they please, refer the questions in dispute, or some of them, to a Lord Ordinary, in

¹ Robertson, Petitioner, July 18, 1876, *ante*, vol. iii. 1104.

No. 133.

June 9, 1877.
Lindsay v.
Walker's
Trustees.

such a way as to exclude review of his judgment. Here the substantial conclusions of the action had been arranged; and nothing remained to be settled except the questions of expenses and interest; and the parties might quite reasonably, I think, have agreed to refer these points to the Lord Ordinary in such a way as to make his determination of them final.

It is true that if we had nothing but the minute from which to discover the intention of the parties as to this it might be a strong thing to say that the reclaiming note is incompetent. It is not, however, usual in minutes renouncing probation to make mention of the Lord Ordinary, and to agree to his disposing of questions before him. Although under the terms of the minute there may be some ambiguity as to the object of the parties I think that the two letters of 14th March, founded on for the respondents, completely clear the matter up. I think in a matter of procedure such as we have here we may look at these letters along with the minute. Now, the respondents' agent in his letter says his object was to take the action finally out of Court, and the agent for the reclaimers, in answer, says nothing to the contrary, but apparently acquiesces in the object as stated by the respondents' agent. I have therefore come to the conclusion that the parties intended that the questions as to interest and expenses should be disposed of by Lord Young without his judgment being liable to review, and in that way finally taking the action out of Court. And if this so the reclaiming note is incompetent.

LORD GIFFORD.—I agree with your Lordship in the chair.

It is always a difficult matter to take a case depending in the ordinary manner before a Lord Ordinary out of the ordinary course of procedure, and it is always difficult to presume that the parties intended to denude the Judge of his public office as Judge, and to clothe him with the different and separate character of an arbitrator chosen by the private parties. This is not to be presumed without very clear evidence and very clear words. The parties here arranged a part of the merits of the case, and then framed a minute for the purpose of facilitating settlement of the other points.

No doubt it is quite competent for parties to agree that a Lord Ordinary's judgment shall be final, and to renounce what is the right of every litigant, the right of submitting all judgments of the Lord Ordinary to review; but here, and in order to effect this, the renunciation of review must be very clearly expressed. The use of the word "finally," as applied, even in a statute, to a Sheriff's judgment, has been held not to bar an appeal to this Court. Now, I do not think there is enough in this joint minute to exclude review of the Lord Ordinary's judgment. I say joint minute, because I am not disposed to construe the minute as signed by counsel, and which alone forms the agreement of the parties, prior correspondence or drafts, or by verbal communings between the agent and counsel. I only look to the minute itself; and I think it would be unsafe to hold that such a minute excluded review, and made the Judge an arbitrator. It is your Lordship's view is the sound one.

THE objection was repelled, and the case heard on the merits.

ALEXANDER GORDON, S.S.C.—ALEXANDER MORISON, S.S.C.—Agents.

ANDREW STEUART, Petitioner and Appellant.—*R. V. Campbell.*JAMES STEPHEN, Respondent.—*M'Kechnie.*

No. 134.

June 12, 1877.

Interdict—Trespass.—A landlord applied for interdict against a person entering upon a piece of ground belonging to him, but let for agricultural purposes, and averred that the trespass was committed in order to obtain a short cut to an adjoining railway station, and that he feared a right of way might be acquired. The respondent did not assert that there was a right of way, but averred that he had leave from the agricultural tenant, who was not a party to the petition. Application refused.

ON 6th October 1875 Mr Steuart of Auchlunkart presented a petition to the Sheriff Court of Banffshire against James Stephen, shoemaker, Deanshaugh. The petition prayed for interdict against Stephen entering upon a piece of ground, the property of Mr Steuart, but let to and in the occupancy of a Mr Hay as agricultural tenant. It was averred that Stephen and others, residing at Deanshaugh, were in the habit of crossing a piece of ground, which lay between their houses and the Mulben station on the Highland Railway, and that by doing so they got a short cut to the station. The particular act of trespass complained of was on 14th September, when the petitioner averred that Stephen had crossed a piece of land on his way from the station to his house. The petitioner led, that if Stephen and the other residents at Deanshaugh were allowed to go on using the piece of ground as a road to or from the station and other places there was "danger of a right of way through the said piece of land being established, the possibility of which the petitioner has a right to prevent by interdict."

Stephen lodged answers to the petition, in which he admitted that by crossing the piece of land in going from Deanshaugh to the station a distance of about 100 yards would be saved. He explained that on the particular occasion complained of, while returning from the station, he had some cattle, of which he had charge, straying from their grazing ground and among growing corn belonging to Hay, the tenant of the piece of land, and that in order to drive them out of the corn as soon as possible he had crossed the piece of land and committed the act complained of. He added,—“Mr Hay, the tenant of the ground, who had the exclusive right thereto, did not complain of the respondent passing through part of his grass field, and the respondent had general authority from Mr Hay to protect his corn fields from the inroads of cattle.” He also “explained that it was only when it was in grass that the respondent ever walked over the ground in question, and that it was only in grass for two or three years continuously, and is in corn and green crops at other times, according to ordinary rotation.”

He led for the petitioner;—(1) Without the consent of the petitioner, the respondent, who has no right to the piece of land mentioned in the petition, is not entitled to enter upon or walk through the same. (2) The petitioner having given no consent to the respondent to enter upon the piece of land in question, and the respondent having been upon it on 14th September 1875, and walked through the same, without the consent of the petitioner, committed a trespass, and ought to be interdicted from repeating the same. (6) The petitioner, as proprietor of the piece of land in question, is quite entitled to raise and carry on the present action without the consent of the agricultural tenant of said land.

He led for the respondent;—(1) The petitioner not being in the occupancy of the land on which he alleges the respondent trespassed, and not walking on which he craves the respondent to be interdicted, and the land being in the exclusive occupancy of the tenant thereof, who is

2D DIVISION.
Sheriff of
Banffshire.
R.

No. 134. no party to this process, the petitioner has no title nor interest to raise or insist in it. (2) The respondent never having gone upon the piece of land in question save when it was in grass, and that very rarely, and never without the consent nor in opposition to the wishes of the tenant and occupant of the land, the application for interdict is groundless. (3) On the particular occasion condescended on (15th September 1875) the respondent having gone upon the land specified for a necessary and lawful purpose, with a view to save and protect the tenant's crop, was perfectly justified in doing so, and the complaint on that score affords no ground for the present application.

June 12, 1877.
Steuart v.
Stephen.

On 4th December 1876 the Sheriff-substitute (Gordon) refused the interdict as craved, and dismissed the petition, with expenses.

The petitioner appealed to the Court of Session, and argued;—Land in Scotland were only let to tenants for agricultural purposes, and not for other uses, so the acquiescence of the agricultural tenant in the respondent's presence on the ground could not affect the landlord's right to prevent his lands being used as a short cut.¹ Moreover a right of way might be acquired in this manner, which would seriously diminish the value of the land.

Counsel for the respondent was not called upon.

LORD ORMIDALE.—In this case the allegation of the petitioner, and his ground of action, is trespass, and that necessarily implies a wrong. But all the petitioner says is that the respondent has passed over a field not in his the petitioner's possession at all, but in that of his tenant's, and he does not pretend that the respondent has done him, or any one else, the slightest injury. Nor does the petitioner, as landlord, aver that the tenant who has the right of possession so far as the field said to be trespassed on is concerned, has any objection, or could have had any, to the respondent passing over it, as it is said he did. In no correct sense, therefore, can I hold, on the shewing of the petitioner himself, that the respondent committed any trespass. It would certainly be extraordinary if the tenant of a piece of ground, such as that in question, could not allow his neighbour, like the respondent, to cross his field without subjecting him to a charge of trespass by the landlord.

I think it unnecessary to enter into a consideration of the rights of the landlord and tenant as to permitting or preventing third parties from entering upon ground which has been let to another, or to determine anything on the subject. What I am satisfied of here is that no case of trespass has been disclosed, either in averment or otherwise, of which the petitioner could complain, and therefore that the Sheriff-substitute did right in refusing the interdict asked against the respondent. Anything of the nature of wrong or injury which the petitioner seems to apprehend is that the respondent might, if he were allowed to cross the field in question, establish a right of way on his the petitioner's property. But the respondent does not now say, or, so far as I can see, has ever said that his object was to establish a right of way, or any other right. He says, on the contrary, that he has had the permission of the tenant of the field for all he did. The fear of the petitioner appears to me, therefore, to be quite fanciful, or, at any rate, too remote, indirect, and contingent, to be the ground of an action for trespass.

In these circumstances I am very clear that the appeal should be dismissed.

¹ Breadalbane v. Campbells, Feb. 12, 1851, 13 D. 647, 23 Scot. Jur. 286; Copland v. Maxwell, Feb. 28, 1871, 9 Macph. (H. L.) 1, 43 Scot. Jur. 246, 2 R. 2 Sc. and Div. App. 103; Taylor on Landlord and Tenant, 611, secs. 775-7.

MR. GIFFORD.—I am of the same opinion. It must be borne in mind that No. 134.
 is a possessory action to regulate the state of possession of this field, lying
 between the respondent's house and the bridge leading to the railway station. June 12, 1877.
 The petition asks that the respondent shall be absolutely and unconditionally *Steuart v.*
 interdicted from entering upon or crossing the field in question in any circum- *Stephen.*
 stances. In such an action it is always in the Sheriff's discretion either to grant
 or withhold interdict, and he is not bound to grant interdict unless he thinks
 the case is suited for it, and that some serious or material wrong is
 threatened to be committed.

Now, is there a wrong threatened here? The respondent does not claim as a
 proprietor a right to go across this field. He only does so when it is in grass, and
 the tenant does not object. This is no claim to a right of way; if it were
 the case would be different. But anything of that sort is expressly dis-
 avowed. Indeed the refusal of this petition for interdict on the ground that the
 respondent does not claim any right of way, or any right at all, but only to walk
 over the tenant's leave, would be a complete answer to an action of right of
 way—as good a one as if the prayer of the petition had been granted. The
 substitute is clearly right. He does not dismiss the petition, which would
 be the case if he held that the petitioner had no title. He refuses the interdict
 as being too severe a proceeding, and a remedy quite inapplicable to such a case.
 If the respondent were to be interdicted the interdict would require to be
 qualified in many ways; for example, the respondent's right to cross the field
 over the leave of the tenant in possession would require to be reserved, and so
 on. But a qualified interdict of this kind is out of the question.

MR. JUSTICE-CLERK.—I entirely concur. The question is, whether we are
 to interdict a man from taking a short cut which does no harm to any one.
 There seems no real ground for apprehension that a right of way will be consti-
 tuted. Nothing which the defender has done, or is likely to do, has any ten-
 der in that direction. He is not asserting a right of way, but a very reason-
 able exercise of leave given by the tenant.

MR. GIFFORD by no means prepared to say that if a railway station was erected in a
 district, and a nearer access could be obtained by a short cut through
 the land, and the landlord was prepared to allege that constant use was made of
 the land, he might not interfere by way of interdict. But this is not a case
 of that description, and I think the Sheriff has come to a right decision.

THE appeal was dismissed.

MAITLAND & LYON, W.S.—THOMAS CARMICHAEL, S.S.C.—Agents.

ADAM MORTON GLASS, Pursuer.—*Balfour—Rankine.*
 JOHN HAIG AND COMPANY, Defenders.—*McKechnie.*

No. 135.

Partnership, dissolution of by bankruptcy—Interest in Sinking of Pit.
 John Haig and Adam Morton Glass having obtained a lease of the
 coal and fire-clay on the estates of Nellfield, Hairstones, and Braid-
 entered, on 22d April 1872, into a contract of copartnership, which
 contained, *inter alia*, the following condition:—"In the event of the
 bankruptcy of either party the partnership shall be dissolved, and the
 share shall be the property of the solvent partner; the balance belonging to
 the bankrupt shall be ascertained, and the solvent partner shall give bills

June 12, 1877.
*Glass v. Haig
 and Company.*

2D DIVISION.
 Lord Ruth-
 ford Clark.
 I.

No. 135. for the amount. . . . Neither the bankrupt nor his creditors shall have any claim to the prospective value of the lease."

June 12, 1877.

Glass v. Haig
and Company.

The working of the minerals was commenced and carried on by firm till 29th May 1873, when the estates of Mr Glass were sequestrated. Between 27th April 1872 and 1st January 1873 Mr Glass contributed upwards of £800 to the firm. A shaft was sunk by the date of Mr Glass's sequestration, and a quantity of limestone had been excavated and sold. Mr Glass was reinvested in his estates in December 1874, and raised an action of count and reckoning against Mr Haig, in which he claimed to be credited with a share of the value of the pit-sinkings. Mr Haig resisted this claim, on the ground that such a claim was barred by the clause in the deed of copartnership above quoted as being a claim for prospective value of the lease. *Held* that the only value of the pit-sinkings was in connection with the prospective value of the lease, and claim rejected.

MACLACHLAN & RODGER, W.S.—WELSH, FORBES, & MACPHERSON, W.S.—Agents.

No. 136.

WILLIAM SMITH AND ANOTHER (Weir's Trustees), Petitioners.—

Moody Stuart.

June 18, 1877.

Weir's
Trustees.

Trust—Trusts Scotland Act, 1867 (30 and 31 Vict. c. 97), sec. 3 and 4. Authority to Sell Heritage and to make Advances from Capital.—Circumstances in which trustees under a trust-settlement which gave no power to sell were authorised, under section 3 of the Trusts Act, to sell heritable property, and under section 7 of the same Act to advance the price obtained for the maintenance and education of beneficiaries, who were minors.

1ST DIVISION,
with three
consulted
Judges.
Lord Adam.
B.

THE late Samuel Weir died on 16th October 1876. He was survived by one daughter, aged twenty-six, and three sons, the eldest of whom was seventeen years old, and was serving an apprenticeship, and the other two, aged thirteen and eight, were at school.

The whole estate left by Mr Weir consisted of a dwelling-house at South Clerk Street, Edinburgh, valued at £700, and in the valuation stated at the yearly value of £45—(Mr Weir had resided in this house and after his death his children continued to occupy it); two-thirds shares of a shop 14 West Adam Street, Edinburgh, rented at £35 per annum, and valued at £500—(the remaining one-third belonged to the eldest son Duncan, in right of his deceased mother); household furniture valued at £158, 10s. 6d., and money, £108, 17s. 8d. The money was nearly exhausted in paying the debts of Mr Weir, and in the maintenance of the family after his death.

Mr Weir left a trust-disposition and settlement the purposes of which were—"First, for payment of my lawful debts and funeral expenses. Second, I direct my trustees to hold the residue of my estate, heritable and moveable, until my youngest surviving child shall attain the age of twenty-one years, and during that time to give my said daughter, Isabella Ballantyne Weir, the use of my dwelling-house No. 37 South Clerk Street, Edinburgh, and the furniture therein, on the condition that it is to be the home of my children until my youngest surviving child shall attain the age of twenty-one years of age, and also during that period to pay the expenses out of the residue of my estate and effects among my children equally. Third, on my youngest surviving child attaining said age of twenty-one years I direct my trustees to convey to my said daughter, Isabella Ballantyne Weir, my said dwelling-house No. 37 South Clerk Street, Edinburgh. Fourth, in respect that my eldest son, Duncan Weir, is entitled, in right of his mother, to one-third share of the shop No. 14 West Adam Street, Edinburgh, I direct my trustees to convey one of the two-thirds of said shop belonging to me to

second son, Samuel Weir, and the remaining one-third to my third son, Alexander Weir. Fifth, after fulfilment of the above purposes of trust I direct my trustees to divide equally among all my children then surviving the whole residue of my said means and estate."

No. 136.
June 18, 1877.
Weir's
Trustees.

The trustees under the trust-disposition and settlement, who were Mr John Weir, writer in Edinburgh, and the eldest daughter of the truster, Miss Isabella Weir, brought a petition under sections 3 and 7 of the Trusts (Scotland) Act, 1867 (which are quoted in the opinion of the Lord President), for authority "to sell the said two-third shares which belonged to the truster of said shop No. 14 West Adam Street, and apply the proceeds of the sale in the maintenance and education of the said Samuel and Alexander Weir; and also, with consent of the said Isabella Ballantyne Weir, to borrow money on the security of the said house No. 37 South Clerk Street to the full amount to which a loan can be obtained thereon, or such other amount as to your Lordships shall seem right, or to sell the same, or to either or both, as they, with consent foresaid, shall deem expedient, to pay the sum so borrowed, or the proceeds of such sale, to the said Isabella Ballantyne Weir, and to make and execute such bond and disposition in security, or bonds and dispositions in security, and deed or deeds of conveyance, as shall be requisite."

The petitioners stated "that except one-third share of the said shop 14 West Adam Street, to which the said Duncan Weir is entitled in right of his mother, the truster's children have no funds or estate other than what is now set forth, and the total income of the trust-estate is quite insufficient for their maintenance, and for the education of the said Samuel and Alexander Weir."

The Lord Ordinary remitted to Mr John W. Tawse, W.S., to inquire into the circumstances set forth in the petition, and to report.*

Mr Tawse reported—"If the family are to occupy the house in South Clerk Street the income from the estate is only the rent of the shop in West Adam Street, which is insufficient for their maintenance and the education of the younger children."

There is, therefore, a necessity for making the heritable properties in some other way than the mere use of the one and annual return from the other available to supply the wants of the family. It appears to the reporter, however, that regard to the circumstances in which the family are placed, as a fit and proper matter for consideration under this petition, and the ground of necessity to borrow, whether they should not occupy a house at a lower rent, and not the one in Clerk Street. If this were done about £20 a-year would be added to the family income, but which would still be probably insufficient to meet their wants."

The application for power to sell and also to borrow is not consistent with the terms of the trust-deed, and is open to several objections. As the residue of the estate is directed to be held until the youngest child attains twenty-one, the income in the meantime being paid to the children equally, the capital of the trust, consisting mainly of the heritable properties, ought to suffer proportionately.

If, however, the proposal were carried out of selling the shares of the South Clerk Street property destined to the younger children, and applying the proceeds for their maintenance, their share of the capital of the trust-estate would be wholly used up, while the daughter's share of the heritable property, at least the reversion in the event of any money being borrowed on it, would remain to her. Then, again, it is plainly inexpedient, were power given to sell the trustees' interest in the subjects in Adam Street, to give power at the same time to borrow on the other property, at any rate to exercise that power at the same time and consequently have to pay interest on money not immediately required. Therefore, the proposal of the application to the Court is perhaps expedient, where the interests of one individual alone concerned, it does not give due

No. 136. The Lord Ordinary refused the prayer of the petition. *

June 13, 1877.
Weir's
Trustees.

The petitioners reclaimed.

The Court appointed David Roberts, S.S.C., *curator ad litem* to Duncan Weir, and he lodged a minute in which he stated that he was willing to consent to a sale of the shop in Adam Street.

The Court, after hearing counsel, appointed the cause to be argued before the Judges of the First Division with the assistance of the Judges of the Second Division.

Argued for the petitioners;—The intentions of the truster were: (1) that his debts should be paid; (2) that the whole of his estate should go to his children, and to no one else; (3) that the whole family should reside together in the house in South Clerk Street with their sister, and should be alimented out of his estate. These intentions should, if possible, be carried out, but as it was impossible to carry them out in the way the truster directed, so that the shop be retained by the trustees, the Court should endeavour to carry out as much of the truster's intention as was possible. There was no express prohibition against sale in the trust-deed. Even at common law the Court might have given power to the trustees to sell, and the Trusts Act was intended to give a further power to the Court. A father's representatives were bound to aliment his family, and the trustees could have been compelled to sell the property in order to aliment the family.¹

At advising,—

LORD PRESIDENT.—This petition is presented under the Trusts Act of 1850 by the trustees of the late Samuel Weir, who were appointed by a trust-deed

regard to the legal rights of the respective beneficiaries in the ultimate division of the estate.

“On the whole, the reporter feels the matter remitted to him one of considerable difficulty, as while it was evidently the intention of the truster that his children should occupy the house in Clerk Street, and receive the rents of the shop in Adam Street till the youngest was twenty-one, when the properties were to be conveyed—the house in Clerk Street to the daughter, and one-third of the shop in Adam Street to each of the two younger children—it is impossible, in the present state of matters, the intentions of the truster can be carried out, because at present the children have no means of subsistence.

“In these circumstances, therefore, the reporter thinks it will be sufficient power is given to the trustees to sell the two-thirds of the shop in Adam Street, and should it be necessary to borrow on the Clerk Street house at a future time application may be made to the Court for that purpose.”

* “NOTE.—The Lord Ordinary does not doubt that it would be expedient that the subjects should be sold, and the proceeds applied in the education and maintenance of the truster's children. He has some doubt whether a sale of the subjects would not be inconsistent with the intention of the truster; but he refused the petition, because he thinks that the rights of Duncan Weir were prejudiced by the proceeds being applied in the maintenance and education of Samuel and Alexander as proposed. Duncan is entitled to a share of the proceeds derived from the subjects, but if the subjects be sold, and the proceeds paid to his two brothers, he would necessarily be deprived of his share of the proceeds. The same objections apply to the borrowing of money on the security of the house in South Clerk Street. The Lord Ordinary was referred to the case of *Pattison v. Pattison's Trustees*, February 19, 1870, 8 Macph. 575, 42 Scot. Jur. 291; and *Hay's Trustees v. Hay Milne*, June 13, 1873, 11 Macph. 694, 43 Scot. Jur. 430.”

¹ *Erskine v. Wemyss*, May 13, 1829, 7 S. 594, 1 Scot. Jur. 163; *Henderson v. Somerville*, June 22, 1841, 3 D. 1049, 13 Scot. Jur. 489; *Anderson, M.C.*, 1876, ante, vol. iii. p. 639.

and settlement executed in 1876. The prayer of the petition is to authorise the petitioners to sell an heritable subject belonging to the truster, and to apply the proceeds for the maintenance and education of his minor children,—that is to say, to apply the capital sum for that purpose. Now, confessedly, the trustees have no such power to sell under the trust-deed, and as little have they power to apply any part of the capital of the estate for the maintenance and education of his children. It is necessary to examine the provisions of the trust-deed to see whether we can grant this authority in consistency with the provisions of the statute.

Mr Weir left four children. At the time of his death his eldest daughter was sixteen, his eldest son was seventeen, and he had other two boys at school, of thirteen, the other of eight years of age. The eldest boy, Duncan Weir, in right of his mother, entitled to one-third of the subject in West Adam Street, the other two-thirds belonging to the truster. Now, the purposes of the trust are—1st, payment of his debts and funeral expenses; 2d, to hold the residue of his estate, heritable and moveable, until his youngest surviving child should attain the age of twenty-one years, “and during that time to give the Isabella Ballantyne Weir the use of his dwelling-house No. 37 South Clerk Street, Edinburgh, and the furniture therein, on the condition that it was to be the home of his children until his youngest surviving child should attain twenty-one years of age, and also during that period to pay the income of the residue of his estate and effects among his children equally.” Then he provides that on his youngest surviving child attaining the age of twenty-one years his trustees are to convey to Isabella Ballantyne Weir his dwelling-house 37 South Clerk Street. And the fourth purpose is that his trustees shall convey one of two-thirds of the shop No. 14 West Adam Street, “belonging to him, to his eldest son, Samuel Weir, and the remaining one-third to his third son, Alexander Weir.” And lastly, “after fulfilment of the above purposes of the trust, directed his trustees to divide, equally among all his children then surviving, the whole residue of his said means and estate.”

The condition of the trust-estate is that the dwelling-house in Clerk Street is the most valuable part of the estate. The shop in West Adam Street is let for rent of £35 per annum, but as two-thirds of this alone is available for the maintenance of his younger children, they have little more than £5 a-year each. Household furniture has been valued at £158, 10s. 6d., and the money found in the truster's house and in bank amounts to £108. That last sum has been expended in the maintenance of his children since his death, and in the payment of his debts. The petitioners cannot go on to fulfil the purposes of the trust because they have no funds to maintain the family in the house in Clerk Street with Miss Weir, and therefore they propose to sell the two-thirds of the subject in West Adam Street, and to apply the proceeds so as to enable the family to continue living together in Clerk Street until the youngest child attains twenty-one years of age. The clauses of the Trusts Act founded on are the 3d and 7th, which will certainly be necessary to proceed on both if we are to grant the prayer of the petition. The third clause runs thus—“It shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that it is expedient for the execution of the trust, and not inconsistent with the intention thereof; and the Court shall determine all questions of expenses in relation to such applications, and where it shall be of opinion that the expense

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No. 136. of any such application should not be charged against the trust-estate, it shall so find in disposing of the application :—(1) to sell the trust-estate or any part of it ; (2) to grant feus or long leases of the heritable estate or any part of it ; (3) to borrow money on the security of the trust-estate or any part of it ; (4) to exchange any part of the trust-estate which is heritable." Now, I do not think it is at all doubtful that the proposal made here is "expedient for the execution of the trust," for the petitioners have demonstrated that without it they will not be able to administer the affairs of the trust for behoof of his family so as to support them in family together, which was the main purpose of the trust-deed.

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The next inquiry is, whether this authority is "not inconsistent with the intention thereof," that is, not inconsistent with the intention of the trust-deed. That is a more difficult question. Now, the Court may certainly authorise some things that may be said to be inconsistent with the intention of the trust-deed—for example, to give a power of sale at all, where it is not given by the trust-deed, may be said to be so, for if the trust-deed had intended that the truster would himself have given it. But that cannot be the meaning of the clause, for its object was to give power to the Court to authorise sales. The true meaning is that the authority sought shall not be inconsistent with the main design or object of the trust, and it seems to me that it will not be so in this case. What is asked is the indispensable thing for obtaining the object of the trust. On this point this case differs from the case of *Hay's Trustees*, relied on by the Lord Ordinary. The purposes of the trust there were to disencumber the estate of debt, to entail it on a certain series of heirs, and to preserve it entire—to ensure that there was a special prohibition of the sale of any part of it. And, accordingly, we found it impossible to say that the sale of any part was "not inconsistent" with the main purpose of the trust. Here the circumstances of the case are very different indeed. The Lord Ordinary seems to have had an impression that such a proceeding as this would not be consistent with the intention of the truster, but he has based his refusal on the ground that *James Weir's* interest might be prejudiced by any such proceeding. That difficulty is now removed, because *Duncan's* curator has made inquiry, and now concludes that the entire subject in West Adam Street shall be sold. On the whole, I am of opinion that the third section applies to this case, and that we are not exceeding the powers given by the statute in granting this authority.

But we must go further, for the trustees ask us to aid them under the third section of the statute. It runs thus—"The Court may from time to time, and on such conditions as they see fit, authorise trustees to advance any part of the capital of a fund destined, either absolutely or contingently, to minor descendants of the truster, being beneficiaries having a vested interest in such fund, if it shall appear that the income of the fund is insufficient or not applicable to, and that such advance is necessary for, the maintenance or education of such beneficiaries, or any of them, and that it is not expressly prohibited by the trust-deed, and that the rights of parties other than the heirs or representatives of the minor beneficiaries shall not be thereby prejudiced." Now, there are a number of conditions there that require to be particularly attended to. We have power to authorise trustees "to advance part of the capital of a fund destined to minor descendants of the truster." What they represent as coming under that description here is the capital produced by the sale of an heritable subject. If an heritable subject is converted into money through the operation of a trust, and with this statute the proceeds will answer the description of the capital of

ust-fund. It must be destined "to minor descendants of the truster." Here No. 136.
 e fund will certainly be in that position, for the house itself was in this posi-
 on, that one-third part had vested in each of the two younger children. Then, June 13, 1877.
 rther, it is necessary that it should "appear that the income of the fund is in- Weir's
 ficient or not applicable to, and that such advance is necessary for, the main- Trustees.
 nance or education of such beneficiaries, or any of them." That, as I have
 d, is well made out, and it is clear that such a proceeding is not "expressly
 hibited by the trust-deed," and there are no other parties whose rights can
 sibly be prejudiced. We have therefore a complete compliance with the con-
 ditions required by statute.

I feel satisfied that we are applying the statute in such a way as to work out
 nearly as possible the intentions of the truster. That is satisfactory, for the
 ect of the Act is that trusts shall be made to work smoothly, so as to carry
 the wishes of a truster. As to the proposal to borrow money on the security
 the house in Clerk Street I shall not say more than this at present, that there
 very different considerations applicable to it.

ORD JUSTICE-CLERK.—I substantially agree with the opinion your Lordship
 just delivered. I am of opinion that the Court has power under the 3d
 ion of the Trusts Act to direct part of the heritable property of the testator
 be sold, and that we have also power under the 7th section to direct the em-
 ment of a proportion of the capital of the trust-estate in alimenting and
 tating the children of the testator. Nor am I prepared to say that in order
 support the judgment proposed it is necessary to invoke the provisions of the
 ute at all.

a regard to the provisions of the 3d section, the elements to be proved are,
 the step is expedient for the execution of the trust, and that it is not incon-
 nt with its intention. That it is expedient there can be no doubt, for it is
 in that otherwise there is no source from which the children can be sup-
 -d. I further think not only that the sale of the heritable subject in ques-
 for the purpose proposed, is not inconsistent with the intention of the
 -leed, but that it is essential to its fulfilment. The primary and supereminent
 t of this settlement, and one superior to all the provisions in regard to the
 ate division of the estate, was to provide a home for the testator's minor child-
 and, of course, such support as alone would make the house available. This
 nite clear from the clause in the deed. The testator plainly assumes that,
 g with the obligation of the daughter to permit the children to occupy the
 as their home, there would be sufficient means supplied from his estate to
 ain and educate them, an object paramount as compared with any ultimate
 al of the residue. Holding this, therefore, to be the unquestionable in-
 on of the testator in so applying part of the fee of his property, we fulfil
 rst purpose of the trust in the only way which is practicable.
 e 7th clause also entirely sanctions this course, because, so far as the proceed-
 on being expressly prohibited by the trust-deed, that its propriety is plainly
 nised by it. I am not moved by the difficulty suggested, founded on the
 f the word "fund." I think the phrase equivalent to "property." But if
 hird section gives power to sell the heritable property the 7th clearly gives
 r to expend the price for the maintenance and benefit of the children.
 quite concur in the proposed limitation of the sale to the property in
 ion.

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LORD DEAS.—It is necessary to keep in mind that we are not here dealing with a case of granting power to a factor for pupils on the ground of necessity. We are dealing with a case under section 3 of the Trusts Act. What your Lordship proposes is that the shop shall be sold under section 3, and that the proceeds shall be applied for the maintenance of the children under section 7. Now section 3 gives us power to grant authority to sell on being satisfied that such sale is “expedient for the execution of the trust, and not inconsistent with the intention thereof.” That, as I read it, means the intention of the testator as expressed in his trust-deed. We must therefore look to the trust-deed, and not go beyond it. We are not to make a will for the testator, but are to look at his expressed will. I am of opinion with your Lordship that in authorising the trustees to sell the shop we are not doing anything inconsistent with the intention of the testator as expressed in his will, because, as has been well pointed out, that intention was that the whole family were to live together in the dwelling-house as a home for the children, and the intention thus expressed cannot be carried out if they have nothing to live upon. I am, therefore, of opinion that we ought to grant the power of sale under section 3, so far as regards the shop. There is no suspension by the terms of the will of the vesting of the fee of the shop, as there is of the fee of the residue, which, as well as the house, may stand in a very different situation from the shop.

When we come to the application of the money, I find that section 7 provides that we may authorise the trustees “to advance any part of the capital of a fund destined either absolutely or contingently to minor descendants of the trust, being beneficiaries, having a vested interest in the fund.” An objection might have arisen had there not been a vested interest in the fund, but that objection cannot be made here, for the reason I have just stated. In the course proposed by your Lordship I think we are carrying out the purpose of the trust, and we are certainly not going against any purpose which he has expressed.

LORD ORMDALE.—The trustees of the late Mr Weir have presented this petition to the Junior Lord Ordinary for authority to sell a shop in West Adam Street, and to borrow money on a house in South Clerk Street, these subjects being parts of the trust-estate; but his Lordship has refused the petition, apparently very much, if not exclusively, upon the ground that the interests of the trustor's eldest son, to whom a third of the West Adam Street shop belonged, would be prejudiced by the proposed sale. That objection, however, may now be held to be obviated by the minute which has been lodged since the Lord Ordinary's interlocutor was pronounced for the curator *ad litem* of the eldest son, stating that he (the eldest son) was “agreeable to the trustees being authorised to sell the two-thirds of the shop, and that he would at the same time sell his own third, so as to give a complete title to a purchaser.” The curator has further stated in the minute that as he conceives the money is absolutely required, and “that there is no other way of raising it, and that it would be for the benefit of all parties interested to have the property sold, he is ready to assent to the Court granting authority.”

The question, in these circumstances, is, whether the Court can authorise the testamentary trustees of the late Mr Samuel Weir to sell the shop in West Adam Street, two-thirds of which form part of the trust-estate, in order that money may be raised for the education and maintenance of the trustor's two younger

ons, and it appears to be indisputable that there is no other way by which these No. 136.
essential objects can be accomplished.

But although the truster has left his estate for the ultimate enjoyment of his children, the capital or fee of it cannot, looking merely to the terms of his settlement, be, in the meantime, encroached upon. Neither is any power properly conferred by the settlement on the trustees to sell the trust-estate or to borrow money on its security. It is, however, provided by section 3 of the Trusts (Scotland) Act, 1867, that it shall be competent for the Court, on the petition of the trustees under any trust-deed, to grant authority to them to sell the trust-estate, or any part of it, or to borrow money on its security, "on being satisfied at the same is expedient for the execution of the trust, and not inconsistent with the intention thereof."

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In regard to the expediency of authorising a sale in the circumstances which we here occurred I can have no doubt; and on this point the Lord Ordinary appears also to have been satisfied. Nor is it stated by his Lordship that he considers a sale to be inconsistent with the intention of the trust, although he says he has some doubts on the subject. It is certainly not necessary that there should be anything in the trust-deed that can be held to direct or authorise the trustees to sell the trust-estate or some part of it, for, if the trust-deed had been of that nature, it would have been unnecessary to invoke the statutory powers of the Court. It is enough that the proposed sale is "not inconsistent with the intention of the trust."

Now, it cannot be said that payment or satisfaction of the truster's debts would be inconsistent with the intention of the present or any testamentary trust, for, independently of express provision on the subject, the debts and obligations of Mr Weir must, *ante omnia*, be paid and satisfied. It is only on his estate that his other directions can have any effect. In the present instance, the first purpose of the trust is payment of the truster's debts. But that goes a very little, if any way at all, to indicate that the truster intended to comprehend within the debts he so directed to be paid such a claim for maintenance and education as that in question, for I do not suppose he had any such claim in his contemplation in appointing as he did, in the first purpose of his trust, his debts to be paid. But, although this may be so, it by no means follows that the proposed sale, when not only expedient, but also indispensable for the maintenance and education of the truster's children, may not very fairly be held to be "not inconsistent with the intention of the trust." That the maintenance and education of his children is not only the duty of a parent, but also an obligation—and it is a reciprocal one—which can be enforced against him, is too clear and well established for argument. So much is this the case that Lord Stair (i., 5, 1) refers to it as a "law written in the hearts of parents and children." And not only is it an obligation enforceable against a parent in his own life, but it also transcends his death against his estate, and his representatives, whether trustees or not, in possession under a gratuitous testamentary title of such estate. On this point it is sufficient to refer to the recent case of Spalding v. Spalding's Trustees, cited at the hearing (13th December 1874, 2 Rettie, p. 237), where a young child was held entitled, as a creditor, to aliment out of the trust-estate of its father, although by the terms of the trust-settlement there in question the father had destined the whole of his estate for other purposes, particularly for the benefit of other three children specially named by him. The general law being so, it may, I think, not unreasonably be held that

No. 136. the proposal to sell is not inconsistent with the intention of the trust. The
 June 13, 1877. truster probably anticipated when his settlement was executed that he would
 Weir's leave means and estate sufficient not only for the maintenance and education
 Trustees. of his children till they could maintain themselves, but also to secure to them
 the other benefits he expressly provided for them, although circumstances have
 turned out differently from what he had expected. Be this, however, as it may,
 I am unable to hold that it is inconsistent with the trust to authorise the
 proposed sale. On the contrary, I am not only satisfied that the proposed sale
 "is expedient for the execution of the trust," but also that it is "not in-
 consistent with the intention thereof."

Supposing, then, the Court were to authorise the sale of the West Adam
 Street shop as proposed, and that the proceeds were in the hands of the trust-
 ees as a trust-fund, the 7th section of the Act would apply *in terminis*; for
 it cannot be doubted that the truster's children are in the position of benefi-
 ciaries having a vested interest in that fund; that the income of the fund is
 insufficient for their present needs; that an advance of the capital or a part
 of it is necessary for their maintenance or education; and that it is not ex-
 pressly prohibited by the trust-deed. Nor will the rights of any parties
 other than the heirs or representatives of the minor beneficiaries, be, so far as
 I can see, prejudiced by such advance.

The result, therefore, is that, in my opinion, the interlocutor of the Lord
 Ordinary reclaimed against ought to be recalled, and the trustees authorised
 to sell the Adam Street shop as proposed by them, and to make such advance
 out of the proceeds arising from the sale of the two-third shares of the West
 Adam Street shop belonging to the truster's two younger children as may
 be necessary for their education and maintenance.

Whether the Court could authorise the trustees to borrow money on the Clerk
 Street house, or authorise it to be sold, is a different question, which it is not
 necessary to determine. I have only to add that I think it very advisable that
 the Clerk Street house should continue as now to be occupied in common by
 the family, or, in the words of the truster himself, to be "the home of the
 children till the youngest shall attain twenty-one years of age."

LORD MURE, LORD GIFFORD, and LORD SHAND concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor
 reclaimed against: Grant warrant to and authorise the petitioners
 with the consent and concurrence of Duncan Weir, the eldest son
 of the truster, and of David Roberts, S.S.C., his *curator ad litem*, to
 sell the shop No. 14 West Adam Street for the best price that can
 be obtained therefor, and, after paying over to the said Duncan
 Weir his one-third share of the proceeds of the said sale, to apply
 the remaining two-thirds to the maintenance and education of
 Samuel Weir and Alexander Weir, the two younger sons of the
 truster, and decern *ad interim*: And authorise the petitioners to
 charge the expenses of this application, together with the expenses
 incurred by the said *curator ad litem*, against the trust-
 estate, as the said expenses respectively shall be taxed by the
 Auditor."

DALGLEISH & BELL, W.S., Agents.

EDWARD AVERIL LUCAS AND OTHERS (Sir George de la Poer Beresford's Trustees), Pursuers.—*Balfour—J. P. B. Robertson—Graham Murray.* No. 137.
 JAMES GARDNER, Defender.—*Kinnear—Asher—Lorimer.*

June 13, 1877.
 Beresford's
 Trustees v.
 Gardner.

Reduction—Fraud—Effect of Decree—Lease—Process—Record.—In an action brought by a landlord against a tenant concluding for reduction of a thirty-five years' lease and for removing, the pursuer, after obtaining a verdict which established fraudulent impetration, moved the Court to pronounce decree of reduction and removing. The tenant objected to decree of removing going out, in respect that there existed a memorandum of agreement between the pursuer and him of date prior to the lease under reduction binding the pursuer to recute a lease for twenty-one years.

Held that as the memorandum founded on was not of such a character as to give in itself a title of possession there was no reason why the decree of reduction should not have its ordinary effect, and the pursuer be restored against the lease and reinstated in possession.

Vide supra, p. 194 and p. 363.

The trustees of the late Sir George de la Poer Beresford, proprietors of the estate of Ballachulish, on 1st and 14th November and 2d December 1873 granted a lease of the slate quarries of Ballachulish, for thirty years from Whitsunday 1874, to James Gardner.

In October 1876 Sir George Beresford's trustees raised an action of reduction, removing, and count, reckoning, and payment, against Gardner, on the ground that the lease of November and December 1873 had been obtained from them by fraud.

The case went to trial on the following issue:—"Whether the pursuers, any of them, were induced to execute the lease dated the 1st and 14th November and 2d December 1873, of which No. 12 of process is a copy, by fraudulent representations made by the defender, or by his son George Gardner, writer in Glasgow, on his behalf?"

The jury returned a special verdict finding "that the pursuers, with the exception of Edward Averil Lucas, were induced to execute the lease mentioned in the issue by fraudulent representations made by George Gardner, the defender's son, and that the defender, his father, was a consenting party to his making the said fraudulent representations."

The pursuers thereafter moved the Court to apply the verdict, to rescind the lease, and to grant decree of removing against the defender; and to remit to the Lord Ordinary to proceed with the cause in reference to the conclusions of count, reckoning, and payment.

The defender resisted this motion, on the ground, as stated in his third plea (which was added on 9th January 1877, after the record had been closed and when the case was in the roll for the adjustment of an issue), that the pursuers were not entitled to decree of removing as concluded "in respect that, in the event of the lease under reduction being set aside, the defender will be entitled to obtain a lease from the pursuers in pursuance of the agreement of 7th June 1873, or otherwise in terms of the agreement set forth in the condescendence." (The agreement last referred to was a verbal agreement to grant a lease for fifteen years.)

The only reference on record to the agreement of 7th June was contained in the 5th and 6th articles of the defender's statement of facts, in which it was stated incidentally and as part of the narrative with reference to the lease under reduction,—(Stat. 5). . . . "It was farther agreed between the parties that the defender should take a lease of the quarries and the adjoining dwelling-house, called Larroch House. . . . The first agreement with regard to the lease was made in June 1873, and was to the

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effect that a lease for twenty-one years should be granted immediately on the expiry of the existing lease to Mr Pitcairn, on the same terms and conditions as to rent and lordship." (Then followed further details of the agreement). "The said agreement having been made, a memorandum thereof was drawn up and signed by the parties at Rothesay on the 7th of June 1873."

The memorandum of 7th June 1873 itself bore to be a minute of agreement between the pursuers, the first parties, and the defender, the second party, and was in these terms:—"The first parties agree and engage immediately on the expiry of the present lease in favour of Alexander Pitcairn of the slate quarries, &c., at Ballachulish, Argyleshire, to grant to the second party a lease thereof, in the same terms and conditions as to rent, lordship, and otherwise as are expressed in the lease in favour of Mr Pitcairn, and that for the period of twenty-one years from Whitsunday 1874, being the date of expiry of Mr Pitcairn's lease." (Then followed certain particular stipulations). "A formal lease to be prepared by Archibald Ferguson, writer, Glasgow, or at all events revised by him, on behalf of the second party, embodying the foresaid terms, and to be complete prior to Whitsunday 1874. In witness whereof, these presents, written on this and the six preceding pages, by the said Archibald Ferguson, as subscribed by the parties at Rothesay the 7th day of June 1873, before these witnesses, the said Archibald Ferguson, and George Gardner, writer Glasgow.—ELIZABETH BERESFORD; EDW. A. LUCAS; CHAS. D. LUCAS JAMES GARDNER. Archd. Ferguson, witness; George Gardner, witness Rothesay, 7th June 1873."

This document consisted of six pages, the first five of which were initialed merely by the parties, and only the last signed. It was stated that the testing-clause was only filled up after the deed had been produced in process, when the defender added to the record his third plea in law. It was disputed whether the witnesses though present at the signing of the memorandum had been called on to act as instrumentary witnesses, whether they had not signed *ex intervallo* at the request of the defender alone.

Argued for the defender;—The memorandum of 7th June 1873 was valid and binding deed, notwithstanding (1) that it was signed on the first five pages by initials only,¹ and (2) that the testing-clause had been filled up after the deed had been produced in process, it not having been produced in judgment.² The result was that the pursuers were bound to execute a lease in terms of the memorandum. That being so, there were no good reasons for putting the defender out of possession, when he was entitled to be immediately reinstated in possession. The verdict therefore should be applied only to reduce the existing lease, and a remit should be made to a man of business to prepare a new lease in terms of the memorandum.

Argued for the pursuers;—(1) The memorandum of 7th June did not bear on its face to be a lease, but only a contract for the execution of a lease. Were things intact the pursuers' only action on the memorandum

¹ 1696, c. 15.

² Conveyancing Act, 1874, 37 and 38 Vict., cap. 94, sec. 39; Ogilvie v. Finlater, 1674, M. 16,804; Paton's Creditors, 1711, M. 16,807; M'Donald v. M'Donald, 1714, M. 16,808; Drury v. Drury, 1753, M. 16,936; Hill Arthur, Dec. 6, 1870, 9 Macph. 223, 43 Scot. Jur. 171; Addison, Feb. 23, 1877, ante, vol. ii., 457; M'Laren v. Menzies, July 20, 1876, ante, vol. iii., 11; Stewart v. Burns, Feb. 1, 1877, supra, p. 427.

would have been one not to obtain possession, but to obtain a lease or title of possession. Had any possession followed on the memorandum it would have been different. But the possession which the defender had had was on another title altogether. The lease on which the defender had been possessing having come to an end by reduction, parties should be re-mitted to their original position, the defender's right being *in obligatione tantum*. If possession had been inverted then matters should be restored. (2) There were no averments on record to sustain the defender's third plea in law. Setting aside all questions as to formality of execution the averment on record shewed that the document never was in the defender's own view obligatory or intended to be completed as a probative writ. The averments on record were quite irrelevant to sustain an action founded on it. But (3) the deed was improbable,¹ or, at least, could only be set up by direct action. This was not the process in which to try the questions raised as to its execution. The defender would not have been entitled to obtain possession on a document with regard to the execution of which there were such serious questions without setting it up by a direct action. Still less was he now entitled to retain possession.

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LORD PRESIDENT.—The motion of the pursuers is that the verdict of the jury be applied, and that decree of reduction and removing be pronounced in terms of the summons.

The objection offered on the part of the defender is founded on his third plea, which was added to the record by the Lord Ordinary's interlocutor of 9th January last. Now, in order to judge of the validity of that plea it is necessary to have in view what is the nature of the action and what its conclusions. The first conclusion is for reduction of the lease to the defender, dated 10th and 14th November and 2d December 1873, of the slate quarries of Ballachulish. The second conclusion is for removing of the defender. And the third conclusion is for his accounting, not only as tenant but also as creditor in possession of the estate under an *ex facie* absolute disposition with an explanatory agreement.

Now, the pursuers aver in article 13 of the condescendence that the defender entered into possession of the quarries under the lease sought to be reduced at Whitsunday 1874. In the answer the defender admits "that the pursuers executed a lease of said quarries in favour of the defender, and that he entered to possession at Whitsunday 1874." It is now established that that lease was obtained by fraud, and falls to be set aside, and that lease is on the defender's own shewing the only title under which the defender holds or ever has held possession. It seems to me to follow, as a necessary consequence, that when that title of possession is set aside on the ground of fraud, the fraudulent possession which has followed on it must also come to an end. If I at all understand the nature of an action of reduction, a decree in terms of the reductive conclusions of the summons operates as an entire restitution of the pursuer against the fraud which has been practised upon him, and consequently, as the summons itself expresses it, he is to be reposed and restored thereagainst *in integrum*—not only

¹ Ross' Lect., 1, 136; Ersk., 3, 2, 8; Home v. Dickson, 1730, M. 16,898, rep. in M. Bell's Lect., ed. 1876, 1, 52; Thomson v. M'Crummen's Trustees, Feb. 1, 1856, 18 D. 470; M. Bell's Lectures, ed. 1876, 1, 48; Dickson on Evidence, sec. 727.

No. 137. against the particular deed sought to be reduced, but also against all that has followed or may follow thereon. The notion of allowing a person to retain possession of a heritable subject for a single day after his title has been set aside on the ground of fraud is entirely inconsistent with the theory of an action of reduction on that ground.

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What, then, is the plea to the contrary maintained here by the defender: "The pursuers are not entitled to decree of removing as concluded for, in respect that in the event of the lease under reduction being set aside, the defender will be entitled to obtain a lease from the pursuers in terms of the agreement of 7th June 1873, or otherwise, in terms of the agreement set forth in the condescendence"—that last being a verbal agreement. The only thing that can be seriously maintained under this plea—if, indeed, even that be seriously maintained—is that the defender is entitled to remain in possession notwithstanding that his fraudulent title has been set aside, because he has another title under which he may obtain a lease to be executed. Now, even supposing the writing of 7th June 1873 to be a probative document I think that this is a bad plea, because all that that writing binds the parties to do is to adjust a lease by which the defender may obtain possession of the quarries. But on the true construction of that document he is not, in my opinion, entitled to enter into possession except of consent until such lease is adjusted. As the document is expressed I think the defender was bound to have the terms of the lease adjusted so as to enable him to enter into possession at the term of Whitsunday 1874. At any rate if the terms were not then adjusted he was not in law entitled to enter into possession at that term.

But, over and above that, the document is, to say the least of it, not clearly probative document. And how is it set forth on record? It is mentioned by the defender, *narrative*, as a mere memorandum of terms of lease verbally agreed to. So far as the pursuers are concerned they had no call to say a word on record about the document, and they have had no opportunity of adding any statement since the change of ground taken by the defender, and his founding plea in defence of it. Before we could consider the rights of parties under the document we should be bound to have a record made up, and to allow a proof for certainly without a proof the document can never be set up as a probative document.

In these circumstances, I am of opinion that the defender's third plea in law is irrelevant, and I am therefore for granting the motion of the pursuers.

If the defender thinks that he can set up this document of 7th June 1873 as a fresh title of possession there is of course nothing to prevent him doing so by an appropriate action.

LORD DEAS.—I agree with your Lordship that the lease which the defender had obtained having been set aside on the ground of fraud, the defender cannot be allowed to retain possession in the meantime, whatever right he may eventually establish in virtue of the document of June 1873 in any subsequent proceeding. To say the least of it, there are important questions requiring to be decided in the defender's favour before that document of June 1873 can be set up either as a lease or as entitling him to obtain a lease. We are no doubt familiar with the practice of holding that an agreement which specifies the subject, the rent, and the period of endurance, may itself form a good title of possession, but that the adjustment and execution of a formal lease, according to recognised rules

applicable to the particular subject, may be insisted on at any time. That has generally occurred in reference to agricultural leases, when, in former days, transactions with tenants were regarded as *inter rusticos*, and much that was usual was held to be understood between the parties. But this document of June 1873 is peculiar in its terms. There is much in it to favour the construction that there is to be no lease at all unless a formal lease should be prepared and completed prior to Whitsunday 1874. That is one difficulty the defender has to overcome.

Then there will be a question whether the document is duly tested. It consists indeed a testing-clause crushed in where, it is obvious, no testing-clause ever intended to be. But it is averred, and would rather appear to be the case, that that testing-clause was not there until after the document had been produced in process; and, indeed, it is averred that it was not there till after the making of the record. It may be an important question whether, if these averments or either of them shall turn out to be true, the document can be held to stand at all.

Thirdly, there will be an important question whether that document can be held to be subscribed in terms of the statute. It consists of two sheets, and four or more pages of it are signed (if signed at all) only by initials.

I cannot, I think, be called upon to determine these questions at present. I will content myself to shew that there are important questions to be tried before a verdict can be given to the document now founded on.

The defender no doubt says that even supposing this document not to be valid, he is entitled to have it made so under the Conveyancing Act, 1874. This, again, raises an important question, for in order to make this out the defender must establish that the Act is retrospective, whereas the Act itself contains expressions which are plausibly said to infer the contrary except in cases in which it specially provides for. It will be a startling result if a man shall be enabled by the statute to set up any improbativ document he may happen to find in his charter-chest, whatever may be its date. But all I say at present is that whatever may be the result of any future proceedings which the defender may be advised to institute, I cannot hold that, in the face of this adverse verdict on the ground of fraud, he is entitled to retain possession until these important questions shall be appropriately raised and decided.

MR MURE and LORD SHAND concurred.

THIS interlocutor was pronounced:—"Apply the verdict; and, in respect thereof, reduce, decern, and declare in terms of the reductive conclusions of the summons: Further, repel the third plea in law stated by the defender, and decern in terms of the conclusions for removing: Find the pursuers entitled to expenses since 15th December 1876, the date of closing the record," &c.

TODD, MURRAY, & JAMIESON, W.S.—ADAMSON, & GULLAND, W.S.—Agents.

No. 137.
June 13, 1877.
Beresford's
Trustees v.
Gardner.

No. 138.

June 14, 1877.
M'Carter v.
Stewart and
Mackenzie.

JOHN M'CARTER, Appellant (Pursuer).—*Balfour*—*M'Kechzie*.
STEWART AND MACKENZIE, Respondents (Defenders).—*Trayner*—*R. V. Campbell*.

Sale—Delivery—Defective quality—Rejection—Exception to general rule.

A general understanding existed between a merchant and a manufacturer that the former was to supply the latter with certain goods as required, to be used in his business.

On 1st February 1876 the merchant was ordered to stop further deliveries, but the order was misunderstood, and notwithstanding thereof he continued to deliver as before, and the deliveries were accepted without the manufacturer's personal knowledge. A series of eight separate deliveries had been made in the month of February before the manufacturer became, on 29th February, aware of what was taking place. On examination it was found that such of the goods as had not been used up in the works were defective in quality, and on 3d March they were rejected.

Held that the course of dealing between the parties was not one to which the strict rule of law as to the immediate rejection of defective goods could be applied, and that examination of the goods was made and their rejection intimated to the merchant in reasonable time.

1ST DIVISION.
Sheriff of
Renfrewshire.
M.

THIS was an action in the Sheriff Court at Paisley, at the instance of John M'Carter, marine store dealer, Glasgow, against Stewart and Mackenzie, papermakers, Pollockshaws, to recover the price of certain goods sold and delivered by the pursuer to the defenders in the months of December 1875 and February 1876.

The defenders admitted liability for the price of the goods sued for, with the exception of certain parcels of round ropes delivered on eight different dates between 1st and 29th February 1876, and consigned to the Court the balance admittedly due.

With regard to the round rope delivered in February it was proved that in the beginning of February the defender, who had had a standing order for some time for delivery to the pursuers of round ropes as required for their business, was informed that the pursuers would take no more goods from him, and that he was to cease his deliveries; that notwithstanding the intimation, which was apparently misunderstood by him, the pursuer continued during the month of February to send parcels of round rope as before, and that these to the amount of twenty-six bales weighing seventy-eight cwt., were received at the defenders' works with the personal knowledge of the defenders; that on 29th February it came to the knowledge of the defenders that these deliveries were being made, and that they at once stopped farther deliveries; that on examination it was discovered that of the round rope delivered in February eleven bales weighing thirty-three cwt., had been used up in the defenders' works without their knowledge, and that the remaining fifteen bales, weighing five cwt., were not composed of round rope but of a counterfeit substitute for it; that the defenders on making this discovery on 3d March rejected what remained of the bales.

For what was thus rejected the defenders refused to pay, on the ground that it was delivered against their express orders, and that even if by accepting delivery they were to be held as having purchased it, it was not the material which it was represented to be, and had been timeously rejected.

The Sheriff-substitute (Cowan) sustained this defence.

The Sheriff (Fraser) adhered on appeal.

The pursuer appealed to the Court of Session.¹

Authorities referred to.—*M'Cormick v. Rittmeyer*, June 3, 1869, 7 Mac

LORD PRESIDENT.—I think that the Sheriff-substitute and the Sheriff are right in the view of the evidence which they have taken. The fifteen bales of goods in question were delivered in February to the defenders, and were on examination, in March following, found to be composed of inferior materials, and were ordered back to the pursuer immediately on the defenders becoming aware of their having been delivered and being so defective in quality. The only other question raised on record was whether the fifteen bales were in point of fact delivered by the pursuer or by somebody else. On that point also I agree with the Sheriffs.

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The only point of real importance in the case is whether, in pronouncing decree in accordance with this view of the facts, the Sheriffs were not infringing the rule of law applicable to the position of parties who receive goods delivered to them as purchasers, and afterwards object to the quality.

There is no doubt as to the general rule of law that it is the duty of such purchaser, on receiving delivery, immediately to give notice of the inferiority of the delivery, to reject the goods, and to rescind the contract.

But the circumstances of the case are peculiar. It is not the ordinary case of action for goods sold and delivered under a single contract of sale, nor even under successive contracts. It is an action founded on a series of dealings, in which one party supplies goods as required to be used in the conduct of the business of the other party. There was here no express order but merely an understanding that the pursuer was to furnish certain goods, and the defenders use them up in their manufactory as required. On that understanding a series of deliveries were made by the pursuer in December and January. Then when bales are proved to have been delivered at various times in February. It is not possible to say now at what particular times these fifteen bales were delivered, but that they were delivered in pursuance of the general agreement so mentioned is, as I have said, proved.

Now, it would be neither expedient nor just to apply to a case of this kind the general rule of law applicable to cases where delivery has been made under a definite contract. There is here no proper contract to rescind. The goods are delivered just as it pleases the seller to deliver them, and are used just as the purchaser requires them. It would be very hard to require the purchaser to examine every bale as delivered, and accept it or reject it at once. In such a case the general rule I have mentioned may, I think, be relaxed. If, within a reasonable time, the purchaser, when he comes to use the goods, finds they are defective, and then at once objects, I think he is entitled then to return them. The rest of the deliveries may have been used up or may be fit for use in the defenders' business. But that is not to prevent the defenders having an opportunity of returning any particular deliveries which are manifestly unfit for use. In such a case as this, therefore, I am of opinion that there is an exception from the general rule laid down in the cases of M'Cormick, and Couston, Thomson, and Company.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THIS interlocutor was pronounced :—" Find in fact that the goods

41 Scot. Jur. 465 ; Chapman v. Couston, Thomson, and Company, March 1871, 9 Macph. 675, 43 Scot. Jur. 326, July 19, 1872, 10 Macph. (H. of L.) 44 Scot. Jur. 402

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marked 'round rope' in the account sued for as supplied in February 1876 were delivered at the defenders' (respondents') works against their express orders, were received there without the knowledge of the principals, were on examination in the beginning of March found to be composed of inferior materials and not proper round ropes, and were to the extent of fifteen bales tendered by the pursuer (appellant) early in March immediately on the defenders becoming aware of their having been delivered and being so defective in quality; that the said bales weigh about forty-five cwt. and are lying at the defenders' works for delivery to the pursuer, who has refused to take delivery thereof: . . . Find in law that the defenders are not liable in the circumstances above mentioned to pay for the fifteen bales of round rope: Therefore refuse the appeal, and decern," &c.

THOMAS CARMICHAEL, S.S.C.—JOHN MARTIN, W.S.—Agents.

No. 139.

June 14, 1877.
Fraser v.
School Board
of Carluke.

JOHN FRASER, Pursuer.—*Wallace.*

THE SCHOOL BOARD OF THE PARISH OF CARLUKE, Defenders.—*Traynor*
—Moncreiff.

School—Education Act, 1872, 35 and 36 Vict. c. 62, sec. 55—Emoluments of Schoolmaster.—The Education Act, 1872, provides (sec. 55) that teachers "appointed prior to its coming into operation shall not, with respect to emoluments as by law, contract, or usage, secured to or enjoyed by them at the passing of the Act, be prejudiced by any of the provisions" therein contained. *Held* that a master who, at the passing of the Act, was in receipt of a fixed salary and school fees, was entitled (1) to continued payment of his full salary, though he had for some time prior to the passing of the Act voluntarily employed and paid an assistant, whose place was afterwards filled by a regular assistant employed and paid by the school board; and (2) to the actual school fees paid in each year so long as the school remained on its former footing, and not merely to the average as at the passing of the Act.

1ST DIVISION.
 Lord Rutherford
 Clark.
 B.

IN this action a question was raised under the 55th section of the Education Act, 1872,* as to what were the "emoluments" "as by law, contract, or usage, secured to or enjoyed by him" of a parochial schoolmaster appointed prior to that Act.

The pursuer of the action, John Fraser, had been appointed master of the parish school of Carluke in 1852. After the passing of the Parish and Burgh Schoolmasters Act, 1861, the heritors of the parish by a meeting fixed "the salary of the schoolmaster of this parish at a maximum rate of £70 per annum, Mr Fraser agreeing to allow to a female assistant a salary of not less than £30 sterling per annum out of the gross income." Mr Fraser also enjoyed from the date of his appointment the whole school fees.

At the date of the passing of the Education Act, 1872, the average attendance at the parish school was about 205, and the average fees were about £220 a-year. A female teacher was employed, to whose salary

*Section 55 of the Education Act, 1872, provides that, "subject to the provisions hereinafter contained regarding the removal of the teachers of public schools appointed previously to the passing of this Act, such teachers shall not, with respect to tenure of office, emoluments, or retiring allowance, as by law, contract, or usage, secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions herein contained, and such emoluments and retiring allowances shall be paid and provided by the school board having the management of such schools respectively."

rsuer contributed £30 in terms of his agreement with the heritors. The rsuer also of his own accord employed a male assistant to whom he paid salary of £40. He averred, however, that the employment of a male assistant was not necessary for the efficient conduct of the school at that time, but was a voluntary act on his part.

After the passing of the Education Act of 1872 the school board determined to fix the pursuer's salary at the average of the fees drawn by him the date of the passing of the Act, whatever that might be ascertained to be, and to take upon themselves the burden of supplying him with a male and female assistant.

To this the pursuer refused to agree, and claimed the whole school fees, together with a salary of £70 a-year, subject to deduction of £30 for a male teacher. He raised the present action to enforce his demand.

The Lord Ordinary, after a proof, pronounced this interlocutor:—Finds that at the date of the passing of the Education Act the pursuer had a salary of £70 a-year and the fees of the school, subject to the obligation of payment of £30 a-year as the salary of a female assistant: Finds that down to the present time the pursuer is entitled to receive the said salary and the fees of the school: And with these findings appoints the pursuer to be put to the roll for further procedure: Finds the pursuer entitled to expenses as far as hitherto incurred," &c.*

"NOTE.—When the Education Act passed, the pursuer had a salary of £70 per annum and the fees paid by the pupils, but subject to the obligation of paying a salary of £30 per annum to a female assistant. The school was then very populous and largely attended. Of his own accord the pursuer employed a female assistant at a salary of £40; but he explains that this was due to the fact that he required help, because he was registrar of the parish, and because he was engaged in certain duties in connection with the Education Bill then before Parliament.

Since the Education Act was passed various attempts have been made on the part of the defenders to fix the remuneration which the pursuer should receive. But they have proceeded on the footing that his salary was absorbed by the payment of assistants, and that his emoluments consisted entirely in the fees of the school. The Lord Ordinary regrets that the defenders have seen fit to take this view. The employment of a male assistant was a voluntary act on the part of the pursuer, and the Lord Ordinary has no reason to think that it was in any respect a necessary condition of his ability to earn the fees. The course which has been led is directly to the contrary.

[This point settled, there is not much difference between the parties. The pursuer claims the fees of the school as it at present exists, and the defenders are of opinion that he should receive them, though they do not acknowledge his right. A material change is about to be made in the constitution of the school; and it is contended that change is made the pursuer does not contend that he can thereafter receive the fees. He contends for no more than that he shall not be prejudiced in respect of the emoluments which he enjoyed at the passing of the Act.

The Lord Ordinary thinks that the pursuer is entitled to the fees which have hitherto been received at the school, and, for anything which he yet sees, that the pursuer will be entitled to the fees till the school is placed on its new footing.

There has no doubt been an increase in the teaching staff, to meet modern requirements; but it does not appear that the attendance of pupils has materially increased since the Act was passed, or that such increase as there may be would have taken place if things had remained as before. The defenders contend that the emoluments to which the pursuer is entitled as of right must be ascertained by reference to the amount which he was earning when the Act passed, and by reference to an average of previous years. In the opinion of the Lord Ordinary, the prospects of the school cannot be thrown out of account. The pursuer held an office which entitled him to such fees as were received from

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No. 139. LORD PRESIDENT.—I am of opinion that the interlocutor of the Lord Ordinary is well founded.

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The question to be determined is, what were the pursuer's emoluments as master of Carluke Parish School, by law, contract, or usage, prior to the passing of the Education Act, 1872. It appears to me that the emoluments of this gentleman were secured to him partly by law, so far as the school fees were concerned, and partly by contract, as regarded his salary. The contract between the heritors and the schoolmaster is embodied in a minute of the heritors, by which the fixed "the salary of the schoolmaster of this parish at the maximum rate of £7 sterling per annum, Mr Fraser agreeing to allow to his female assistant a salary of not less than £30 sterling per annum out of his gross income." It appears to me therefore, that, according to the 55th section of the Education Act, 1872, the emoluments of this gentleman consisted of the school fees to which he was entitled by law, and also of a salary of £70, subject to deduction of £30. I should have hesitated as to allowing proof in these circumstances. I think it is irrelevant to say that these being his emoluments, he chose voluntarily to take assistance, and pay for it out of his own pocket. That does not affect the question of his emoluments as secured to him by law and contract. But if we are to look at the evidence I do not think that the facts proved establish that assistance was necessary. I adopt the view of the facts taken by the Lord Ordinary in the note, and I farther think that the qualification contained in the latter part of the note is a proper qualification.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT adhered.

J. & A. HASTIE, S.S.C.—MACONOCHE & HARE, W.S.—Agents.

No. 140. GLASGOW ROYAL INFIRMARY, Respondents (Pursuers).—*R. V. Campbell*

June 15, 1877.

Glasgow Royal

Infirmary v.

Wylie, &c.

REV. ALEXANDER WYLIE AND OTHERS (Trustees of Bath Street Baptist Church, Glasgow), Appellants (Defenders).—*Balfour—Alison*.

Property—Mutual Gable.—To an action by the proprietor of a tenement burgh against the proprietor of the adjoining stance to recover one-half the value of a mutual gable, of which the defender had taken the use, it was pleaded in defence (1) that the mutual gable having been erected by the common authority of the parties no claim arose to the proprietor of one stance against the proprietor of the other; (2) that such use had been made by the common proprietor of the gable by subsequent proprietors of the defenders' stance, of the mutual gable that

pupils. He is a very successful teacher, and he might very naturally have been allowed to increase his emoluments by increasing the number of scholars. The value of his office cannot be fairly estimated without taking its prospects into account.

"The defenders have not tendered any salary which, in the opinion of the Lord Ordinary, was a fair compensation for the emoluments which the pursuer previously enjoyed. For they have offered to transact only on the footing that the pursuer is not entitled to any salary. The Lord Ordinary therefore holds that the pursuer is entitled to claim his former salary and the fees of the school down to the present time. But, as at present advised, he does not think that he can pronounce any decree applicable to the future. For he cannot interfere with the arrangements which the defenders may lawfully make, and he cannot pronounce any decree which will fix the rights of the pursuer in the future. These are subject to changes which may be made from time to time in the school."

defenders on purchasing the stance were entitled to assume that the claim for half the cost of the mutual gable had been extinguished or settled. *Held* that the common author in conveying the one stance to the pursuers or authors, with the tenement erected thereon, conveyed likewise a right as just himself or his singular successors in the adjoining stance to recover one half the cost of the mutual gable whenever they came to make use of it; and that the use of the gable by the defenders' author was by buildings of such temporary nature that the defenders were bound to have satisfied themselves in inquiry as to the state of the facts before they purchased.

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Glasgow Royal
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THIS action was raised in the Sheriff Court at Glasgow by the Glasgow Royal Infirmary, as proprietors of the tenement No. 38 Cambridge Street, Glasgow, against the Rev. Alexander Wylie and others, the trustees of Bath Street Baptist Chapel, as proprietors of the adjoining stance to the south of the pursuers' tenement, to recover one-half of cost of the mutual gable, which was built in 1852, and which came to be used by defenders in 1874 when they began to build on their property.

1ST DIVISION.
Sheriff of
Lanarkshire.
M.

The defence was (1) that the mutual gable in question had been erected in 1852 by George Sharp, then the common proprietor of both stances; that he erected on the one side of it the tenement belonging to the pursuers, and on the ground afterwards conveyed to the defenders, a building which the mutual gable formed one side and the flues from which were into the vent of the mutual gable; that this building was pulled down by the defenders before they erected their present tenement, consisting of a house below and a chapel above; that in these circumstances no claim was made for half the cost of the mutual gable to the pursuers when they purchased their property, all such claim having been extinguished by *rescissio* when the two properties were in the hands of the common proprietor Sharp. (2) That Sharp sold off the defenders' stance to Messrs Glasgow and Scott, who sold to Peter Walker, who sold to the defenders; Messrs Douglas and Scott made farther use of the mutual gable; the mutual gable having been thus used by the defenders' predecessors or authors, there was a presumption of payment by the party who used it to the then proprietor of the adjoining ground; and in any event no liability could transmit against the defenders, who did not reject any of their predecessors in the property, having acquired it by purchase.

The Sheriff-substitute (A. Erskine Murray) repelled the defences, and decreed against the defenders for one-half the cost of the mutual gable.

The Sheriff (F. W. Clark) adhered on appeal.

The defenders appealed to the Court of Session.

The facts of the case are stated by the First Division in their interdict of 15th June 1877 disposing of the appeal. They "find (1) that that George Sharp was proprietor about 1852 on separate titles both of the ground on the east side of Cambridge Street, now the property of the pursuers (respondents) the Royal Infirmary, and the adjoining stance to the south, now the property of the defenders (appellants) and others: Find (2) that there was at that time an office, a small temporary building on the stance now defenders', against the boundary a two-stall stable behind it: Find (3) that in 1852 Sharp erected a tenement of three stories besides the sunk story on the stance, now pursued, with a mutual gable along the boundary of the two stances: Find (4) that on the erection of this gable the old north wall of the office and house was taken down and replaced by the gable, and its flue let into the vents of the gable coming from the sunk flat, and the joists, &c. of the office and stable were let into the gable wall: Find (5) that on 31st March 1853 Sharp sold to a party, Craig, the tenement under the dis-

No. 140. position recited in 5-6 of process without any special reference to the mutual gable or reservation in respect thereof: Find (6) that about 1851 Sharp added to the one-story erections on the southern stance a one stall stable behind or further east than the two-stall stable, and a shed still further east, all against the gable wall: Find (7) that in 1862 Sharp sold the southern stance to Douglas, who, in 1871, sold to his partner Scott, and it was occupied from 1862 to 1874 as a mason's shed: Find (8) that Douglas and Scott changed the office into a room and the two stall stable into a kitchen, occupied as a house by Scott, the fireplaces of room and kitchen being in adjoining corners and leading into the same flue of the gable: Find (9) that Scott being troubled by smoke blowing down put a can on the top of the chimney of the gable with which the flues connected: Find (10) that in 1874 the southern stance was acquired by Peter Walker, who immediately transferred it to the defenders, who are the trustees of a Baptist congregation, and have erected thereon shops below and a chapel above to the height of the gable, using two of the vents, one in a shop and one in the vestry, and walling up the other vents and presses."

Argued for the appellants;—(1) The common proprietor of both tenements having himself used the mutual gable before parting with the stance afterwards conveyed to the defenders, he himself would have had no claim against his own disponees for one-half the cost. The right to continue to use it was included in the conveyance by him. The pursuers as his singular successors could have no claim which he had not.¹ The use proved was sufficient.²

Argued for the respondents;—The use of the mutual gable proved was merely of a temporary nature, and insufficient to raise a claim against the defenders or their authors for half the cost of the mutual gable. It could not therefore bar that claim when they came to make a permanent use of it.

LORD PRESIDENT.—The pursuers are proprietors of the tenement of ground No. 38 Cambridge Street, Glasgow, and the defenders are proprietors of the adjoining tenement of ground in the same street, lying to the south of No. 38. These two tenements of ground at one time, and before either was built upon, belonged to one person, Mr Sharp. He acquired them, indeed, by separate titles though apparently from the same author. In 1851 he got a conveyance to the subjects which are now the property of the defenders, the Bath Street Baptist Chapel Congregation, and in November 1852 he acquired the subjects which now belong to the Glasgow Royal Infirmary.

While proprietor of both stances, Mr Sharp built on the last mentioned, which now belongs to the infirmary; and in doing so he erected a gable wall in the usual way along the boundary between the two stances. After he had built on the one stance Mr Sharp conveyed it and the buildings upon it to the predecessors of the infirmary. He subsequently sold the other stance, when unbuilt upon, to the predecessors of the Baptist Chapel Congregation. The Baptist Chapel Congregation are now proceeding to erect a building upon the

¹ Hunter v. Luke, June 2, 1846, 8 D. 787, 18 Scot. Jur. 410; Law v. Meith, Nov. 30, 1855, 18 D. 125, 28 Scot. Jur. 44; Earl of Moray v. Arrol, Nov. 30, 1858, 21 D. 33, 31 Scot. Jur. 19; Walker v. Sherar, Feb. 4, 1870, Macph. 494, 42 Scot. Jur. 225.

² Ness v. Ferrier, May 13, 1825, 4 S. 7; Mackenzie v. Mackenzie, Nov. 1829, 8 S. 74, 2 Scot. Jur. 29; Mackenzie v. Morison's Trustees, Nov. 23, 1839 S. 44, 3 Scot. Jur. 33; Rodger v. Russell, June 10, 1873, 11 Macph. 67, 45 Scot. Jur. 417.

ground, making use to a certain extent of the gable of the pursuers' tenement as a mutual gable. The pursuers now demand from the defenders one-half the cost of the gable wall. There can be no doubt as to the right of the pursuers to assist in their demand, unless it be for the two reasons stated by the Bath Street Chapel Congregation in defence to this action.

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Wylie, &c.

They say, in the first place, that there is a speciality here in the fact that the feu, at the time when the gable wall was built, belonged to the same person; and that he in building the gable could not create a credit in himself as proprietor of the one feu and a debit against himself as proprietor of the other—that he could not, in short, make himself the debtor and creditor in the same obligation. But it is not necessary to consider what was the effect of anything Mr Sharp did while proprietor. The important question is, what was the effect of his conveyance of the first built-on stance to a purchaser? When he conveyed the stance and building he had erected thereon to the authors of the Glasgow Royal Infirmary I am of opinion that he conveyed along with it a right to demand one-half the cost of the gable wall, whensoever the second stance should be built upon, from the proprietor thereof at the time. That right passed to Mr Sharp's disponee under his conveyance as a pertinent of the property thereby conveyed. Had Mr Sharp continued himself the owner of the built-on stance, and afterwards proceeded to build on it, I think he would have been liable, just as the Bath Street Chapel Congregation are now. Therefore, when he conveyed to the authors of the latter the unoccupied stance gave them a title on the footing on which all building ground within burgh conveyed, viz, that they had right to the adjoining gable as a mutual gable on which to build one-half the price.

But the defenders say, in the second place, that when they bought the unoccupied stance the state of the subjects was such that they were entitled to consider that the debt to the pursuers was discharged, seeing that they found ready buildings of a certain kind on the ground which had taken advantage of the mutual gable. There were certainly some small buildings on the ground, which had taken advantage of the mutual gable to this extent, that they were built against the gable, and that some means of conveying away smoke from them had been devised by inserting pipes into one of the chimneys of the gable. It may be a question whether the owner of an unoccupied stance is entitled to erect any building, however small, taking advantage of the mutual gable, without settling with the party in right of the gable. If the pursuers had said they would not allow you to touch the gable in any way without first settling with them there would have been a good deal to say in support of such a contention. But that is not the form which the question takes here. It is whether the defenders as singular successors were entitled to consider, when they bought the stance, that the condition of them was such as to entitle them to believe that one-half of the gable wall had been paid for. Now, I am of opinion that that was not the state of matters at all, that in fact the natural inference from the existing state of things was the very reverse. No permanent buildings having been erected on the ground, it was, to say the least of it, most unlikely that one-half of the mutual gable had been paid for—so unlikely certainly that the defenders were bound to have satisfied themselves by inquiry as to the facts. I am therefore of opinion that effect must be given to the pursuers' demand.

MR DEAS, LORD MURE, and LORD SHAND concurred.

No. 140.

June 15, 1877.
Glasgow Royal
Infirmary v.
Wylie, &c.

THIS interlocutor was pronounced :—(After the findings in fact quoted in the narrative, p. 895, *supra*)—"Find in law (1) that the right of the mutual gable was carried in the disposition by Sharp & Craig and is now in pursuers; (2) that the sum payable by the proprietor of the southern stance when he came to use the mutual gable was half the original expense; (3) that the proprietor of the northern tenement had no right to demand payment from the southern proprietor until the latter used the mutual gable; (4) that the erection of the sheds and one-story building in Sharp's time and Scott's time was not such a use as to entitle the defender when purchasing the subjects to assume that the cost of the gable had been already paid; (5) that the gable is now for the first time appropriated by the owners of the defenders' property; (6) that the defenders are therefore liable to the pursuers in half the original expense of the gable: Therefore refuse the appeal," &c.

JOHN GILL, L.A.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 141.

June 16, 1877.
Cox Brothers
v. Jackson and
Lamb.

COX BROTHERS (Pursuers), Respondents.—*Lorimer*.
JACKSON AND LAMB (Defenders), Appellants.—*Brand*.

Sheriff—Debts Recovery Act, 1867 (30 and 31 Vict. cap. 96)—Account appended to Summons.—An account appended to a summons in a debts recovery action contained entries of various dates "To goods," with the amount charged at each date. The defender stated as a preliminary defence the plea that the account was not detailed, which the Sheriff repelled. *Held* that the Sheriff was right in repelling the plea.

1ST DIVISION.
Sheriff of
Linarkshire.
M.

THIS was an appeal in an action under the Debts Recovery Act, 1867, in the Sheriff Court at Glasgow, at the instance of Cox Brothers, tannery and leather factors, against Jackson and Lamb, shoemakers, for payment of the balance of an account.

The account appended to the summons bore—"To Cox Brothers, tannery and leather factors," and contained entries of various dates "To goods," with the amount charged at each date thus :—

"1876. June 9. To goods, £94 3 5."

The defence was thus minuted by the Sheriff-substitute :—

"The defenders' procurator stated the defence to be, First, preliminary—The account sued for is not detailed. On the merits—A denial of owing the sum sued for. The pursuers abide by summons."

The Sheriff-substitute (Scott Moncrieff) repelled the preliminary plea, and the Sheriff (Clark) adhered on appeal.

The defenders appealed to the Court of Session, and argued :—The object of appending an account to the summons was to give to the defender in a compendious way the information which otherwise would require lengthy condescendence. But the account sued on did not contain information necessary to enable him to meet the case against him. The pursuers' argument, that the invoices must be held to have been appended with the goods at each date, and to contain the information, would be equally to an account with entries "to amount of account rendered."

The Court did not call for a reply.

The Court held that the preliminary plea had been rightly repelled.

¹ Webster v. Alexander, Feb. 15, 1859, 21 D. 509; but see Welsh v. Hebb, Feb. 11, 1847, 9 D. 643.

Lord Shand, who was of opinion that it should have been sustained to No. 141.
the effect of ordering a detailed account to be produced.

APPEAL refused, and case remitted to the Sheriff.

W. ELLIOT ARMSTRONG, L.A.—MACBRAIR & KEITH, S.S.C.—Agents.

June 16, 1877.
Cox Brothers
v. Jackson and
Lamb.

CHARLES ANDREW AITCHISON, Pursuer—*Muirhead—Asher—Keir.* No. 142.
ISABELLA AITCHISON (John Aitchison's Executrix), Defender.—*Balfour—*
Mackintosh. June 16, 1877.
Aitchison v.
Aitchison.

Partnership—Joint Interest—Business carried on by a Family.—A family of brothers and sisters resided together, and without any deed of copartnery or definite agreement of any kind employed themselves in various branches of an extensive bakery, cooking, and confectionery business, which had gradually grown out of a small business in which their deceased father had been engaged, and in which his funds (never distributed) had been mainly embarked. Held, in the circumstances of the case, which were very special, that the concern was carried on for the joint behoof of the family, and that each member was entitled to an equal share of the profits.

THIS was an action of count, reckoning, and payment raised in May 1875 by Charles Andrew Aitchison, confectioner in Edinburgh, against his brother, John Aitchison, also confectioner in Edinburgh (now deceased), in which he pursuer called upon the defender to account for his intromissions with the trust-estate of their father, John Aitchison, baker in Edinburgh, who died on 16th January 1823, and with the funds realised from or belonging to the business carried on under the name of J. Aitchison and Sons in Little King Street, Register Street, and Queen Street, Edinburgh, and under the name of George Aitchison in Wemyss Place, Edinburgh, and with the property, stocks, loans, and other investments in which the funds of the said trust-estate and business had been placed, and also with the trust-estate of their mother, Mrs Jean Inderwick or Aitchison, who died on 14th January 1848.

The averments of the pursuer substantially were that from the time of his father's death his business was continued and gradually extended by his widow and children; that after the death of his mother, Alexander, the eldest son, was settled with and paid off, and the business carried on by the other surviving children, either in partnership or for joint behoof, all being equally interested in the business; that the defender began to assist his mother in 1830, and was from the first entrusted with the management of the books of the concern, and that he and his mother during her life received the drawings of the business, and that after her death the defender alone received the drawings and kept the bank accounts of the concern, which he manipulated at pleasure.

The defender maintained that he was not liable to account for his mother's trust-estate, in respect that he was not a trustee under his settlement, and had no intromissions with his estate, nor for the businesses in Little King Street, Register Street, and Wemyss Place, in respect that he took no part in them, and had no intromissions with the funds or profits thereof. With regard to the Queen Street business, which was the most important subject in dispute, he averred that the pursuer was never a partner therein, but that, on the contrary, it had belonged exclusively to his mother, his brother James, and himself, until shortly before his mother's death, when it was made over to James and himself, and that since James's death in 1866 he had been the sole partner. He also in his defences refused to account for the estate of his mother, in respect that he was only one of her executors, and had no separate intromissions with her

2D DIVISION.
Id. Curriehill.
I.

No. 142.
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estate, and stated a plea of all parties not called, but this plea was not insisted in. He also maintained that the pursuer's claim for an accounting in regard to the estates of their father and mother was excluded by certain family arrangements, and actings which he alleged had followed thereon.

The Lord Ordinary allowed the parties a proof of their averments, "under reservation of all objections to the competency of parole proof as regards the averments, which, it may be maintained, are only provable by writ or oath, and also under reservation of all mere questions of accounting."

The result of the proof was shortly as follows:—John Aitchison, the father of the parties, was a baker in Edinburgh, and carried on business in two shops, one in Little King Street and the other in East Register Street. He was survived by his wife and by six sons and three daughters whose names and ages at their father's death in 1823 were,—Alexander, 24; James, 22; John (the defender), 20; Isabella, 18; George, 16; William, 13; Margaret, 10; Charles (the pursuer), 8; and Catherine, 4. He left a trust-disposition and settlement of his means and estate, specially including his stock in trade, in favour of his widow in liferent and his children in fee, in such proportions as his widow might direct, she having the power to deprive any of the children of the whole or any part of their shares. Mrs Aitchison was named an executor along with the trustees. The personal estate left by John Aitchison senior amounted to about £1300, in addition to which he was possessed of the two shops in which the business was carried on, and two other small shops in Catherine Street.

The trustees under John Aitchison senior's settlement handed over to his widow his whole trust-estate, in order that she might carry on the business for behoof of the family. Mrs Aitchison, who was a person of great energy and business capacity, along with her sons, Alexander and James who were of full age, continued her husband's business in Little King Street and Register Street, under the firm of "Mrs Aitchison and Sons" or "J. Aitchison and Sons," her name being Jean. In 1828 she took a lease of the shop No. 77 Queen Street, and house above it, which she afterwards purchased, and there she and her son James commenced a confectionery business, which gradually became one of the largest and most successful of the kind in Edinburgh.

The other sons as they grew up all came in one capacity or another to take part in the business. When the Queen Street shop was opened George was put in charge of the Register Street shop, and Alexander took charge of the Little King Street shop. The name of the firm in Queen Street was the same as before, "Aitchison and Sons," or "Jean Aitchison and Sons," and for some years the whole three shops were managed as one concern, the drawings being regularly taken to or accounted for to Mrs Aitchison.

In 1830 the defender, who had been a clerk in a wine merchant's office, gave up his situation at his mother's desire, and came to assist her in Queen Street in keeping the books and attending customers. No written contract of copartnership was ever executed between Mrs Aitchison and her sons, but the defender produced in process two indentures, one dated in 1830, and the other in 1833, between the firm of "Aitchison and Sons" and apprentices employed by them, in which the masters were designed as "Mrs Jean Aitchison, James Aitchison, and John Aitchison, carrying on business under the firm of Aitchison and Sons, confectioners in Edinburgh." No indentures subsequent to 1833 were produced.

In 1832 George Aitchison left the Register Street shop and went to the shop at the corner of Wemyss Place and Albyn Place, nearly opposite Queen Street. He there began the business of a baker, ostensibly in the

own name. It was one of the questions in the present case whether, as the defender maintained, this Wemyss Place shop was a separate concern, in which George alone was interested, he having no interest in the Queen Street business, or whether, as the pursuer maintained, it was truly a branch of the concern of Aitchison and Sons. The Wemyss Place business was sold in 1865, and upon the death of his brother James in 1866 George took the place which James had occupied in the Queen Street establishment, namely, the superintendence of the cooking department, and continued to fill that place till his own death in 1874.

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In 1835 Alexander, the eldest son, was married, and an arrangement as came to by which the baking business carried on in Little King Street and Register Street was made over entirely to him, he paying a rent to his mother for the use of the premises.

After Alexander's marriage the pursuer, who had been assisting in the Register Street shop, entered the Queen Street establishment, where he remained actively engaged in the business until shortly before the present tion was raised. He superintended the confectionery department, and was clearly proved, notwithstanding an attempt on the part of the defender to make out that the pursuer's services were of little value, that he was a very skilful compounder of creams, ices, jellies, and cakes, for which the establishment acquired a great reputation. After the pursuer came to the Queen Street James devoted himself to the practical superintendence of the cooking department.

About the same year, William, who had been in an architect's office, joined the Queen Street establishment, and gave his whole time to the business until his death in 1874. His principal duty was to superintend the packing of confectionery, and to assist in the saleroom.

About the same time also Isabella, the eldest daughter, came to the shop, where she assisted in the sale department.

In 1846 the pursuer was sued for damages for breach of promise of marriage by a Miss Tucker. The case went to trial, and a verdict was returned for Miss Tucker. The summons had libelled the defender (the pursuer) as a partner of the firm of Aitchison and Sons, but the defences, which were framed chiefly by the instructions of John James, it was stated that the defender was not a partner, and that the pursuer had sought to entrap him in the erroneous belief that he was a partner.

In consequence of this entanglement Mrs Aitchison, who had previously made a settlement in favour of her children equally, executed a deed, dated 6th May 1847, by which she excluded the pursuer from all share in her succession, and, of the same date, in virtue of the powers given her by her husband's settlement, she executed a deed excluding the pursuer from all share in that estate. It was in evidence that Mrs Aitchison always believed that her power of distribution extended not only over the original stock of her husband's estate, but over the business which had grown out of it, and that this belief was shared by the members of the family.

On 23d December 1847, twelve days before Mrs Aitchison's death, and when she was in very infirm health, a document, bearing to be a minute of agreement, was entered into between her and her sons James and George, in which these three persons were designed "as the only partners in the company in business as confectioners in No. 77 Queen Street, Edinburgh," in the following terms:—"The said parties having agreed to dissolve the said copartnership as at the term of Martinmas last 1847, the same is hereby held as dissolved at that date accordingly, and it is declared that the said Mrs Jane Inderwick or Aitchison retired from the said copartnership as at the term of Martinmas last, and that her good-

No. 142. will and interest in the business now belongs to the said James and John Aitchison."

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Mrs Aitchison died on 4th January 1848, leaving personal estate to the value of about £1300, and heritable estate worth about £2000. Her sons, Alexander, James, John, George, and William, and her daughter Isabella were named executors.

A meeting of the whole family was held on 27th November thereafter, of which the following minute was drawn up by Mr W. R. Baillie, W.S., the family agent:—"Mr Alex. Aitchison stated that the present meeting had been called for the purpose of reading the settlement of the late Mrs Aitchison, and taking the other steps which were necessary thereon."

"Mr Baillie then produced a disposition by Mrs Aitchison, dated 26th October 1830, in favour of her children, and codicil thereto annexed, dated 6th May 1847, and also a writing executed by her on the date last mentioned, in reference to her husband's trust-disposition. These deeds were then read.

"There was then also produced to the meeting and read a minute of agreement between the deceased and James and John Aitchison, her sons, in reference to the dissolution of the copartnership between them, dated 27th December 1847.

"The meeting considering that the codicil before mentioned, which recalled the said disposition in so far as it included the said Charles Andrew Aitchison and the heirs of his body, had been executed by the deceased in consequence of special causes which had now ceased to exist, and that the deceased had also resolved, if she had been spared, to cancel the said codicil, agreed and hereby agree to hold the said codicil as cancelled, to renounce all benefit which they and each of them may or might derive under it, and to divide the estate of the deceased, heritable and moveable, in the same manner as if such codicil had never been executed, and also to execute all deeds which may be necessary for carrying this writing into full effect. The meeting also for the same causes agreed and hereby agree to hold the other writing before mentioned, dated the same day as said codicil, as cancelled, to renounce all benefit which they and each of them may or might derive under it, and to divide the estate of their deceased father, heritable and moveable, in the same manner as if such writing had never been executed, and also to execute all writings or deeds which may be necessary for carrying this minute into full effect."

The minute was signed by all the members of the family then alive except Alexander, who was present but did not sign. Neither he nor any of the others appear to have taken any objection to the minute of dissolution on the ground that it erroneously stated Mrs Aitchison, and her sons James and John, as having been the sole partners of the Queen Street business. The pursuer in his evidence explained this by saying that Alexander frequently complained that he was not satisfied with what had been done for him at his marriage, and that he was making further claims when John and James resisted, and that James told him (the pursuer) that the minute of dissolution had been got by them from their mother to stop Alexander's claims, and that it would never be used against the other members of the family, and that it was read merely to frighten Alexander, who was then claiming to be a partner in the Queen Street business.

Alexander continued to press his claims, and ultimately they were settled by the following "minute of agreement between Alexander Aitchison, baker in Edinburgh, on the first part, and John Aitchison, confectioner in Edinburgh, on the part of his other brothers and sisters, and taking burden for them, on the second part:—1. The subjects in Leith, King Street, in Catherine Street, and shop in East Register Street, what

severally belonged to the late Mr John Aitchison, or to his widow or family, and also one share of the Stockbridge Mill Company, are to be henceforth the property of Alexander Aitchison, and his brothers and sister are at their expense to concur in making them over to him, and he is to be infeft therein at their expense. 2. The remainder of the property of the late John Aitchison, or of his widow and family, including the subjects in Broughton Street, is to be henceforth the property of the other members of the family, and they are at their own expense to receive from Alexander Aitchison all deeds which may be necessary for fully vesting them therein. 3. On these objects being accomplished, Alexander Aitchison is to grant a full discharge of all claims that he may have against his brothers and sister of any kind whatever, and they are to grant a similar discharge to him of all claims they may have against him of any kind whatever, which discharges shall be at the expense of the second party solely."

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In implement of this deed Alexander made up titles as heir of his mother in the premises No. 77 Queen Street, and by disposition dated 10th April 1852 conveyed the same to his remaining brothers and sister.

With the exception of Alexander none of the family ever married. The unmarried members continued to live together as one family and in great harmony until after the death of William in August 1874. Disagreements subsequently arose between the survivors (the pursuer, the defender, andabella),* caused apparently by the fact that George and William had made separate wills in favour of the pursuer, each of the family having previously made a will in favour of the survivors. From the father's death in 1823 down to the date of Alexander's marriage in 1835 the profits of the four establishments were regularly paid over to Mrs Aitchison, and applied by her for the joint behoof. After the latter date, Alexander received for his own use the drawings of the Little King Street and Register Street shops, while the profits of the other two establishments were paid to Mrs Aitchison, and after her death to the defender, and applied for behoof of all the family except Alexander. None of them ever received anything in the shape of wages, but whatever was required for clothing or other necessaries was paid to them by the defender, either out of the till in Queen Street, or by cheque upon an account in the National Bank, into which all the earnings of the several businesses were paid. Out of the accumulated drawings investments of various kinds, particularly purchases of house property, were made by the defender, sometimes with and sometimes without consultation with his brothers and sister, the titles being taken either in the names of the whole surviving brothers and sister except Alexander, or in the names of two or more of them, a few only being taken in the name of an individual. No principle was apparent in the way in which the names were selected, but the defender stated in his evidence that when Alexander was paid off the rest of the family agreed each to execute a *mortis causa* settlement, by which everything which he or she should die possessed of should go to the rest of the family and the survivors, and that shortly after the date of the agreement each of the family executed a will in these terms, and the whole were taken by the defender into his own custody, and he explained that as the property of every member of the family would thus come to the survivor it was immaterial how the funds of each were invested, and that he, therefore, on the faith of these wills, invested the funds of Aitchison and Company,

* Margaret died young, soon after her father; Catherine died in 1849; James in 1866; Alexander in 1873; George in January 1874; and William in August 1874.

No. 142. which he says belonged to himself and James alone, in the way described. In whatever way the titles to the investments were taken the rents and dividends were as a rule collected by the defender and paid into the general bank account. Among other properties a villa, called Mount Vernon, in the neighbourhood of Edinburgh, was purchased in 1854, and the title taken in the names of all the members of the family except Alexander. The family resided there in summer, and large quantities of fruit were grown in the gardens there under glass, all of which was used for the purposes of the Queen Street business.

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About the year 1860 or 1861 George Aitchison discontinued taking the drawings of the Wemyss Place shop to Queen Street, and accumulated the cash in tin boxes in a cupboard in his shop, till it amounted to at least £6000. At length he was alarmed by an attempt to break into the premises, which induced him to deposit the money in bank. He did not, however, pay it into the general account with the National Bank, but deposited it in three sums of £2000 each in the Royal Bank in the names of his brothers William and the pursuer and himself respectively, and his subsequent drawings and the sum which he received in 1865 from the sale of the business were applied either in making investments in his own name, or in payment to his brothers Charles and William. It appears from the evidence that George resorted to this expedient, in order to bring pressure to bear on the defender, whom he had repeatedly asked to exhibit a balance-sheet, but which he could not obtain. George's conduct did not, however, seem to disturb his amicable relations with the defender, who continued as before to make investments out of the general fund in the names of members of the family, including George.

The grounds on which the parties supported their respective contentions will be found fully explained in the note to the Lord Ordinary's interlocutor, dated 5th December 1876, which was as follows:—"Finds that the defender is bound to hold count and reckoning with the pursuer for his various intrusions, in terms of the conclusions of the summons; but finds that in such count and reckoning the funds realised from the business carried on under the name of George Aitchison, in Wemyss Place, and the proceeds of the sale thereof, in so far as received by the said George Aitchison, now deceased, by the late William Aitchison, and by the pursuer, or any of them, and not accounted for in the general fund managed by the defender, must be accounted for by the pursuer, and taken into the general account; appoints the cause to be enrolled, in order that the accounting may be proceeded with; reserves all questions of expenses, and grants leave to the defender to reclaim, if so advised."*

* "NOTE.—(After a narrative of the facts, the substance of which has been given above)—The principal question now for decision is, for whose behoof were the businesses in Queen Street and Wemyss Place carried on after 1835? The pursuer maintains that they were all one concern, and were carried on for behoof of the whole family; the defender, on the other hand, maintains that the business in Wemyss Place was carried on by George solely for his own behoof, and that none of the other members of the family had any interest in that business, and that the business in Queen Street belonged entirely to Mrs Aitchison, James, and the defender, as the sole partners thereof, until shortly before Mrs Aitchison's death, when, in virtue of an agreement between her and the two alleged partners, the whole business was transferred to them, and was thenceforth their exclusive property, and that neither George, William, Charles, or Isabella had any interest in it whatever.

"After the best consideration which I have been able to give to the matter, both oral and documentary, I have come to be of opinion that it is not proved

The defender reclaimed, but before the reclaiming note came on for No. 142. hearing he died, and his sister, Miss Isabella Aitchison, was sisted in his room as his executrix and representative.

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that there was any proper partnership entered into between Mrs Aitchison and her sons, or any of them ; but that it is proved that until 1835 the business in Little King Street, East Register Street, Queen Street, and Wemyss Place, and after that date until Mrs Aitchison's death, the businesses in Queen Street and Wemyss Place, were all truly branches of one concern—that they had all derived their existence from the as yet undivided estate of old John Aitchison, the father, and that they were carried on by the widow and her sons and a daughter for behoof of the whole family—the mother being interested in the liferent, and the sons and daughter in the fee in equal shares, but with power to the mother to diminish the share of any child, and even to exclude the child altogether ; and that from Mrs Aitchison's death the Queen Street business until now, and the Wemyss Place business until it was discontinued in 1865, were carried on by the surviving brothers and sister, other than Alexander, for their joint behoof. I shall now explain the grounds of this opinion.

“In the first place it may not unreasonably be presumed that where a business in which a deceased father of a family had been engaged, and in which his funds had been almost wholly embarked, is without any distribution of any part of his estate among his children carried on after his death by his widow and the grown-up sons (the other children being in minority or pupillarity), the business, until a distribution takes place, is so carried on for behoof of the widow and all the children in proportion to their respective interests in the estate.

“In the second place, this presumption derives, in the present case, very great support from the circumstance that, without any distribution of the estate beyond paying off the eldest son in the manner to be afterwards noticed, the business was conducted from the date of the father's death, and for a period of half a century, on the footing of introducing into it from time to time as they grew up, and in one capacity or another, every member of the family, each giving his or her whole time to their respective departments, and all, excepting the eldest son, who alone of the family ever married, living together during their joint lives.”

(His Lordship then referred to the way in which the profits of the different shops were dealt with, and the investments therefrom made, and to the unlikelihood that the use of the premises in Queen Street or of the Mount Vernon fruit would have been given by the other members of the family for the purposes of the business in Queen Street without charge, unless that was a business in which they were all equally interested, and proceeded)—“From what has been said, I think it is plain (1) that until 1835 the business of all the four establishments were carried on as one concern, and for the joint behoof of the whole family ; (2) that from 1835 till after Mrs Aitchison's death in 1848 the business in Queen Street and Wemyss Place was carried on for behoof of all the family, except Alexander, who received for his own use the drawings of Little King Street and Register Street ; (3) that ever since Mrs Aitchison's death the Queen Street business has been carried on upon the same footing. The question remains, however, for whose behoof was the Wemyss Place business carried on after 1848 ?”

(After a review of the evidence on this part of the case his Lordship proceeded)—“It appears to me that the evidence on this branch of the case, when read in the light of the other circumstances already adverted to, leads to the conclusion that the two establishments were but one concern, carried on under different names, but truly for behoof of the same members of the family.

“It is necessary, however, now to notice the arguments maintained by the defender against that conclusion. In the first place, he maintains that it is proved by a written document, to which, however, his mother and his brother James were alone parties, that the Queen Street business belonged to them, and to them alone—to the exclusion of all the other members of the family. The circum-

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Argued for the defender ;—The claim of the pursuer to an equal share in the business must rest on one of two grounds, (1) that he was a partner of

stances under which that document was executed require some attention. It appears that for some time before his mother's death, Alexander, the eldest son, had been dissatisfied with the share of the family property which had been assigned to him by his mother in 1835 in the shape of the goodwill and profits of the shops in Little King Street and Register Street—and had been claiming, or threatening to claim, to participate in the profits of Queen Street and Wemyss Place. Mrs Aitchison was at this time laid aside from business, and was in very infirm health, and a document (No. 7 of pro.), bearing to be a minute of agreement, was entered into between her and her sons James and John, in which they are designed as 'all residing in Queen Street, Edinburgh, and the only partners of the company carrying on business as confectioners in No. 77 Queen Street, Edinburgh.' The terms of the said agreement were as follows :—'The said parties having agreed to dissolve the said copartnership as at the term of Martinmas 1847, the same is hereby held as dissolved as at that date accordingly, and it is also declared that the said Mrs Jean Inderwick or Aitchison retired from the said copartnership as at the said term of Martinmas last, and that her goodwill and interest in the business now belonged to the said James and John Aitchison.' This document, which is dated 23d December 1847, undoubtedly raises a presumption in favour of the defender's contention ; but that is a presumption which may be overcome by the other facts in the case. In considering this part of the case it is material to bear in mind that Mrs Aitchison had the power under her husband's settlement of excluding any of her children from participation in the father's estate, and it appears that about, or shortly before, the date of this document, she had exercised this power by a codicil to her own will, and by a separate writing relating to her husband's estate, whereby she excluded the pursuer from all share in either her own or her husband's estate, although she had previously intended the whole to be divided equally among all her children, all of whom appear to have regarded the property which the mother had accumulated, and the business in which she was engaged, as truly her husband's estate, enlarged no doubt by her good management and the aid of her children, but still her husband's estate. In the light, at all events, the pursuer regarded the matter—for shortly before the event took place in his history which must not be lost sight of. He was in 1846 sued for damages for breach of promise of marriage by a certain Miss Eliza Tucker, and it was in consequence of the scrape into which he had thus got that his mother excluded him from all participation in his father's estate and her own. The case went to trial, and the jury returned a verdict for the pursuer (Miss Tucker) for £200—but she accepted a less sum, and assigned her decree on 31st December 1847 to his brother Alexander, who appears to have advanced the amount. The action had libelled the defender (the present pursuer) as a partner of the firm of Aitchison and Sons, but in the defence it was stated that he was not a partner of that firm, and upon this circumstance the present defender now founds, as proving his case that the pursuer was not then and never was a partner. Now, even if it were necessary for the pursuer to now to make out that there was a proper partnership between him and the other members of the family, I do not think that the statement made for his defence against Miss Tucker's action can be so used against him. Technically perhaps the statement was perfectly true, inasmuch as no formal contract of copartnership had ever been entered into by the pursuer or anybody else. But the defences seem to have been the composition, not so much of the pursuer as of Mr Wotherspoon, S.S.C., his agent, with the assistance of James and John, who desired to get the pursuer out of the country pending the litigation, and the statement in question was made after the pursuer had explained to his agent the position which he held, of being interested in the family property, including the business—but only in expectancy, as being subject to exclusion by his mother, if she should see fit to exclude him.

"Thus, while I think the statement made for the present pursuer is true

the firm of Aitchison and Sons, or (2) that the profits of the business were held by the defender in trust for behoof of the pursuer and the rest of the

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action was literally true at the time it was made, it cannot prevent him from now maintaining that he is, and has all along been, interested in the family property and business, and for that purpose it is not necessary for him to make out a contract of copartnership with his mother or his brothers and sister.

"After this, Mrs Aitchison died on 4th January 1848, and a meeting of the family was held on 27th November thereafter, called by Alexander for the purpose of, *inter alia*, reading the settlement of Mrs Aitchison. Mr W. R. Baillie, W.S., produced the settlement, dated in 1830, and the codicil thereto, dated 6th August 1847, and the relative writing of same date dealing with her husband's estate, all of which were read to the meeting. There was then also produced to the meeting the minute of agreement, dated 23d December 1847, in reference to the dissolution of the copartnership between Mrs Aitchison and her sons James and John. Thereafter, on the narrative that the codicil and other writing referred to, in so far as dealing with the pursuer and the heirs of his body, had 'been executed by the deceased in consequence of special causes' (*i.e.* the pursuer's entanglement with Miss Tucker, and the proceedings against him & her instance), 'which had now ceased to exist, and that the deceased had also resolved, if she had been spared, to cancel' the said codicil and other writing, the meeting agreed to hold the same as cancelled, and to renounce all benefit which they and each of them might derive under the same, and to divide the state of the deceased, heritable and moveable, in the same manner as if such codicil had never been executed, and also to execute all deeds which might be necessary for carrying the minute into full effect. Now, this minute is signed by all the members of the family then alive, excepting Alexander, and neither one nor any of his brothers or sister stated any objections to the minute of dissolution, on the ground that it incorrectly stated Mrs Aitchison and her sons James and John as having been the sole partners in the Queen Street business, and James and John as being now the sole partners. And so far the minute is in favour of the defender's views. But upon this point Charles gives an explanation, the import of which is, that Alexander had frequently complained that he was not satisfied with what had been done for him at his marriage, and that at the time of his mother's death he was making further claims which John and James resisted; and that James told him (the pursuer), that the minute of dissolution had been got by them from their mother to stop Alexander's claims, and that it would never be used against the other members of the family, and that it was read merely to frighten Alexander, who was then claiming to be a partner in the Queen Street business. Now, I am inclined to believe this story, told by Charles, to be true, both because it is in itself not an improbable one, and because the defender, who was in Court during the whole of the examination of the pursuer, and was himself recalled and examined at great length after the pursuer's examination was concluded, although he denies that he himself said to the pursuer that the document was taken merely to keep Alexander out of the business, admits that Alexander was then making claims, on the ground that he had not got his due share of the family profits, and the rest of the evidence shews that, although Alexander's claims were soon afterwards compromised, the so-called deed of dissolution and transference was never, in point of fact, acted on as regards the other members of the family. I am confirmed in this view by the equivocating way in which the defender explained the transaction between himself and his mother and his brother James, which had resulted in the execution of this minute of dissolution. He at first said that there is no doubt that she got a payment for it,—that he was sure there had been a balance of the books to ascertain her share of the profits, and that a balance-sheet had been made up, and yet, in answer to the immediately succeeding questions, he flatly contradicts himself. He is asked—'(Q.) During all your experience, as having charge of the financial department of that business, did you ever once balance your books? (A.) Never. (Q.) Did you ever make out a balance-sheet in your life? (A.) Never.' And I am satisfied that there never

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family. As to the first ground, there were no facts and circumstances from which partnership could be inferred. The pursuer's case was that

was any balancing of accounts, or any payment by John and James, or either of them, to Mrs Aitchison to account or in satisfaction of her interest in the business.

"But matters become still more clear when the family arrangement, made in 1851, is considered. Alexander had still been pressing his claims, and the result was that, on 17th March 1851, an agreement was entered into between Alexander Aitchison, of the first part, and 'John Aitchison, confectioner in Edinburgh, on the part of his other brothers and sister, and taking burden for them, on the second part.' By that agreement the claims of Alexander were compromised by his accepting, as his share of the family property (or, as it is termed in the agreement, the property 'of the late John Aitchison, or of his widow or family'), the subjects in Little King Street, Catherine Street, and Register Street, and agreeing to grant a full discharge of all his claims against the other members of the family, of any kind whatever, while the remainder of the said family property, *i.e.*, 'the property of the late John Aitchison, or his widow and family,' was thenceforth to be the property of the other members of the family, who were to be at the sole expense of all deeds necessary for carrying the agreement into effect. It is maintained by the defender that neither the business in Queen Street nor that in Wemyss Place was in contemplation of the parties to the agreement. But I cannot accept that interpretation of the document, because the property which was here divided between Alexander, on the one hand, and the other members of the family, on the other, was the whole estate which had belonged to their father, John Aitchison, or to their mother Mrs Aitchison, and which then belonged to the family—*i.e.*, to the family *dividually and collectively*. . . . I think, therefore, that the fair meaning of this agreement was that Alexander, in consideration of his discharging all claims which he might have had for farther participation with his brothers and sister in the family property above enumerated, received, as his share of that property in addition to the businesses in Little King Street and Register Street, of which he had been in the exclusive possession for sixteen years, the subjects in Little King Street, Catherine Street, and Register Street, and left the whole of the remainder, including the businesses at Wemyss Place and Queen Street, to be dealt with by them as their own property, in which all were equally interested. But, farther, this deed was acted upon and implemented, on the part of Alexander, who had made up titles as heir of his mother in the premises No. 77 Queen Street, where the confectionery business was carried on, and the house above No. 76, in which the family resided, by his conveying the same, on 10th April 1852, to his brothers James, John, George, William, and Charles, and his sister Isabella, and their respective heirs and assignees. Now, what followed upon this agreement on the part of the other members of the family is most instructive. On 27th May 1851 the house No. 75 Queen Street was purchased in name of James, John, William, Charles, George, and Isabella at the price of £1600; and on 9th June 1854 Mount Vernon was purchased in name of the same six persons at the price of £5500, the price in both instances being paid out of the general bank account kept in name of Aitchison and Sons; and various other houses and stocks were all from time to time purchased out of the same common fund, the titles being taken sometimes in name of the whole family other than Alexander, sometimes in the name of two or more members, a few small investments only being occasionally purchased in the individual names of George, of the pursuer, or of the defender. But in whatever names the titles to the property and stocks were taken, the rents and dividends were, as a rule, collected by John, who in financial matters acted for the whole family, and were by him paid into the general bank account as a common fund. I am, therefore, of opinion that, whatever weight might have been given to the minute of dissolution and transference of partnership in 1847, had it stood alone, it was not acted on, and was entirely superseded by the family agreement of 1851, in

was a partner from the date of his father's death, or at least, from his majority, but his own acts, as well as the other evidence in the case,

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acted as that has been by the subsequent actings of the defender himself, and his brothers and sister.

"But, in the second place, the defender maintains that the idea that the Wemyss Place business was a part of the common concern is negatived by the actings of George Aitchison, in whose name alone that business was carried on. It appears that in 1860 or 1861, a few years before that business was given up, George discontinued taking over his drawings to Queen Street and throwing them into the common fund, and accumulated the cash in tin boxes, which he kept in a cupboard in his shop in Wemyss Place until it amounted to at least £1000, or according to the defender to £10,000; and he would apparently have gone on hoarding the money in that fashion had he not been alarmed by an almost successful attempt at burglary, which induced him to deposit it in the bank. He did not, however, pay it into the general account kept in the National Bank, but he seems to have divided it between himself and his brothers William and James, £2000 having been deposited in the Royal Bank in the name of each, and his subsequent drawings and the sum which he obtained from Mr. Mill, to whom he sold the business in 1865, appears to have been applied either in making investments in his own name or in payment to his brothers Charles and William. This, however, is explained by the pursuer in his evidence to have arisen from a suspicion which these three brothers had come to entertain of the defender, in his financial management of the common fund, was taking no good care of himself, George having repeatedly asked the defender to exhibit a balance-sheet, which, however, he could not obtain. The defender denies that a balance-sheet had ever been asked, but I think it is in the circumstances highly probable that such a demand was made, and that George's reason for accumulating the Wemyss Place drawings in his shop instead of handing them to the defender was to prevent further funds going into the defender's hands until he had explained his past actings, but that he intended on receiving proper explanation to hand the amount to the defender. And it is not a little remarkable, although George's proceedings appear all to have been known to the defender, he still continued, until the death of George in 1874, to invest the fund accumulating from time to time in the National Bank account, kept by him in the name of Aitchison and Son, in purchasing property and stock in name of the different members of the family, including George. This is admitted by him in his evidence, and is very clearly brought out by the list of investments contained in pp. 82 to 84 of the Joint Print, from which it appears that between the years 1863 and 1867 sums amounting in all to not less than £20,750 were applied in purchasing house property in the names of James, John, George, William, Charles, and Isabella, in equal proportions, the name of James being omitted in purchases made after his death in 1866. Now, all this is quite inexplicable on the theory of the defender. If it had been the case that he and James, till the death of the latter in 1866, and the defender himself after that date, were the sole partners of and persons interested in the firm of Aitchison and Son, and the Queen Street business, and if George had no interest in that business, it is quite inconceivable that he would have gone on making these large investments in the way above described with funds in which, according to his own evidence, none of the other members of the family, and least of all George, had the slightest interest. On the other hand, all that was done is just what might have been expected to have been done if the pursuer's theory be, as I think it is, the correct one. I cannot doubt that the defender went on making these investments after George discontinued to pay the drawings into the common account simply because he knew that George had a right to demand the account, or which he was pressing, and he therefore did not venture to insist upon George handing over his drawings while he himself was refusing to account for his past. He says that he made the investments 'to keep the family together,' and, I take it, is another way of saying that he did it 'to stop their mouths'

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by an occasional payment to account, and thus to defer the day of general reckoning.

"But it is here right to notice another explanation given by the defender of his reason for making these investments. It is this:—He says that when the rest of the family combined to get Alexander paid off, and his claims discharged they agreed that each should execute a *mortis causa* settlement, by which every thing of which he or she should die possessed should go to the other member of the family and the survivor, excepting Alexander, and that shortly after the date of the agreement each of the family executed a will in those terms, and the whole were taken by the defender into his own custody. And he says that the property of every member of the family would thus come to the survivor, it was immaterial how the funds of each were invested, and that he therefore, on the faith of these wills, invested the funds of Aitchison and Co., which he says belonged to himself and James alone, in the way already described. The only one of these wills which has been printed is that executed by James, who was the first decesser, and who died in 1866; and assuming the other wills to be similarly expressed, it appears that these were not mutual settlements. None of them refers to the settlements executed by the other members of the family, and each reserves full power to the grantor at any time to alter, innovate, revoke, or annul the settlement. I therefore can attach no weight whatever to the defender's argument that James and he made the family investments referred to on the faith of his being in possession of these several wills.

"Before concluding, I should also notice that the defender, in support of his pleas, that the confectionery business of 'Aitchison and Sons' belonged exclusively to his mother and his brother James, and himself, has produced two or three indentures between that firm and apprentices, in which partnerships are referred to. The first indenture is with Mr Ramsay, and is dated 19th November 1833 at which time the business was carried on exclusively in Little King Street and Register Street. The masters are here described as 'Mrs Jean Aitchison, widow of John Aitchison, lately baker there, Alexander Aitchison and James Aitchison, bakers there, carrying on business under the firm of Mrs Aitchison and Sons.' The other two indentures are dated 29th May 1830 and 29th November 1833 respectively, after the Queen Street business was started. The masters are there described as 'Mrs Jean Aitchison, James Aitchison, and John Aitchison, carrying on business under the firm of Aitchison and Sons, confectioners in Edinburgh.' Now, it is remarkable that no indentures after 1833 have been produced. The defender says they had no apprentices after that time, but that must be a mistake, because the evidence shews that at all events up to 1851 there were always several apprentices—certainly more than two. At this is really a matter of little moment, because until 1833, when the last indenture produced was entered into, Mrs Aitchison and her eldest three sons, Alexander, James, and John, were, excepting George, the only members of the family who were from their age qualified to carry on business, or to undertake the teaching of apprentices. The other members of the family were either engaged in other occupations, or were as yet too young, and George was not a partner; and although the fact that Mrs Aitchison and certain of her sons put themselves out to their apprentices, and even to the public, as carrying on a confectionery business under a social firm, would have undoubtedly made them liable to the public as partners, it does not, as between the members of the family, create any presumption that such partnership was for their own benefit alone. At all events any presumption so created must yield to the facts.

"Now, I think that the facts proved in this case abundantly establish that although Mrs Aitchison and her sons, James and John, may have chosen to call themselves partners, they carried on their business, not for their own benefit alone, but for behoof of all the other members of the family; and that, as the members successively came into the business, and devoted their time and attention to it, they were in reality, though not perhaps in form or in name, part-

the second ground of action, that could only be proved by the writ or oath of the alleged trustee.¹ Parole evidence was incompetent, but even if it was admissible there was no sufficient evidence to establish the pursuer's case. No. 142.
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Argued for the pursuer;—It was not necessary for the pursuer's case that he should be able to specify the date at which he became a partner. There was nothing to prevent a person "growing into a partner." Be it as it might, the pursuer's case was the not uncommon one of a person being made a partner in his infancy. Such a person when he came of age had it in his option either to repudiate or to adopt what had been done for him.² Mrs Aitchison's belief as to the extent of the powers which she possessed under her husband's settlement, a belief which was shared by the rest of the family, was quite sufficient to explain the fact that during her lifetime the pursuer was not very clear about his own position as a partner. Whatever her powers were, the minute of 27th November 1848 placed the pursuer in precisely the same position as if the deed excluding him had never been executed. The facts and circumstances pointed out by the Lord Ordinary were enough to establish that the pursuer was a partner. Even if he was not so in a legal and mercantile sense, the agreement of 17th March 1851 satisfied the requirements of the Act 1696, and shewed that the business, whoever were the nominal partners, was carried on for the joint behoof. At advising,—

LORD JUSTICE-CLERK.—I shall not attempt in giving my opinion on this important and difficult case to state in any detail the import of the voluminous evidence which has been led, or the material facts which it discloses. They have all gone over with great care and accuracy in the note of the Lord Ordinary,

Indeed, I think it is clear that, after 1835, at all events after 1851, if the firm of Aitchison and Sons had got into difficulties, every one of the sons or daughters would, when the facts came to be inquired into, have been held liable for the debts of the concern as partners, in respect of their interest in the capital and profits of the business.

On the whole matter, therefore, I think that the defender is bound to hold it and reckoning with the pursuer in all the matters specified in the conclusions of the summons. The estate of John Aitchison, the father, formed undoubtedly the capital out of which the present business was created, and the defender by joining his mother in managing that business is liable to account for the original capital, none of which can be said to have been dissipated by the time. Then, as a surviving executor of his mother, and as the representative of her estate, his brother, another executor, and as undoubtedly an intramitter with her estate, and as indeed admittedly the general financial manager for the whole family, he is bound to account for his intromissions with her estate. And, as the general financial manager of the business of Aitchison and Sons, which his brothers and sister were equally interested, he is bound to account for his intromissions therewith, including the drawings from Wemyss Place, so far as received by him, or accounted for to the general fund under his management. But as George Aitchison withheld some of these drawings for some time, and as the amount so withheld was either appropriated by George or given to his brother William and the pursuer, and as the pursuer represents of his said brothers, it is necessary, in order to do justice to all concerned, that the drawings, in so far as not received by the defender, should now be accounted for by the pursuer, and taken into account in the general count and finding.

Statute 1696, c. 25.

Call's Coms. ii. p. 624, (5th ed.); Lindley on Partnership, pp. 82, 84.

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and we have had the advantage of a very able and exhaustive argument from the bar on their import. I shall content myself with simply referring to the more salient features of the history of this singular family, and then address myself to the not less singular questions which that history has raised for our decision. The outline of the career of the family is shortly as follows:—John Aitchison, the father of the family, was a baker in Edinburgh, in respectable but a humble enough position, having two shops, one in Little King Street, and the other in Register Street; he died in 1823 leaving a widow and nine children. Besides the goodwill of the business, he was possessed at his death of some house property, consisting of the shop and dwelling-house in Little King Street, and two other shops in Catherine Street, and personalty amounting to between £1300 and £1400. He left a trust-settlement under which the widow was to have the life interest of the whole estate, and the fee was to go to the children in such proportions as she might think fit. The widow, who was also executrix, seems to have been an energetic and enterprising woman. She carried on her husband's business from 1823 to 1828 in the old establishments, when she removed to a shop in Queen Street, in which from that year to the present time a trade in confectionery has been carried on by the family. The eldest of the sons was Alexander. He married early, and confined himself to the old baking business in his father's shops, for which he paid a rent to his mother. All the rest of the family continued to live together until the death of their mother in 1848, with the exception of one of the daughters who died early. The Queen Street business flourished greatly, and it was carried on under the designation of Jean Aitchison and Sons. There seems no doubt that in 1831 Mrs Aitchison had assumed her two sons, James and John, formally as partners, and they are named as such in an indenture dated in 1833. George Aitchison, another of the sons, opened a business as a baker in Wemyss Place about 1832, which turned out a very profitable concern, and was given up in 1865 or 1866. It appears that although James and John were the only two ostensible partners, all the rest of the family assisted in the business in Queen Street. Charles, the pursuer of this action, was the youngest of the family. He became a skilful confectioner, and there seems little doubt that the prosperity of the Queen Street business was greatly indebted to him, but it does not appear that he had any specific allowance for his labour in the shop, nor any specific footing arranged in writing. He was eight years old at the date of his father's death, and at his mother's death in 1848 was consequently thirty-two years of age.

There was but one bank account kept for the firm, and whoever were the partners entitled to operate on it, of which I shall afterwards speak, it seems sufficiently proved that from this account came all the funds by which the members of the Aitchison family were maintained, with the exception of Alexander, the eldest, and of George, who had his separate establishment. I rather gather from the result of the evidence that so close and intimate were the relations of the family to each other, and so complete the confidence which subsisted between them, that they obtained from John or James such money as they wanted for current use, and from time to time many investments were made, particularly the purchase of house property, in the names of different members of the family, all the funds for which came out of the profits of the Queen Street business, aided by very large sums contributed by George from the business in Wemyss Place. This was the state of the family in 1848, when the mother died. Passing over for the present some important events which happened at the

eriod. It is enough to say that the family continued to live together, the business to be conducted with great success on the same footing, and investments to be made in the same way until 1874. Previous to this the family had made separate settlements in favour of each other. By the last-mentioned date they had all died excepting John, Charles, and Isabella, when for the first time disagreement arose between them, caused apparently by the fact that George and James had made separate wills in favour of Charles, the pursuer. The result was that Charles raised an action against John for the purpose of obtaining an account of the profits of the business, and claiming an equal share therein with his other brothers and sister excepting Alexander. This claim the Lord Ordinary has sustained, on grounds which he has fully explained in his note.

The claim substantially is rested on two alternative grounds—partnership and joint interest. It is said that Charles Aitchison was a partner from the first, and continued to be so throughout the whole currency of the Queen Street business, with all the rights and liabilities of a partner in a trading concern. But it is said alternatively, that even if he was not a partner in any mercantile sense, the footing upon which the business was conducted from first to last was that the family should have a joint interest in its profits, whoever the nominal or legal partners were in a commercial and legal sense. There is a third, and to my mind a very formidable view, whether the members of this family, conducting their affairs upon a principle of mutual and tacit confidence in each other, did not leave them in a position so abnormal and primitive as, whatever the moral obligation might be, to create no legal standing ground for such a claim as this. I have seldom found more difficulty in coming to a conclusion satisfactory to my own mind than on the problems thus presented.

First, after full consideration I have come to a very clear opinion that the suggestion of a mercantile partnership on the part of the pursuer is one which cannot be maintained. The theory put forward by the pursuer on this head is, from the first there was an arrangement or understanding that each of the children should become partners in the family business when they became of age to accept and assume their share in it, and that although this was not evidenced by any writing at any time, the whole conduct of the parties, and the facts and circumstances under which they continued to act, are sufficient to establish that such was the case. I do not doubt that such a partnership might have been established by a general arrangement of this nature. Neither do I doubt that without any written document it might be proved by facts and circumstances leading inevitably to that inference. But the difficulty I find in giving effect to this plea is, that I can find no trace whatever of such an arrangement having been made, or any facts or circumstances leading to such an inference. On the contrary, I think it clear that no such arrangement was ever made, and that the facts and circumstances established by the proof are wholly inconsistent with it. If there were any arrangement and understanding which could receive any legal effect it was, I apprehend, of a nature entirely different.

The proposition to be proved is that Charles Aitchison became a partner of the trading firm of Jane Aitchison and Sons, and that he became, by contract entered into with him and some one entitled so to contract, liable for the debts as well as entitled to a share of the profits of the concern. Whoever made the contract originally, and however it may be established, that must be the legal result. Now, no one but his mother, old Mrs Aitchison, could have made this arrangement originally, and no one but the existing partners could have assumed him

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afterwards. But it is quite certain that old Mrs Aitchison never made such arrangement. It is proved beyond all doubt that from first to last she kept, and intended to keep, the business in her own hand, and subject entirely to her own will, excepting as regarded the two recognised partners. She thought as regarded Charles that she had complete control over him, and actually, on his engagement to be married, excluded him from any share in her own or her husband's estate, which she believed and Charles believed included the business, and which Charles never doubted she had power to do. I should not have laid much stress on the conveyance of her share in the partnership to her sons James and John, excepting that it seems to have been read, without any circumstance or remark, at the meeting of the family after the mother's death. But that fact proves the knowledge of the whole circle that the imaginary arrangement never existed. But what to my mind is quite conclusive on this head is that Charles never imagined for a moment that he was a partner. During the whole period from 1837, when he became of age, to 1848, when his mother died, he never did an act or made a statement implying that he was a partner. He never drew on the firm's account. He never signed the company firm. He never in any way held himself out to the public as a partner, or, as far as I see, did any act which could have made him liable, or indicated any intention of making himself liable for the company's debts. I cannot regard the investments which were made from time to time as participation in the profits of the company, because these were manifestly not distributed on any such footing. But the most conclusive of the facts and circumstances in the case are the acts and statements of the pursuer himself, because from first to last, down to the date of his mother's death, he never thought that he was a partner or said he was, but said and thought the reverse.

The circumstances connected with his engagement to be married, and the action which was brought against him for breach of promise, throw a significant light on this part of the case. He was at that time twenty-nine years of age, and, if the plea I am now considering had been true, had been a partner for eight years. I am not disposed to say that the statements made by a counsel in a judicial pleading are necessarily the statements of the party for any purpose but that of the lawsuit itself. But the fact that the statements in the defence lodged for him to the action were made, and made, unquestionably, with his knowledge and sanction, is a fact of very considerable importance. He has indeed said that he may or may not have seen this paper, and that his brothers James and John managed it for him; but if he had never seen it he could hardly be ignorant of that fact. It is there stated on his behalf, not merely that he never was a partner of the firm of Aitchison and Sons, but that the lady who sued him had tried to entrap him on the mistaken idea that he was a partner. I cannot believe that any man could authorise such a statement knowing it to be false, and if his brothers John and James authorised it, it only shows more clearly that they knew it to be true. It is indeed suggested that these statements were made for a purpose, to prevent the lady from arresting funds in the hands of the copartnership. But truth as well as falsehood may be stated for a purpose, as I have no doubt these statements were. And lastly, on this head when Charles in the witness-box is confronted with these statements he cannot deny their truth. Being asked—"Did you instruct Mr Wotherspoon to say in your defences that you were not a partner of the business of Aitchison and Sons?" he says—"No; I was in the sense that by the two wills I expected to get it, but I never

and nothing come. I always expected it to come to me, but I had never got it. No. 142.
 It was to come from the will of my mother, and I understood she had the power
 of excluding me." In other words, Charles knew that he was not a partner at
 that time, but only hoped he might become so. The mother executed two deeds
 for the purpose of excluding him from any share in the succession, and thus it
 seems to me clear that all the persons with whom this supposed contract was
 made, the mother, the two brothers, and Charles himself, knew quite well that
 no such contract had been made.

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Some isolated facts were thrown in as make-weights to help this theory, but
 they have no bearing on the case. I do not detain your Lordships by reference
 to them. They were much later in date, and were of no materiality as proving
 partnership. But I have sketched the principal grounds on which I think that
 this part of the case must fail. There was no partnership in 1848 at the mother's
 death, and thereafter the imaginary contract never was made.

I pass on, however, to the second, and, in my mind, much more important
 feature of this case. The relation between the different members of the family
 was not, and never was supposed to be, one of mercantile partnership. It was
 rather one of domestic community. The whole family lived together, worked
 together, and had to a certain extent everything in common. They present a
 very remarkable and very pleasant picture of family concord and confidence,
 which was unbroken for nearly fifty years. They never thought of putting their
 interests in the legal light of a commercial partnership, but they evidently did
 consider the wonderful prosperity which had descended upon them as the fruit
 of a joint concern, and that concern the estate of their father out of which it had
 grown. Old Mrs Aitchison never ceased to think that she and her children
 were administering the father's estate, and that her power of division extended
 to the large increment which the business yielded, just as it would have done
 the £1300 which he left in 1823.

As regards the mother's impression, it is easy to see on what it rested. She
 had taken the capital of her husband's estate and had invested it for her children,
 and she considered herself bound to deal with its fruits as if it had been the
 estate of which she was the administratrix. There was some reason in that.
 The business had no other capital than what she furnished, and although that
 might not have been sufficient of itself to render these profits the property
 of the children, it very reasonably accounts for the light in which she regarded
 them. By her will she divided her husband's estate among her children equally,
 and in my opinion the whole of this case turns on what she and the children
 understood that their father's estate consisted of.

This brings me to refer to what appears to me to be the most important ele-
 ment in this singular history—I mean the minute of the meeting of the family
 the late Mrs Jane Aitchison, held on the 27th of November 1848.¹ This
 minute is signed by all the surviving children, and it contains an agreement to
 divide the estate of the mother and the estate of the father as if the cancellation
 of Charles' interest had never been made. Then this is followed by a minute
 of agreement in the year 1851, between Alexander Aitchison, the eldest son, on
 the one part, and John Aitchison, "on the part of his other brothers and
 sisters, and taking burden for them," on the other part.

The claim which Alexander had made, and which was adjusted by this minute,

¹ Quoted *supra*, p. 902.

No. 142. was made on precisely the same grounds as that of the pursuer. He wanted a division of the partnership property as one of the family entitled to participate in his father's estate. The minute of agreement makes over certain heritable subjects to Alexander, which it is said are to be henceforth the property of Alexander Aitchison, and his brothers and his sister are at their expense to concur in making them over to him, and he is to be infest therein at their expense. On the other hand, it is stipulated that the remainder of the property of the late John Aitchison, or of his widow and family, including the subjects in Broughton Street, is to be henceforth the property of the other members of the family, and they are at their own expense to receive from Alexander Aitchison all deeds which may be necessary for fully vesting them therein. Then follows an obligation of a mutual discharge between Alexander and the rest of the family.

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Now, that which Alexander Aitchison had claimed, and which he thereby discharged, was a claim on the company's stock. It appears clearly from the evidence that that was the substance of his contention with the family. He wanted the company wound up and the estate divided, from which it appears quite clearly that the property of the widow and family, which was henceforth to be the property of the other members of the family, and the claims against which were to be discharged, were truly the profits of the business. It cannot be concealed that even in these writings there is a certain amount of ambiguity involved, but their importance consists in this, that if, as I am inclined to hold, the other circumstances of the case indicate throughout a community of interest from first to last, then this last-mentioned document, read in the light of these circumstances, amounts to a written acknowledgment of that common interest under the hand of John Aitchison as acting for all the members of the family. I cannot believe that the restitution of Charles under the first minute or the discharge by Alexander under the second, only referred to the two sums of £1300 which had been left by their father and mother. If I am right in this view of the transaction it relieves the case of all technical difficulty as regards the proof of trust, and amounts to an acknowledgment in writing of, what all the evidence seems to me to indicate, a common interest in the whole family in the realised fortune.

The Lord Ordinary has so fully explained the import of the general evidence on this subject that I forbear to enlarge on it. If I am right in my reading of these writings, the case rests, as I think, on a sufficiently solid foundation, and one much more consistent with the proved facts of the case than the theory of a commercial partnership in law. If a family of brothers and sisters, each engaged in their own avocations, agree to live together, and throw their separate earnings into a common fund, they will not thereby become partners in the separate trades or callings in which each might be engaged; but still, if they choose, by writing under their hand, to indicate the nature of their arrangement, the joint purse might be equally divisible. Such, I think, is the case here; nor do I think that the technical rule of law in regard to the proof of trust will avail to prevent us from giving effect to what we think was the true intention of the parties.

If, however, I am wrong in my view of these writings, it may be that, with the most friendly and affectionate intentions towards each other, the members of this family have failed to put their intentions in a form which the law will enforce. It is impossible to disguise that this alternative is capable of being supported by considerations not without weight. But with the best attention I

have been able to give to a case which has perplexed me more than any I ever had occasion to consider, I am of opinion, on the grounds which I have shortly illustrated, that the interlocutor of the Lord Ordinary ought to be adhered to. No. 142.
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LORD ORMDALE.—This is a very important case, not only as regards the large pecuniary interests involved, but also the nicety and difficulty in some respects of the legal principles upon which it depends.

The original defender, John Aitchison, having died since the Lord Ordinary's judgment was pronounced, his sister has been sisted in his place as his executrix and representative. It will be understood, however, that when I refer to the defender I mean the late John Aitchison. In dealing with the case I think it will be found of much importance, and conduce greatly to a sound result, to begin by endeavouring to ascertain what is the nature of the contract or other ground upon which the liability of the defender to the pursuer rests, for that there is some measure and description of liability is not disputed. Is it the contract of service as maintained by the defender, or the contract of partnership maintained by the pursuer, or does the liability of the defender to account arise simply from the position of trustee which, in one view of the case, it may be supposed he occupied in relation to the pursuer during the greater part of his life?

That the pursuer was merely a servant in the Queen Street establishment of Aitchison and Sons from the time he went there in 1835 till the raising of this action in 1875, a period of forty years, and that he can have no claim upon the defender on any other footing, is, I think, a wholly inadmissible view of the case. And yet, according to the defender's statement in the record, and when examined as a witness in the case, not only was the pursuer's position in the Queen Street business that of a mere servant, but his services as such were so valued as not to be "equivalent to the cost of his maintenance." This is *in* *minis* the statement he makes in the third article of his statement of facts; accordingly he admits in the course of his evidence that he never paid him any of his brothers any salary; and afterwards he says—"There was never any arrangement with Charles as to what wages he should get. He came and money from me occasionally." This evidence is wholly unsupported by entries in the books of the concern—books admittedly kept by or under the charge of the defender himself—and in opposition to all the other evidence in the case, which, whether sufficient or not to establish the ground action maintained by the pursuer, is at any rate conclusive to the effect that the pursuer's position in the business was not that of a servant merely. In the record, then, to that view of the matter, I consider it quite unnecessary to say anything, except to remark that the circumstance of the defender having put it forward, and in connection with it attempted to disparage without sufficient cause, the position and capacity of the pursuer, is calculated to detract very much from his credibility in other respects.

Then, the defender's view of his own and the pursuer's position in the business in question, viz., that of master and servant, and an accounting on that footing, may be dismissed as altogether untenable, the only other grounds of liability and accounting as between the pursuer and defender which I think were established were those of trust and partnership—that is to say, either that the defender must be held to have stood in the relation of a trustee to the pursuer, or that he and the pursuer, with other members of the family, had carried on the

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business in question in partnership, and that the defender having taken possession of the partnership funds and property in whole or in part is bound to account to the pursuer for his share thereof.

Now, in regard to holding that the defender's position was merely that of a trustee, and that he is subject to liability to account in that character alone, I have been unable to satisfy myself that this is the true ground of action, or that it can be sustained in the circumstances. It is certainly not the ground upon which the pursuer's counsel maintained his case at the bar. On the contrary, they distinctly stated, in answer to the direct inquiry of the Court, that it was partnership upon which they relied; and for myself I do not see how they could well have given any other answer, having regard not only to the whole circumstances of the case, but especially to the passage in the evidence of the pursuer when examined as a witness, in these terms—" (Q.) What have you understood all along to be your position in this business?—(A.) Just a partner. (Q.) Equally with the rest?—(A.) Yes; equally. (Q.) With all your brothers and your sister—(A.) All the same. (Q.) Can you say from anything which was stated to you by George and William what they understood to be their position?—(A.) Just the same." It would be difficult therefore, I think, for the pursuer, in the face of such evidence as this, given by himself, to maintain his action on any other ground than that of partnership. Besides, it is very obvious that if it was purely trust and not partnership that the pursuer desired to make out, a great part of the proof must be held to be incompetent; for it is a rule of the law in Scotland, about which there can be no question, that a trust can only be established against a party by his writ or oath, as required by the Act 1696, cap. 2. But in this case the proof has not been governed by any such rule. On the contrary, a great deal of parole testimony has been adduced quite inconsistent with it, although very valuable in the constitution of a partnership. I do not, indeed, see how the indispensable foundation of a trust can be found in this case. There is no doubt the family agreement embodied in the minute No 20 of proceedings dated 27th November 1848,¹ which, being subscribed by both the pursuer and defender, must be held to be the writ of each. But after careful consideration of that writ I have been unable to hold that it can be taken as constituting trust—such a trust as would be necessary to support the present action against the defender. It bears as its sole object to set aside a codicil to her will by Mrs Aitchison, and to declare that the estate of her husband, the father of one of the parties to the minute, should be divided as if no such codicil existed. Beyond this there is nothing in the minute, and it certainly contains no express reference to a trust or to trustees. And if parole evidence were admissible at all in a question as to the constitution of a trust, in order to explain the true meaning of the minute of 27th November 1848, I do not see how the parole evidence in the present case can aid that object. No witness is asked anything, I think, in relation to the minute except the pursuer and defender. The first is not, however, asked a single question as to what he understood to be the meaning and effect of the minute. He is merely asked some questions as to the bearing on another minute of agreement between old Mrs Aitchison and her sons John and James, in which they describe themselves as the "only partners in the company carrying on business in No 77 Queen Street, Edinburgh."² How far that agreement may be a piece of evidence in the question whether the p

¹ Quoted *supra*, p. 902.

² Quoted *supra*, p. 901.

suer was or was not a partner in the Queen Street business will be afterwards considered with the rest of the evidence bearing on that matter, but as to its establishing a trust, or being any evidence to that effect, I fail to understand. As to the defender's parole testimony, again, he is merely asked in regard to the minute of agreement No. 7 of process, about his mother's signature to it, and as to its meaning or effect; and so, as to the minute of 27th November 1848, No. 20 of process, he is merely asked a few questions to shew that all the family were present at the meeting, and that the minute sets out what really occurred.

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In my opinion, therefore, the ground of the defender's liability to account to the pursuer must, if it is to be established at all, be made out on the footing of there having been a partnership between them and their brothers and sisters. There can be no doubt, I think, that such a ground of action has been averred and pleaded by the pursuer with sufficient relevancy and specification, and this did not understand to be disputed.

It only remains, then, in any admissible view that I can take of the case, to consider whether the pursuer has established his claim against the defender for accounting on the ground of partnership. But, before examining the evidence applicable to such a ground of liability it is necessary to keep in view the mode by which partnership may be legally constituted, and the nature of the evidence by which it may be competently established. Professor Bell—and no higher authority than that could be appealed to on the subject—says, section 351 of his Principles,—“Partnership may be described as a mutual contract and voluntary association of two or more persons for the acquisition of gain or profit, with a contribution, for that end, of stipulated charges of goods, money, skill, and industry—the stock of the society being held in trust for creditors.” And in section 353 he explains,—“The stock of the company, as contributed, and increased diminished by the dealings of the company, is not only common and held *pro diviso* by all the partners, but it is vested in them in trust, for the creditors of the company in the first place; and afterwards for division among the partners, according to the shares of each.” I do not suppose that exception can be taken to this definition of partnership, and I think it was incumbent upon the pursuer to make out that there was a partnership, as so defined, between him and the defender and the other members of their family.

But in order to do this it was not necessary for the pursuer to shew that there was any written contract of copartnership specifically setting out the kind of business which was to form its object, the date of its commencement, the number of partners, the capital or stock contributed by each, or any other particulars. As this Professor Bell says, in section 361 of his Principles, in reference to the evidence of partnership as between the partners themselves—and that is the question which presents itself for consideration in the present case—that “partnership as between the partners themselves is a consensual contract, and on such evidence as the law of Scotland admits in proof of consent the partners will be entitled to their rights as such, or bound to the public. This may be either, 1st, a solemn written contract of copartnership duly authenticated; 2d, a less formal writing,—letters exchanged, minutes, articles subscribed by initials and afterwards acted upon, or articles written in the ledger; 3d, circumstantial proof; or 4th, parole evidence of clerks, agents, or persons dealing with the company.” That the law of England is to the same effect is obvious from the statement in Mr Justice Aldley's work on Partnership (vol. 1 of last ed. p. 94), where he says—“Partnerships, even for long terms of years, very often exist in this country

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without any written agreement at all, the absence of direct documentary evidence of any agreement for a partnership is entitled to very little weight. As between the alleged partners themselves, the evidence relied on where no written agreement is forthcoming, is their conduct, the mode in which they have dealt with each other, and the mode in which each has, with the knowledge of the other dealt with other people. This can be shewn by books of account, by the testimony of clerks, agents, and other persons, by letters and admissions, and, in short, by any of the modes in which facts can be established."

When the true nature of partnership is considered, and the various modes in which it may be established as a consensual contract, as now explained, are kept in view, much of the difficulty which might otherwise be experienced in arriving at a determination in this case will, I think, disappear. It must also be recollected that the alleged partnership, if it existed at all, continued over a very long period of time; that the acts and conduct of the parties, as well as the other circumstances occurring during all that time, must be considered as a whole, and not taken and disposed of in reference to separate and detached periods, or separate and detached events.

The only question, then, that remains is the jury one, for it is essentially a jury question, although tried by the Court as in place of a jury—Whether the pursuer has sufficiently established that the alleged partnership existed? As this leads me to a consideration of the evidence in the case. It is not, however, my intention to enter with much detail or minuteness into an examination of the evidence; nor is it necessary that I should do so after the thorough manner in which this has been done by the Lord Ordinary. There are, however, some points arising on the proof in regard to which it may be right that I should say a few words.

There is, first, the peculiar state of matters for the time between the death of old Mr Aitchison, the father of the parties, in 1823, and the death of the wife of their mother, in 1848. If the question of partnership had arisen in reference to that period and been limited to that period of time alone, the pursuer might have had more difficulty to encounter than he has in the case as it stands, for undoubtedly the relative position of parties was peculiar, and in certain views scarcely consistent with partnership. But when the acts and conduct of the parties, and all the circumstances which subsequently occurred, are also taken into consideration in connection with and in continuation of these of the more limited period I have referred to, a flood of reflected light is let in which enables the Court to determine what the true position of the parties has been throughout, and what their respective rights and liabilities. For example, as the pursuer was in partnership for some part of the limited period between the deaths of his father and mother, he could neither have discharged the duties nor subjected himself to the responsibilities of a partner.

But it is also indisputable that his mother and brothers, including the defender who had attained majority long before him, might, if they pleased, have assisted towards him, and so dealt with his patrimony, as to entitle him after he came of age to assume the position of a partner, and warrant him in insisting, as he now does, for an accounting with the defender. This very point is dealt with by Professor Bell in his Commentaries (vol. ii. p. 624 of 5th ed.), where he says "One who is incapable of consent—a pupil, an idiot, or a lunatic—cannot enter into a partnership; but they may continue to enjoy the benefit of a share in a partnership which has pre-existed or has descended to them." Mr Lindsay

again (vol. i. p. 82), says—"An infant may be a partner; but, speaking generally, while he is an infant he incurs no liability, and is not responsible for the debts of the firm; and when he comes of age, or even before it, he may, if he chooses, disaffirm past transactions." But as Mr Justice Lindley also shews (*ib.* p. 84), the infant may after he comes of age affirm and ratify what has been done for him, and continue the partnership which had previously commenced. I cannot, therefore, see that any insuperable difficulty arises from the age of the pursuer during some part of the time between the deaths of his father and mother, or from the apparent assumption, on one occasion at least, by his mother of power to disinherit him, and cut him off from all connection with the alleged partnership business. The conduct of the pursuer's mother in this respect appears, as has been satisfactorily explained by the Lord Ordinary, to have been imputed for a temporary purpose, and was very soon departed from.

Nor do I think that the written documents, very few in number, founded on by the defender as proving that he and his brother James were the only partners of Aitchison and Sons, create any great difficulty, when all the circumstances connected with them are kept in view. The pursuer was not a party to any of these documents, and it is not proved that he had ever seen any of them till they were produced in the present action, except the minute of agreement of 23d December 1847, No. 7 of process,¹ to which I have had occasion already to allude. But the pursuer was not a party to that minute of agreement, and of course he was not in any way committed or bound by it, at least directly. It was argued, however, that as it was referred to in the minute of meeting of 27th November 1848, No. 20 of process,² and as the pursuer was present at that meeting and took no objection to the statement in it, to the effect that the defender and James Aitchison were the only partners of the company carrying on business in Queen Street, he must be held to have admitted that as a fact, and is now barred from maintaining the contrary. I cannot think so, having regard to the pursuer's explanations when examined as a witness, and the mass of evidence in the case inconsistent with and contradictory of any such theory.

Another piece of written evidence on which the defender seemed greatly to rely, but with which, I must own, I have not been much impressed, is the statement made in name of the pursuer in his defences to Miss Tucker's action against him, to the effect that he was not a partner of the Queen Street company. But, besides the reasons assigned by the Lord Ordinary for laying that statement aside of little moment, I must remark that I greatly doubt whether it is admissible competent evidence at all in the present suit. It was a statement made in a different suit with a different party and in reference to a different matter altogether; and it has not, I think, been sufficiently proved that the pleading in which the statement appears had been seen by or approved of by the pursuer, though made for him by his solicitor or counsel. In the case of *Marianski v. Cairns* it appears to have been held in the House of Lords (1 Macqueen, p. 212) that, as a general rule, pleadings for a party in one suit cannot be used in another way of admission against him unless the pleadings were signed by himself. Now, as the pleadings for the pursuer in the suit with Tucker were not signed by him, the statements contained in these pleadings cannot legitimately be used founded on against him in the present case.

But while there are some written documents of more or less importance which the defender has founded on as furnishing evidence in his favour, there are other

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writings which appear to me to furnish evidence equally strong, if not stronger, against him. Take, for example, the minute of agreement of 17th March 1851, No. 9 of process, between the defender and his eldest brother Alexander Aitchison, when the latter went out of the business and separated his interests from the rest of the family. John, the defender, entered into that agreement, as it bears, for himself, and "on the part of his other brothers (including the present pursuer) and sister." By the second head of that agreement it is stipulated that, with the exception of what is specially assigned to Alexander, "the remainder of the property of the late John Aitchison, or of his widow and family, including the subjects in Broughton Street, is to be henceforth the property of the other members of the family." It rather appears to me that the defender was here dealing with the whole property and interests which had accrued to him and all the family from both father and mother, and if so, the whole property and interests—and the company business of Aitchison and Sons was and is a very valuable property—which he maintains in the present action to have then belonged to him after settling with Alexander, must have comprehended the very partnership, property, and interests now in dispute. And if I am right in this, it is all but conclusive against the defender, especially when taken in connection with what appears to be the relative explanatory statement of Alexander Aitchison, in his own handwriting, No. 173 of process,¹ and the formal disposition, No. 144 of process, which was shortly afterwards executed by Alexander, of the Queen Street shop, where the business was carried in favour, not of the defender only, but of him and also of the pursuer and all the brothers and sisters then alive.

Independently of and in addition to the written documents there is a great deal of what appears to me to be very valuable oral testimony, which, indeed, was indispensable in explanation of the acts and conduct of parties. Now, I cannot help thinking that the preponderance of the parole testimony is favourable to the pursuer and against the defender. After very careful consideration I think it establishes amongst others the following important points—(1) That there was throughout a common purse or fund into which, on the one hand, all the drawings from the Queen Street business and its branches, and the rents of the houses, and interest of the other investments made by them from time to time, were put, and, on the other hand, all the personal expenses of the parties were drawn as they required; (2) that it is also established that the pursuer, from the time he joined the business in 1835 till the present action was raised, was as constantly in attendance and charge of his own department of the business as the defender was of his; (3) that it is also established that in or for such attendance and charge there is no indication whatever of the pursuer having ever acted, or been paid or treated as a servant or employee merely in the business any more than the defender himself; (4) that it has, on the contrary, been proved by distinct and uncontradicted testimony that the pursuer acted, and was looked upon and considered by others, as a partner of the company just as the defender was; and (5) that no rent was ever paid by the company or by the defender and James, assuming that they were the only partners of it, as the defender says, for the Queen Street premises, although according to the title, and indeed admittedly, these premises belonged to all the family alike, and not to the defender and James or either of them alone.

¹ A writing headed "Statement of Facts for Mr Alexander Aitchison, 1849" embodying Alexander's views in regard to the questions in dispute between him and his brothers.

It only remains for me to notice the Wemyss Place baking business, and to say that although this part of the case appears to be attended with some difficulty, it is not attached to the Queen Street business proper, yet, for the reasons stated by the Lord Ordinary, I think it must be held to have been very much of the nature of an adjunct to or branch of the Queen Street business. This is, I think, the only view of the matter that can fairly be taken in a question with the defender. On the grounds, therefore, which I have now explained, and for the reasons I have stated, I am of opinion that the interlocutor of the Lord Ordinary reclaimed against ought to be adhered to.

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LORD GIFFORD.—This is in some respects a difficult and perplexing case, but I have felt its difficulty to be rather in the application of legal principle to a case so singular, and perhaps unprecedented, than in any doubt as to the fair import and meaning of the evidence which has been adduced.

The legal rights of the parties, the rights of the pursuer and of the original defender, who is now represented by the sole surviving sister, are to be determined on a consideration of their whole actings and conduct, and of the actings and conduct of the other members of the family during the whole period of their respective lives, at least from the year 1823, when old John Aitchison, baker in Edinburgh, the father of the whole family, died, down to 1875, when the present dispute arose. The family history thus extends over a period of upwards of fifty years. During that period the whole actings and conduct of the pursuer and defender, and indeed of all the members of the family, must be fully considered, for it is upon a just estimate of the legal effect of these actings and of that conduct that the rights of the individual members of this family must be determined.

The history of this family is almost unique. Perhaps in earlier and simpler times, when manners were more patriarchal, the occurrence of such a history might be more frequent. In modern times, at least, and with modern manners, its occurrence is and must be very rare.

Old John Aitchison died in 1823, leaving a widow and a family of nine. None of the children excepting Alexander were ever married. The widow and the whole family, excepting Alexander, who was married in 1834, always occupied the same dwelling-house. They lived as one family under the same roof. From time to time each of them, as they attained, I may almost say, puberty or early youth, contributed their services and efforts for behoof of the common and divided family. At first the widow and the elder children took up and carried on the baking business which the father had left at his death in 1823. From time to time, as the other members of the family came in, they extended the business, took additional shops in different localities, improving and extending the business by adding to it a large and what ultimately became its most important branch, that of confectionery, skilled cooking, and the preparation of ices and desserts. In the conduct of this business in its various branches, and at the different shops, each member of the family devoted himself or herself to the department or work for which each was best suited. The original defender John, who had received a mercantile education, became book-keeper and cashier. The pursuer ultimately became the practical confectioner, and seems to have had very high skill in the preparation of the delicacies of the table. Her brothers superintended the bread and biscuit baking, or bought and dealt in wheat and flour, while the daughters, or such of them as were not needed to

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superintend the domestic arrangements of the common dwelling-house, served in the shops and attended to the customers at the counters. There never was any written contract of copartnery, or any written deed of agreement of any kind—the family had so much confidence in each other that they never thought of defining their rights in or reducing their agreement to writing. Their cordiality was so great, their confidence in each other so exuberant, that they never seem to have thought of asking even in their own minds what their rights were. They were brothers and sisters, and that was enough, and as morning and evening they met round the common table, or as they separated daily each to his appropriate work, but all contributing to one common end, and as they rejoined at evening—one unbroken circle—no question of legal right seems ever to have shadowed their primeval life, for no one ever called anything that he had his own.

From the first this united family had to all intents and purposes a common purse. The old father, John Aitchison, who died in 1823, had left, beside some heritable property, a sum of about £1300. The widow—the mother—seems to have taken possession of her husband's estate, and the whole went into the common stock, and was applied in carrying on the common business. None of the children ever dreamed of asking a division of patrimony either before or after the widow's death, which occurred in 1848, nor did any of them ever ask or obtain any count and reckoning with each other either in reference to their father's succession or their mother's succession, or in reference to the money made in the different shops and businesses which from time to time they carried on. The only exception is the case of the eldest son Alexander, who having married in 1834 (and he was the only married member of the family) came to have interests which were or at least might be separate from, if not adverse to, those of his brothers and sisters. Alexander, from his marriage in 1834, seems to have managed as his own a separate business, but he still retained, at least he claimed to have retained, his share and interest in what may be termed the family or community stock and estate held in common by all the other members of the family, and this claim was not finally settled and Alexander Aitchison finally paid out till 17th March 1851. Of that date a minute of agreement was entered into, No. 9 of process, between Alexander Aitchison on the one part, for himself, and John Aitchison, on the other part, acting not for himself only, but for all the other members of the family. By that agreement Alexander Aitchison agreed to take, and did take, in full of all his claims certain heritable subjects specially agreed upon, and a share in the Stockdale Mill Company, and in respect thereof he discharged his brothers and sisters of all further claim; and, on the other hand (and this is very material, for the deed is the deed of the late John Aitchison, the original defender, acting for himself and for all his brothers and sisters except Alexander), it is expressly stipulated that the remainder of the property—first, of the late John Aitchison, that of the common father; second, of his widow, that is, old Mrs Aitchison, who died three years before; and third, of the family, that is, the whole estate, most of them then getting to be elderly persons—I take the words of the deed—“is to be henceforth the property of the other members of the family, and they are at their own expense to receive from Alexander Aitchison all such which may be necessary for fully vesting them therein.” In this way every article or item of property belonging to the family, except what was specially handed over to Alexander in 1851, is declared to be and plainly was the property

erty—that is, the common property—of the other members of the family—that No. 142.
of the whole children excepting Alexander.

It appears to me that this incident in the family history—I mean the final June 16, 1877.
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paying out or paying off the eldest son Alexander in 1851—throws great light upon the footing on which the rest stood at that date. *Exceptio firmat regulam*. Alexander is no longer to be a member of this family community, but all the rest are to continue to be so. The discharge of Alexander and the deed executed between him and John really amounts to an express declaration that everything that is left is in point of fact the joint and *pro indiviso* property of John and his whole remaining brothers and sister. The perfect community and equality of the interests of the remaining brothers and sister are thus made all the clearer by the exceptional exclusion of one brother, Alexander.

This conclusion—I mean the conclusion that all the property of the brothers and sister except Alexander was held in common—is confirmed, if confirmation is necessary, by the mutual wills which a couple of months afterwards all the elder brothers and the sister made in favour of each other. These wills are of the 10, 11, 12, 13, 14, and 15 of process, and thereby each member of the family constituted all the others—excepting always Alexander—to be in equal shares their respective universal heirs, and thus the family all living in the common domicile in Queen Street were united both in life and in case of death as a community, each having equal shares in one undivided common fund. Practically this family had only one bank account, for although individual members seem on one or two occasions to have set apart sometimes in bank what may be called his or her *peculium* or pocket-money, there was really only one common bank account for their common earnings. Into this account went the profits which arose from the various businesses and transactions in which the family were engaged. Out of it came from time to time the sums required for the investments which were made from time to time chiefly in the purchase of heritable subjects, in loans, and in shares in public companies. The bank account was in name of “Jane Aitchison and Sons,” Jane Aitchison being the widow’s name, and it was operated upon by James Aitchison, by John Aitchison, by George Aitchison, and by Isabella Aitchison, all of whom had power to sign cheques and draw whatever sums were required for common purposes. The fact that the others of the family, and in particular the pursuer, did not draw and had no right to draw on the bank account is immaterial, for it often happens even in the most mercantile partnerships that only some of the partners are allowed to draw on the bank account.

The mode in which and the persons in whose favour the various investments were taken occasion some difficulty, but I think, on the whole, the history of the investments points to continued community of interest. Large sums seem to have been saved almost every year, for the businesses were all prosperous, and these sums were invested from time to time as the balance accumulated in the bank. At first the investments were taken in the names of all the children, including Alexander before he was paid out, but afterwards they were taken, so far as I can judge, almost arbitrarily, sometimes in name of one member of the family, sometimes of another, and sometimes of several different members of the family, the names being selected arbitrarily or at least without any apparent principle. It is not possible to state any principle upon which the various investments are allocated among the different members of the family. It is not pretended that there was any attempt at equality, and it is certain that there never

No. 142. was in any one single case any assignment of special value given, such as wages for service rendered, or salary or remuneration for work done by any particular member of the family.

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And then, after the investments were made, what followed points still more strongly to the continuing community in the whole and in each of the investments, for the rents, dividends, and interests accruing on the investments were not uplifted, drawn, and retained by those particular members of the family in whose names the investments were made, but they all came back to the common stock, helped to swell the annual surplus of each year, which again went to the purchase of new investments made in the same way, and the profits of which accruing from time to time were deposited and accumulated as before.

The adoption of special names for the investments seems to have arisen from the advice which the family had received that the titles to heritable subjects could not be taken to a company or community, but must be taken in the names of specified individuals. In the fullness of the confidence which subsisted between those brothers and sister it seems to have been thought of no consequence whatever in whose names any of the investments were taken.

I gather, then, from the evidence regarding the investments additional corroboration of what appears in the whole history, besides, that the whole property of this family, excepting Alexander after 1851, was the common property of all and of every member thereof.

I need not go further into the details of the evidence which has been laid before us. These details all point one way. Even the seeming exceptions when carefully examined really make for the same result. For example, when George Aitchison, instead of carrying the daily drawings of the Wemyss Place shop to his brother John in Queen Street, as he used to do, to be banked in common form in the common bank account, began to accumulate these drawings in tin boxes in his back shop till they amounted to a great many thousands of pounds, he did so not because he thought or held that these drawings were his own, but as a means of inducing his brother John, who was common cashier, to tell him the state of the common affairs, which he thought John was concealing or withholding, and with whom George did not want to come to open rupture, and accordingly these very tin-box accumulations, and the bank account, when after the attempted burglary superseded the tin boxes, were not kept by George to himself, but were applied, just like the ordinary investments of surplus profits between himself and his brothers William and Charles. From first to last not a shilling was ever paid in wages to any one member of the family, although they all contributed their work and labour and skill; and yet, except upon the footing of community and common interest, the defender's theory must be that some of the brothers and sister were merely the servants or employees of the others, though who were masters and who were servants it is impossible to say. When the country residence of Mount Vernon was purchased in 1854, the title to it was taken to all the brothers and sisters then surviving except Alexander, and its fruit and produce—grapes, peaches, and strawberries, very large quantities in amount—all came to the common Queen Street business. The very attempt to exclude the present pursuer, or to attempt or pretend to exclude him, when in 1845 he got into a scrape by promising to marry Miss Tucker, and was cleared in damages, really confirms his equal interest in the whole, for when Miss Tucker's diligence was got rid of, and she had been induced to accept a compromise,

um in full of her claims, the pretended exclusion was done away with, and the No. 142.
 pursuer was recognised as an equal member of this fraternal community.

Without going further into the evidence, the result is that I have ultimately June 16, 1877.
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 come, and really without much difficulty, to the conclusion that all the members
 of this family, including old Mrs Aitchison while she survived, agreed that their
 whole property should be held in common as one individual family ; that the
 business which they carried on at first in one, and afterwards in several shops
 and departments, should belong to them all, and be carried on for their common
 benefit and behoof ; that the whole profits and produce, both of the property
 and of the business, should form one common fund, in which all the members of
 the family should share in equal proportions. It is also proved that when Alexander
 Aitchison left this community in 1851 the whole other members of the
 family agreed to continue joint proprietors in equal shares of the businesses and
 properties which remained after Alexander was paid out. I have no difficulty
 coming to this conclusion in point of fact. The conduct and actings of the
 parties admit, I think, of no other interpretation, and the equitable claim of
 each member of the family to one just and equal share of the whole accumulated
 stock and property, is, I think, clearly established.

It only remains to consider whether the law can give effect to an agreement
 of family community, as I may call it, established by facts and circumstances,
 I think has been done in the present case, and if so, what is the legal character
 of the legal position of the parties to such an agreement, and what is the legal
 category under which such agreement falls.

Now, I am of opinion that it is quite legal and competent for the members of
 a family, or indeed for any person whatever, whether related by blood or not, to
 enter into such an agreement as that made between the members of this Aitchi-
 son family, and I think such agreement (I have called it provisionally an
 agreement of community) may be legally and competently proved, as has been
 done in the present case, by facts and circumstances.

But I think the compact between the members of this family is really a case
 of partnership, and falls under that category of the law. No doubt it is much
 wider and broader than mercantile partnerships usually are. It embraced the
 whole property of all the partners, at least all the property to which they had
 title by succession from their father and mother, with all its increments, and all
 which each of them had earned or contributed to earn from their early youth up-
 wards. This may be a very uncommon kind of partnership, but there is nothing
 illegal in it, and all the incidents of partnership are equally applicable to it as
 to the ordinary case where each partner only contributes a specified portion of
 special capital upon which the trade is to be carried on. Indeed, community
 is just a name for a wide and universal partnership, which includes the whole
 estate and the whole property and earnings of all the *socii*.

Again, it may be difficult or impossible to say at what precise date each member
 of this family partnership acquired the rights or incurred the liabilities of a
 partner, but this may often happen even in strict mercantile partnerships, when
 they are constituted not by formal agreement but by long actings of the partners
de facto. When once sufficient proof by actings and circumstances has accumu-
 lated, the law may affirm the partnership, though it may not be possible to fix
 a precise date of its commencement. It is quite established law that a pupil
 or lunatic who is adopted as a partner, and whose funds are employed in a
 partnership business, will be held as a partner to the effect of sharing in the

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It may also be quite true that if any question had arisen with third parties such third parties might have been quite unable to establish this partnership so as to bring home personal liability to the pursuer or to his sister or to some others of the less prominent members of the family. But this would be simply from the difficulty of the proof as undertaken by third parties in the case supposed. It would be an accident, not of the contract, but of the difficulty of proving it, and this often happens even in strict mercantile partnerships. There are often sleeping partners who lie so quiet and are so concealed that the public creditors of the firm cannot discover them so as to bring home liability to them, and yet in questions *inter socios* their rights as partners may be made perfectly clear.

In short, I am prepared to hold, although at first I had great difficulty in doing so, that the present is a proper case of universal partnership between all the members of the Aitchison family, Alexander of course being excepted after 1851—that the stock of the partnership consisted of the whole patrimony or succession of all the members of the family, with the whole increment and accumulations which resulted either from the employment of that patrimony in the various businesses in which the members of the family engaged or from the investments in the acquisition of which from time to time parts of the common stock were expended.

But after all I am not sure whether there is any necessity for defining with logical accuracy the precise legal category under which the present case falls. The Lord Ordinary has not done so, and, I think, it will be sufficient if we refer here to the interlocutor which he has pronounced.

THE COURT adhered.

LOCKHEART THOMSON, S.S.C.—WOTHERSPOON & MACK, S.S.C.—Agents.

No. 143.

ALEXANDER GEORGE GOW, Petitioner.—*Fraser—R. V. Campbell.*

CHARLES WILLIAM SCHULZE, Respondent.—*Balfour—Lang.*

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Partnership—Dissolution and Winding up—Sequestration of Partnership Estate, and Appointment of Judicial Factor.—Where, after the dissolution of a partnership, the two partners differed in the winding up of the concern, and the realisation of its outstanding accounts, the Court refused a petition by one of the partners for the sequestration of the partnership estate and appointment of a judicial factor, on the ground that the questions between the partners really resolved into questions of accounting, which a judicial factor could not determine, and that in the realisation of outstanding debts the appointment of a judicial factor would be without advantage, and the cause of additional expense to the partnership estate.

1ST DIVISION.
Lord Gifford.
B.

THIS was a petition presented to the Court by Alexander George Gow, merchant in Dundee, one of the partners of the dissolved firm of Schulze, Gow, and Co., for sequestration of the partnership estate, and appointment of a judicial factor to realise the estate and wind up the concern.

In support of this petition Mr Gow stated: In 1866 a contract of copartnership had been entered into by himself and Mr Charles William Schulze to carry on business under the firm of Schulze, Gow, and Co. as merchants and commission-agents. This partnership subsisted until 1866

July 1875, when, by mutual consent of the partners, it was brought to an end, and the company thereafter only existed for the purpose of liquidation. The business of the firm was entirely in Dundee and Galashiels goods, and the customers of the firm were chiefly, if not entirely, foreigners carrying on business in all parts of the Continent and in Egypt. The Dundee business was managed solely by the petitioner himself, and the Galashiels branch by Mr Schulze. According to the arrangement between the partners a complete set of books was to be kept at Galashiels for the firm's Galashiels business, and another complete set of books at Dundee, to embrace the firm's whole business, including the Galashiels business. One bank account was kept in the Bank of Scotland, Dundee, for the whole business of the firm, and funds were thence supplied for the business of the Galashiels branch. Mr Schulze drew upon this account, and ought to have lodged his receipts therein, but failed to do so to a large amount. He likewise failed to keep regular books at Galashiels for the firm's business there, and failed to supply the petitioner with information as to the firm's transactions there for the making up of the general books of the firm. The business of the firm had been very profitable during the years 1873-75, and at the dissolution of the firm on 31st July 1875 the company estate was of the value of at least £25,000, consisting of—goods of the Dundee branch, about £4400; goods of the Galashiels branch, about £6841; outstanding accounts due to the Galashiels branch, about £5000; a large unascertained amount due by agents of the firm to the Galashiels branch; and a large unascertained amount of profits on the Galashiels business not accounted for. Owing to Mr Schulze's default the petitioner was unable to give an accurate or detailed state of the company's affairs. The liabilities of the firm at Dundee had been discharged, and it was represented by Mr Schulze that the liabilities of the firm at Galashiels had also been discharged, but whether or not this was so the petitioner was unable to ascertain. When the winding up of the firm's affairs commenced the petitioner pressed on Mr Schulze the necessity of at once taking stock, and making up a balance-sheet of the firm's affairs. This Mr Schulze delayed and evaded, and had continued to evade, so that the petitioner was still without information as to how the affairs of the firm stood. So far as the making up of the accounts of the firm Mr Schulze would give no assistance, and refused to concur with the petitioner in taking any proper steps for winding up the affairs of the firm, and a joint liquidation by the partners had become impracticable. Further, in the realisation of the assets of the firm Mr Schulze had used his powers as a partner and his position as head of the Galashiels branch, to the injury of the petitioner and the destruction of mutual confidence and co-operation. He was intent upon establishing himself exclusively in the business formerly carried on by the firm in Galashiels; in league with the foreign agents and travellers of the firm whom he was employing he was using his opportunities to further his own ends at the expense of the petitioner. Though nearly two years had elapsed since the dissolution of the copartnership he had never given any satisfactory account of the Galashiels stock or of its disposal, and he had or pretended he had collected none of the debts due to the Galashiels branch, which amounted to more than £5000. These outstanding accounts of the firm were in imminent danger of being lost if a judicial factor was not at once appointed.

Mr Schulze resisted the application for the appointment of a factor, on the ground that the appointment would be a great expense to the firm, and of little practical use. He denied the averments of the petitioner, and represented that all obstruction in winding up the busi-

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ness had been occasioned by the petitioner, and that the debts due to the Galashiels branch, which it was proposed the judicial factor should collect, were all bad or doubtful debts due by foreign debtors, which were extremely difficult to collect, and required a long time, and the attention of foreign agents and travellers, which would not be at the command of a judicial factor. So far as recoverable the debts were being gradually recovered, and that in point of fact the debts due to the Dundee branch were in the same position, and had not been collected by the petitioner. This the petitioner admitted.

The respondent offered at the bar, either (1) to continue to do his best to recover these debts, which are all due abroad, and many of them in peculiar positions, and that, so far as the respondent was personally concerned, gratuitously; or (2) to concur with the petitioner in any steps the petitioner might suggest as to any or all of these debts. This offer was verbally rejected at the bar by the petitioner, who said he knew nothing whatever about these foreign debts.

The respondent then offered by minute, " (1) either to sell or to purchase the outstanding debts by sealed tender; or (2) to dispose of the whole outstanding debts by public roup, both parties being at liberty to bid."

The Lord Ordinary, on 10th May 1877, refused the prayer of the petition, and dismissed the same, with expenses.*

* "NOTE.—... The parties are at issue as to an accounting *inter se*. In particular, the petitioner says that the respondent has failed to account for his intrusions, and to exhibit proper balances and states of affairs of the Galashiels branch. The petitioner also says that he has various claims against the respondent, including apparently claims of damages—that he has entirely lost confidence in the respondent—that he mistrusts his action in the farther realisation of the debts—that he has asked in vain a full accounting; and he now seeks sequestration of the estates and the appointment of a judicial factor.

"The Lord Ordinary, after hearing parties on 1st instant, continued the case for eight days that the petitioner might examine, with what assistance he chose, the Galashiels books, which, it appears, he had never yet done. On 9th current, however, he intimated that he declined to look at the books, or to say what should be done with any of the outstanding debts, or to give any assistance or advice either in recovering the debts of his own branch or those of the Galashiels branch, but that he simply insisted in the prayer of his petition.

"The Lord Ordinary, after full consideration, is of opinion that the petitioner is not entitled *hoc statu* to the sequestration of the debts and the appointment of a judicial factor.

"One of the main grounds, indeed the principal ground, on which the petitioner relied was, that the accounts between the two partners, that is, the co-account and reckoning *inter socios*, were in a state of confusion; that the books, and especially the Galashiels books, had not been properly kept; and that the respondent had failed to account for his intrusions; and he insisted that the first duty of the factor, if appointed, would be to call the respondent to account to examine into the respondent's whole intrusions, both during the partnership and since its dissolution, and to ascertain and fix the balance now due by the respondent to the petitioner.

"The Lord Ordinary cannot concur in this view. He thinks that when a judicial factor is appointed to wind up a company estate his primary duty is to realise outstanding assets, and not to settle past questions of accounting *inter socios*. No doubt his acting in realising may often facilitate the accounting *inter socios*, and when there is no dispute he will also distribute among the partners; but where serious disputes arise between the partners as to the shares, or as to their past actings, especially as to claims of damages, a factor has no judge of such matters. He has no power to give any binding deliverance

The petitioner reclaimed and argued;—Where the affairs of a partnership, and particularly a partnership in course of liquidation, had come to

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to take proof of any kind as between partners; and his probable course would be, in the case of serious differences, simply to consign the net funds recovered, and allow the partners to compete for them *inter se* by a multiplepointing or otherwise. Accordingly, if in any case there are no outstanding assets at all to recover—if, for example, in the present case, there had been no outstanding debts, the Lord Ordinary, as at present advised, would never sequestrate and appoint a judicial factor merely because there are unsettled disputes between the parties.

“The only ground therefore upon which, in the Lord Ordinary’s opinion, the present application can rest, is that a judicial factor is necessary in order to ingather the bad and doubtful debts still outstanding.

“But the Lord Ordinary is of opinion that in the present case there is no necessity for the appointment of a judicial factor in order to collect or turn into value, as far as possible, the bad and doubtful debts still outstanding; on the contrary, he thinks that the appointment of a judicial factor for such a purpose would, in existing circumstances, probably lead to serious loss to both parties.

“As to the outstanding debts due to the Dundee branch of the business, the collection of these debts is now, and has hitherto been, under the charge of the petitioner himself, as was natural, the petitioner alone having managed the Dundee branch. The respondent stated at the bar that he was both willing and anxious that the petitioner should continue to realise these debts—that he committed the whole steps to be taken to the petitioner’s own discretion, giving the petitioner *carte blanche*, and the respondent’s full authority to do whatever the petitioner thinks best, and to take what assistance he thinks right. The respondent also offered his own advice and assistance whenever required. In reference to the Dundee debts, the Lord Ordinary thinks the petitioner can ask no more than this. The petitioner says that these Dundee debts are in danger of being lost; but if so, it must be the petitioner’s own fault. He has full power (both of his own and the respondent’s authority), to do whatever is necessary, or to employ agents to do what is necessary. In short, the petitioner can do, and do now, everything that a judicial factor could do, and he has knowledge and means of doing which a judicial factor could never have.”

“This leaves out the Galashiels outstanding debts. As to them also the respondent’s offers are fair and reasonable.” (After narrating the different offers made by the respondent as mentioned in the narrative)—

“The Lord Ordinary thinks that these offers are reasonable, and fully meet all that the petitioner can ask. It is both the manifest interest and the bounden duty of both partners to give their best services for winding up their own affairs, and, in the present case, it is thus alone that there is any hope of making anything of the Galashiels debts. They are all due abroad, chiefly apparently by billers in various cities in Italy, Sicily, Hungary, Austria, Russia, Turkey, Egypt, and elsewhere. They would almost certainly be lost if, as the petitioner suggests, a Glasgow or Dundee accountant should be employed to recover them, and it is difficult to say what expense might not be incurred. The petitioner is bound to concur with the respondent in taking the best and the most reasonable measures, or, if the partners cannot agree on this, then to sell or buy the debts *inter se* by tender or public auction. This is not unreasonable, two years having now elapsed. The petitioner is not entitled, as he has done for two years, to refuse to look at the Galashiels books, which, though kept by the respondent, are really the petitioner’s own books, and have always been at his command, and to insist on throwing the whole foreign debts into the hands of an accountant, with almost a certainty of their being lost. The petitioner has never yet made the suggestion as to what ought to be done as to any of the debts in question. Still less is the petitioner entitled to get an accountant who will litigate with the respondent at the expense of the firm,—that is, partly at the expense of the respondent himself. The partners must vindicate their rights *inter se* at their

No. 143. a dead-lock, through the fault of one or more of the partners, the Court would interfere by the sequestration of the estate and appointment of a judicial factor for the protection of the remaining partners. Here fault on the part of the respondent was abundantly shewn, and the risk the petitioner ran was that the debts of the Galashiels branch would not be ingathered, as the debtors were chiefly foreign customers, whom the respondent was endeavouring to secure for his own private business.¹

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LORD PRESIDENT.—I am quite satisfied with the way in which the Lord Ordinary has dealt with this case. I think he has very properly refused the prayer of the petition, and that on very reasonable grounds. Such an application is without doubt quite competent, and may be entertained by the Court if there are circumstances sufficient to justify the appointment craved.

It is necessary therefore to see how the partners here are situated. Their partnership expired, according to their contract of copartnery, on 31st July 1875; their business had been carried on at Dundee and Galashiels, the Dundee branch being under the charge of the petitioner, while the respondent had charge of the Galashiels business. When the expiry of the contract arrived, the natural and obvious mode of winding up the business was that the petitioner should collect the outstanding debts of the Dundee business, and the respondent should wind up the business at Galashiels. It is admitted that the debts of the Dundee business are not yet all collected. That shews either that the petitioner has not been able to get them paid, or that he has been remiss in his duty of recovering them. It is not surprising, therefore, to hear that the same is true of the Galashiels branch. We have no means of knowing the extent of the debts outstanding on the Galashiels account. The statement made by the petitioner in his petition is that they amount to £5000. The statement he has now made at the bar puts them at £12,000. If the petitioner made the original statement without an examination of the books, which is the way he accounts for this discrepancy, he committed a very grave error indeed. But however that may be, we are left without any accurate information as to the facts.

The state of matters, then, is this :—The petitioner says that the respondent has failed to account to him in time past, and is not fit to be trusted with the collection of the debts still due. Now, it is a mistake to suppose that because parties are in dispute as to bygones between them the Court will listen to the petition of one of them to appoint a judicial factor upon the estate, who will in fact be an arbiter between the parties, instead of leaving the parties to take the ordinary remedy of an action of count and reckoning. As to the outstanding debts, it is impossible to entertain this application after the offers made by the respondent. He has lodged a minute in which he offers that the whole out-

own risk and expense. In existing circumstances, therefore, and having regard to the respondent's offers, which meet almost every alternative, the Lord Ordinary refuses the petition."

¹ *Authorities referred to.*—Dixon v. Dixons, Dec. 22, 1831, 10 S. 178, 4 Scot. Jur. 215, 4 Deas and And. 446, Jan. 20, 1832, 10 S. 209, August 13, 1832, 5 Scot. Jur. 56, 6 W. and S. 229; Young v. Collins and Feely, Feb. 24, 1852, 14 D. 540, 24 Scot. Jur. 253, March 10, 1852, 14 D. 746, May 28, 1852, 14 D. 811, 24 Scot. Jur. 457, *rev.* March 14, 1853, 15 D., H. of L. 35, 25 Scot. Jur. 329, 1 Macq. 385; Dickie v. Mitchell, June 12, 1874, *ante*, vol. i. p. 1030; Russell v. Russell, Nov. 14, 1874, *ante*, vol. ii. p. 93; Miller v. Walker, Dec. 10, 1875, *ante*, vol. iii. p. 242; Bell's Com. M'Laren's ed. ii., 527, 535.

tanding debts due to the Galashiels branch should be exposed by auction, leave No. 143.
 being reserved to both parties to bid for them. The Lord Ordinary also informs
 is that the respondent's counsel offered at the bar—" (1) To continue to do his June 19, 1877.
 est to recover these debts, which are all due abroad, and many of them in pecu- Gow v.
 ar positions, and that, so far as the respondent is personally concerned, grati- Schulze.
 usly. (2) To concur with the petitioner in any steps the petitioner might
 suggest as to any or all of these debts." These offers would give the petitioner
 full redress against any of the charges which he brings against the respondent.
 This is a case in which, in accordance with the principles laid down in the case
Dickie v. Mitchell, the Court will not interfere, both parties being still alive.

LORD DEAS.—I have no doubt of the competency of the petition. But
 though competent it does not, of course, follow that its prayer should be
 granted. The whole matter in dispute between the parties is the mode of
 collecting the outstanding debts of the dissolved firm. It is a question of cir-
 cumstances whether we ought to interfere, or whether our interference would
 not be likely to cause additional expense in the collection of the debts in place
 of facilitating that collection. I am of opinion that this is a case in which we
 ought not to interfere. I am satisfied with the grounds of the Lord Ordinary's
 judgment, which come to this, that the debts can be better collected otherwise
 than by incurring the expense of a judicial management. I concur in the views
 expressed by your Lordship and the Lord Ordinary, which I need not recapitu-
 late. I do not say that the time may not come when there may require to be
 sequestration and the appointment of a judicial factor on the partnership estate.
 But we do not make such appointments unless there be a necessity for them, or
 at least a clear expediency. I do not find that there is any such necessity or
 expediency here.

It is said to be a stronger thing to appoint a judicial factor in a going concern
 than in one which exists only for the purpose of winding up, and the petitioner's
 counsel went so far as to put it in the last case as a matter of right. But I can
 perceive stronger reasons for the appointment when the business is going on
 than when it has come to an end. Such, for instance, was *Dixon's case*, decided
 on August 1832, in the House of Lords (6 W. and S. 229), where it would
 have been ruinous all at once to stop the business, which was very extensive.
 There had been £6000 of duties paid to Government in October 1831, and
 another £6000 was to fall due immediately, for which a writ of extent had
 been or was about to be issued by the Crown. There may therefore be stronger
 reasons for appointing a judicial factor on a going business than where nothing
 remains to be done except an accounting between the partners.
 But this is always a question of circumstances, and here I see neither necessity
 nor expediency for granting the application.

LORD MURE concurred.

LORD SHAND.—There is, I think, a good deal of force in the argument that
 a different rule should apply to such applications as the present in the case of
 a partnership with a going business, and in the case, which here occurs, of a com-
 - which has been dissolved, and where the only thing to be done is to realise
 assets, and settle the rights of partners. I think the argument is sound to
 extent, that the Court will more readily interfere in a case in which the com-
 has been dissolved—*Bell's Com. M'Laren's ed. ii. 524*. The consideration

No. 143. on which this rests is, that if the Court should appoint a judicial factor on the estate of a going concern there must follow the judicial management of a continuing partnership business, and nothing short of a case of necessity would justify this. The case of Dixon which has been referred to was a case of necessity. The partners of the company were all dead; and the Court authorised the factor to wind up the affairs of the company. After a dissolution of partnership it is different, and cases will from time to time occur in which the Court ought to interpose, and in which an appointment should be made to prevent injustice being done by one partner to the interests of another. I am of opinion that we ought not to appoint a judicial factor merely for the purpose of clearing up partnership accounts. But if there be good ground for doubt and dissatisfaction on the part of one partner of a dissolved company as to the credit or fidelity of another partner who is realising and appropriating the assets, or if the partners cannot agree on joint or separate measures for winding up the company, and there is consequently a danger of loss of the partnership property, a case arises in which a judicial factor should generally be appointed.

The present case is not one, however, in which I think the Court should interfere. A judicial factor is not the proper person to go into an accounting for past intromissions, at least the appointment would not be proper for that purpose only. The only reasonable ground is, that a sum of about £7000 is due to the company. This sum consists of numerous debts of small amount, and due by a great many persons in different countries. These debts scattered about in this way, could only be collected at very great expense by a judicial factor, who must employ foreign agents, and would have great difficulty in getting the information as to the debtors, and possible objections to the accounts. The respondent has, I think, in the circumstances, made a reasonable proposal to the petitioner in reference to these debts; and I think that one of his offers should be accepted by the petitioner, rather than that a judicial factor should be appointed.

THE COURT adhered.

WM. ARCHIBALD, S.S.C.—JAMES W. MONCREIFF, W.S.—Agents.

No. 144. JAMES BREMNER AND ROBERT THOMSON, Pursuers and Respondents—
Burnet—Low.

June 19, 1877. BURRELL AND SON, Defenders and Appellants.—*Guthrie Smith—*
Bremner & Another v. *R. V. Campbell.*
Burrell & Son.

Ship—Charter-party—Port of Discharge—Demurrage.—The schooner *St. F.* was chartered at S. to load a cargo of scrap iron, and “therewith proceed to Grangemouth, or so near thereunto as she may safely get.” The cargo was brought to and taken from alongside the ship at the merchant’s risk and expense. The vessel arrived in the roads at the mouth of the river Carron, on which the port of Grangemouth was situated, on 10th September, but the docks were full and she could not get a berth. On the 12th, being still unable to get into dock, the master brought the vessel into the river and moored her off the entrance of the docks. On the 13th the master intimated to the charterers that he was ready to discharge. It was proved that vessels frequently discharged cargoes of a similar character to that of the *St. F.* by means of lighters, while lying in the river in the same position, but there was no practice as to cargoes of scrap iron, the trade in which was of very recent introduction at Grangemouth.

Held that on 13th September the *St. F.* had reached her destination, and that the charterers were bound to commence the discharge on the following day.

THIS action was raised in the Sheriff-Court at Falkirk at the instance of James Bremner and Robert Thomson, the owner and master of the schooner "St Fergus," to recover damage from the defenders, Burrell and Son, the charterers of the vessel.

No. 144.
June 19, 1877.
Bremner &
Another v.
Burrell & Son.
1ST DIVISION.
Sheriff of
Stirling.
M.

The circumstances of the case are stated in the interlocutor of the First Division of 19th June 1877 in disposing of an appeal from the Sheriff. They "find in fact that in terms of the charter-party and relative bill of lading; Nos. 13/1 and 11/1 of process, the pursuer (respondent) Robert Thomson, master of the ship 'St Fergus,' received on board said ship at Stettin a cargo of scrap iron and iron turnings from Messrs Hermann and Heilnehmer, merchants, Stettin, of which cargo the defenders (appellants) were the receivers: Find that the 'St Fergus' was chartered to proceed to Grangemouth, or so near thereunto as 'she may safely get, and deliver' the cargo to be brought to and taken from alongside the ship at merchant's risk and expense, with nine working days for loading and unloading the ship, and ten days on demurrage over and above the said lying-days at £3 per day: Find that six of the said lay-days were occupied in loading, and only three lay-days remained for unloading when the ship sailed from Stettin: Find that the 'St Fergus' arrived in Carron on 10th September 1876, when the pursuer reported his arrival to the harbour-master, and on that or the following day he intimated his arrival to the defenders, but in consequence of their crowded state the pursuer was informed that the 'St Fergus' could not get into the harbour docks: Find that on 12th September the pursuer brought his ship to the Carron river about ten o'clock P.M., moored her in the stream at short distance above the 'Basket Point' or 'point of the quay,' at the entrance of the old harbour, with one hawser attached to a pawl on the point of the quay, and another attached to a pawl further up the river, and with an anchor in the stream forward, and with a kedge aft: Find that the old harbour is an ordinary and recognised place for discharging cargoes of all sorts: Find that on the following day, the 13th September, intimations, No. 8/3 of process, was left by the pursuer with the defenders, but they refused to take delivery where the vessel lay, on the ground that she had not arrived at a proper or usual place for discharging: Find that by letter of 15th September, 8/4 of process, the pursuer intimated that the lay-days had expired, and that the ship would henceforth lie on demurrage, and the pursuer thereafter handed from day to day the accounts for demurrage, 8/5 to 8/15 of process, inclusive: Find that the 'St Fergus' lay in the place aforesaid in the river until the morning of 20th September, when, by order of the harbour-master, she was moved into the docks, but no railway berth was clear, and the discharge did not begin until the morning of the 22d September: Find that the discharge was completed on the 28th September: Find that the river Carron at the place 'above the point of the quay' where the 'St Fergus' was moored on 12th September, is outwith the limits of the harbour of Grangemouth belonging to the Caledonian Railway Company, but is within the legal limits of the port of Grangemouth, and is a place recognised by the Custom-house officials for the legal discharge of cargoes: Find that when the harbour and docks happen to be crowded cargoes of all sorts, including silver-sand, flints, coals, loam, sand, and sulphur ore, are frequently discharged by means of lighters from vessels lying in that part of the river Carron which is a public navigable river, and although the discharges take place generally by arrangement between the charterer and shipmaster, they take place sometimes irrespective of any arrangement: Find that cargoes can be so discharged by lighters with safety, if proper and ordinary precautions are taken, and that there

No. 144. is no peculiarity as regards scrap iron to prevent it from being discharged safely in a similar manner, and that no unreasonable amount of expense or inconvenience would be incurred in so discharging such a cargo, even though, as in the present instance, the consignees might intend to send it by railway: Find that the importation of scrap iron by way of Grangemouth has existed—unless to a very trifling extent—for only a year or eighteen months, so that although it has during that time been usual to discharge such cargoes at a railway berth in the docks, there is no established custom of the port, nor is there any compulsory law as to the place where such cargoes should be discharged.”

June 19, 1877.
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The Sheriff-substitute (Bell) found that the lay-days began to run on 14th September, and there being only three lay-days left, expired on 16th September, and that from that day till the 28th September the vessel was on demurrage. He gave decree for £30, being demurrage for ten working days, at £3, as stipulated in the charter-party.

The Sheriff (Lee) adhered on appeal.

The defenders appealed to the Court of Session.¹

LORD PRESIDENT.—The defenders' agents at Stettin chartered the “*Fergus*” by charter-party, dated 23d August 1876, to load there a cargo of 12 tons scrap iron, and “proceed to Grangemouth, or so near thereunto as she may safely get.” The charter-party is in the usual terms. The vessel arrived at Carron roads on 10th September, and on that day the master reported his arrival to the harbour-master. On the following day he intimated the same to the defenders. Finding, however, that from the crowded state of the docks his vessel could not get either into the Caledonian Railway dock or into the old harbour, the master, on 12th September, brought her into the Carron river, and moored her at the entrance of the old harbour. One hawser was attached to a pawl on the quay, and another was attached to a pawl further up the river. An anchor was dropped in the stream both fore and aft.

When he had got his vessel moored in that position the master, on 13th September, intimated to the defenders that she was ready to discharge her cargo. The defenders refused to take delivery where the vessel lay. And the question is, whether their refusal was justifiable.

The defenders maintain that the vessel had not arrived at a usual place of discharge at the port of Grangemouth. On the other hand the owner maintains that the vessel had arrived at the port of Grangemouth, and at a usual place of discharge,—not for cargoes of this particular kind, for it is admitted that the shipment of scrap iron to the port of Grangemouth being a novelty, there is no practice with reference to such cargoes,—but a usual place of discharge for cargoes generally, such as come to that port. As there is no practice with reference to the particular kind of cargo the question comes to depend on the evidence whether or not it was a reasonable demand that the defenders should take delivery at the place where the vessel lay. The Sheriff-substitute and the Sheriff have come to the result that it was a reasonable demand. Though the case is a narrow one on the evidence I cannot arrive at any different conclusion.

¹ *Authorities*.—*Brereton v. Chapman*, 1831, 7 Bing. 559; *Brown v. Johnson*, 1842, 10 Mees. and Wel. 331; *Kell v. Anderson*, 1842, 10 Mees. and Wel. 498; “*Norden*” Steamship Co. v. *Dempsey*, 1876, L. R., 1 C. P. Div. 634; *Hillstrom v. Gibson and Clark*, Feb. 2, 1870, 8 Macph. 463, 42 Scot. Jur. 217; *La Cour v. Donaldson and Son*, May 22, 1874, *ante*, vol. i. 912; *Dall' Ongaro v. Meeson and Co.*, Feb. 4, 1876, *ante*, vol. iii. 419.

ere is evidence that many other vessels have discharged there, by means of No. 144.
 hters, cargoes differing widely in their nature,—silver-sand, flints, coal, loam, June 19, 1877.
 d, and sulphur ore, and other things. It is quite true that there is no evi- Bremner &
 ce of any cargo of scrap iron having been discharged there. But I am not Another v.
 ished that there was any difficulty attending the discharge of scrap iron at Burrell & Son.
 place which would not have equally attended the discharge of any of the
 er materials above mentioned.

There is no difficulty in the rule of law which is recognised both here and in
 gland. A vessel, where she undertakes to go to a certain port does not fulfil
 obligation unless she goes either to the appointed place of discharge or to a
 al place of discharge. But I am of opinion that the obligation in this case
 fulfilled, and that the charterers, though they desired to get the vessel into
 railway dock for the purpose of discharging on to trucks, could not reason-
 r refuse to take delivery where the ship lay when the result was to be to
 se delay. I am therefore for dismissing the appeal.

ORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT pronounced this interlocutor :—(After the findings in fact
 quoted in the narrative, *supra*, p. 935)—“Find in law that the ‘St
 Fergus’ having been on 12th September moored at a safe and
 usual place for discharging cargoes in the river Carron, and, *sepa-*
ratim, the ship having arrived at the old harbour where one of its
 hawsers was attached to a pawl on ‘the point of the quay,’ and
 a requisition having been made on the 13th September by the
 pursuer on the defenders to take delivery where the vessel lay,
 the lay-days began to run upon the morning of the 14th Sep-
 tember, and expired upon Saturday the 16th: Find that the vessel
 lay on demurrage from that date until the 28th September in-
 clusive, being a period of ten working days, at £3 per day, and
 that the defenders are liable to the pursuers in the sum of £30
 sterling in name of demurrage: Therefore refuse the appeal, and
 decern: Find the appellants liable in expenses,” &c.

MITCHELL & BAXTER, W.S.—JOHN WILSON, S.S.C.—Agents.

N TRAILL AND OTHERS (Caithness' Trustees), First Parties.—*Durling*. No. 145.

MARGARET NICOLL OR CAITHNESS, Second Party.—*Jameson*.

DAVID WILSON, Third Party.—*Keir*.

June 20, 1877.
 Caithness'
 Trustees v.
 Caithness.

usband and Wife—Jus Relictæ—Approbate and Reprobate.—Held that
a mortis causa settlement disposes of the whole estate of the granter his
is not entitled to take provisions under it and at the same time claim her
 rights.

ust—Discretionary Powers of Trustees.—A truster left the liferent of the
residue of his estate to his widow, and gave power to the trustees to
advances out of capital to one of two fiars during the currency of the life-
the expediency of doing so being left “to the exclusive judgment” of the
ees, “without control or interference from any party whatever.” Held
the widow had no power to veto the trustees in making advances out of
al.

WILLIAM CAITHNESS, corn merchant, Arbroath, died on 11th February 2^D DIVISION.
 t, survived by his widow, Mrs Margaret Nicoll or Caithness. There R.
 no issue of the marriage, but Mrs Caithness had a daughter by a
 er marriage, Mary Ann Gordon, who was married to David Wilson,

No. 145. and who had two children, William Caithness Wilson and Margaret Nicoll Wilson. All these survived Mr Caithness.

June 20, 1877.
Caithness'
Trustees v.
Caithness.

The only deed regulating Mr Caithness' succession was a trust-disposition and settlement executed by him on 2d May 1862. This deed proceeded on the narrative that the truster had "resolved to make the following settlement of his affairs." John Traill, surgeon, Arbroath, and two others, were nominated trustees, and to them were conveyed "All and sundry lands, . . . debts, . . . and, in general, the whole subjects and estate, heritable and moveable, real and personal, owing and belonging, or which shall be owing and belonging to," the truster at the time of his decease. The trust-purposes were—(1) for payment of debts; (2) for payment of any legacies the truster might bequeath; (3) the liferent of household furniture and effects to his widow; (4) the yearly proceeds of the residue of the whole estate, to be paid to his widow, "declaring that in the event of the said free yearly revenue of my said estate not yielding, in the opinion of my said trustees, a sum sufficient to afford a suitable maintenance to my said wife, they are hereby fully empowered and required to advance to her yearly out of the capital funds of my estate such a sum as will, with the said free revenue, comfortably support her; provided always that the sum so to be advanced from the capital funds shall not, when added to the said free revenue, exceed in any one year £40 sterling; providing, nevertheless, that in case the said free yearly revenue shall exceed the said sum of £40 sterling, my said wife shall be entitled to receive the whole free revenue, my intention in said restriction being to prevent undue encroachment on the stock."

The deed then proceeded:—"Fifthly, in respect I wish to provide for the education of William Caithness Wilson, eldest son of Mrs Mary Ann Gordon or Wilson, my said wife's daughter, . . . therefore, in case the said William Caithness Wilson shall be in minority at the time of my death, and his education or training in business uncompleted, I hereby empower my said trustees to expend such sum or sums, from time to time, from the capital funds of my estate, in or towards the education or training in business of the said William Caithness Wilson, as they in their discretion shall consider fit—the amount and expediency of expending such sums being left by me to the exclusive judgment of my said trustees, without control or interference from any party whatever. Sixthly, on the said William Caithness Wilson, attaining the age of twenty-one years complete, and desiring to engage in a profession or business, and being, in the opinion of my trustees, qualified for so engaging, they are hereby authorised and empowered to advance to the said William Caithness Wilson to account of his share of the residue of my estate from the capital funds of my estate such sum or sums (not exceeding in whole the estimated amount of his share therein), as they shall consider necessary for this purpose; . . . but declaring that the expediency of making such advance is left by me to the exclusive judgment of my said trustees, without control or interference from any party whatever. . . . Seventhly, in case the said Mrs Mary Ann Gordon or Wilson shall at any time during the liferent of my said estate by my said wife be placed in such circumstances as, in the opinion of my said trustees, to require pecuniary assistance, I hereby authorise and empower them to advance to her or apply for her behoof from the capital funds of my estate, from time to time, such sum or sums as they in their discretion shall consider fit—the amount and expediency of making such payments being left by me to the exclusive judgment of my said trustees, without control or interference from any person whatever; declaring always, that my said trustees shall only be at liberty to advance or apply

such sums to or for behoof of the said Mrs Mary Ann Gordon or Wilson No. 145.
 during the liferent of my said estate by the said Mrs Margaret Nicoll or
 faithness, and no longer." The eighth purpose gave the liferent of the June 20, 1877.
 residue of the estate to Mrs Wilson in the event of her surviving her Caithness' Trustees v.
 mother. "And lastly, the residue of my said estate shall belong to the Caithness.
 lawful child or children of the said Mrs Mary Ann Gordon or Wilson
 live at the death of the last survivor of me and my said wife, and the
 said Mrs Mary Ann Gordon or Wilson, and that equally between and
 among them, share and share alike, if there shall be more than one (ex-
 cept that the said William Caithness Wilson shall receive double the
 share of the other child or children)." The deed contained no clause or
 expression excluding the legal rights of the truster's widow.

The estate having been realised amounted to about £1200, and the
 annual return was between £45 and £50.

Doubts having arisen as to the construction of several of the clauses of
 the trust-deed a special case was prepared, to which the trustees were the
 first parties, Mrs Caithness the second party, and David Wilson, as ad-
 ministrator-in-law for his two children, the third party.

The questions submitted were as follows :—“(1) Is the truster's widow,
 the second party, entitled to the conventional provisions in her favour
 under the trust-disposition and settlement of her husband, the said
 William Caithness, and also to her legal claims of *jus relictæ*, and an
 allowance for mournings and aliment to the first term after her husband's
 death, or is she bound to make her election between the said conventional
 provisions and legal claims? (2) If the second party be not bound to
 make her election, and shall take both her conventional provisions and
 legal claims, will she in that event be entitled to have the income of the
 residue to which she is entitled under the trust-disposition and settle-
 ment made up out of capital to £40 per annum? (3) Assuming that the
 second party is bound to make her election as between said conventional
 provisions and her legal claims, and accepts the provisions in her favour
 under the said trust-disposition and settlement, or that she is entitled to both
 her legal claims and conventional provisions, are the first parties entitled,
 without her consent, to encroach on the capital of the estate, and give
 effect to any or all of the fifth, sixth, and seventh purposes of the trust-
 settlement? Or can she prevent the first parties from encroaching on
 the capital of the funds, except for the purpose of making up therefrom
 an annuity or sum of £40 payable to her? (4) When will the shares of
 the residue vest?”

Argued for the trustees ;—(1) Although the deed did not expressly ex-
 clude the legal rights of the widow, that must be implied from the whole
 scope of the deed, and she could not both avail herself of these rights and
 take the conventional provisions under the trust-deed.¹ (2) The deed ex-
 pressly gave the trustees power to make advances from capital without
 interference from any one, and so the widow could have no voice in the
 matter. (3) The fee of the residue would not vest until the death of the
 longest liver of Mrs Caithness and Mrs Wilson, the liferentrices.²

Argued for Mrs Caithness ;—There being no exclusion of the legal

¹ Riddell v. Dalton, Nov. 28, 1781, M. 6457; Young v. Buchanans, Dec. 2,
 1814, M. 6447; Bell v. Laurie, May 14, 1801, Hume's Dec. 486; Breadalbane's
 Trustees v. Duke of Buckingham, March 5, 1840, 2 D. 731, 12 Scot. Jur. 400;
 Leith v. Kirkpatrick, May 20, 1842, 4 D. 1224, 14 Scot. Jur. 395; Leigh
 v. Russell, Dec. 1, 1852, 15 D. 126, 25 Scot. Jur. 63; Keith's Trustees v.
 Keith, July 17, 1857, 19 D. 1040, 29 Scot. Jur. 497; Ersk. Inst. iii. 3, 30.
² Young v. Robertson, Feb. 14, 1862, 4 Macq. 337, 34 Scot. Jur. 270.

- No. 145. rights of the widow in the settlement, it must be concluded that the truster knowing of these rights had intended the provision which he had made for his wife to be in addition to her legal rights. Such an exclusion could not be implied.¹ The widow had sufficient interest in the capital to entitle her to veto its being unnecessarily squandered.

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LORD ORMDALE.—The questions submitted for the opinion and judgment of the Court will be taken up in their order.

1. The first question is whether the widow of the testator is entitled to both her legal and her conventional provisions under his settlement. I am very clearly of opinion, on principle as well as the authorities, that she is not entitled to take both provisions, but must make her election. The testator has disposed of the *universitas* of his estate. It is impossible to look at his settlement without being satisfied that this is so. Unless it were to be held that no settlement can be dealt with as disposing of the *universitas* of the testator's estate, except where that is expressly stated, the *universitas* has been disposed of in the present instance, for nothing could be more comprehensive in that respect than the language of the deed in question. I am therefore of opinion that the testator intended to dispose of the whole means and estate which he died possessed of, without any exception, and that being so, this case falls under the rule recognised and given effect to in the cases which were cited as precedents. Accordingly it must be held in answer to the first question that the second party is not entitled to both her conventional and legal claims, but must make her election.

2. That answer supersedes the second question.

3. The third question proceeds upon the assumption that the widow is put to her election and has chosen her conventional provisions. Is she, then, entitled to prevent the trustees from encroaching on the capital of the estate? The trustees have no personal interest in the matter. It is their duty to carry into effect, so far as they can, the instructions and objects of the testator. He has authorised them, in certain circumstances, but only if they find it advisable, to make advances out of the capital. The smallness of the estate creates a difficulty in connection with this, but the trustees must just act as they see right, not capriciously, but in the exercise of a wise and prudent discretion. The expediency of making these advances is left entirely to them, and I have no doubt they will act rightly. In these circumstances they will probably think that they cannot venture to make any advances, but that is for their consideration. The widow does not appear to me to have any right to interfere with the trustees in the exercise of their discretion. This third question will therefore fall to be answered in accordance with these views.

4. With regard to the fourth question as to vesting, any dispute regarding it was substantially given up at the bar, the matter being too clear for argument. The answer is that the shares of residue will vest on the death of the last survivor of the testator, his widow, and Mrs Mary Ann Gordon or Wilson.

LORD GIFFORD.—I am entirely of the same opinion, and that without any difficulty.

The testator here has made a universal settlement regarding the disposal

¹ Cross v. Boyes, Jan. 16, 1801, Hume's Dec. 484; Thomson v. Smith, Dec. 8, 1849, 12 D. 276, 22 Scot. Jur. 72.

his whole estate, both heritable and moveable, of every description. It is impossible to read his trust-deed without seeing this. It proceeds on the narrative that he has resolved to make a "settlement of his affairs," and he conveys to the trustees all his means and estate. The deed is thus intended to regulate his whole succession at the date of his death.

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Caithness.

In these circumstances the widow says that she has a claim to her legal provisions of *terce* and of *jus relicte*, as she has never renounced or discharged these legal rights. On the other side it was conceded that these rights were not excluded, and that the widow if she chose might claim such provisions; but the trustees maintain that if the widow avails herself of her right, and if she does claim these legal provisions, amounting to one-half of her husband's free moveable estate, she is in that case not entitled, in addition, to the conventional provisions in her favour contained in the deed. I am of opinion that the contention of the trustees is well founded, and that the widow is not entitled to demand both her legal rights and her conventional provisions, but that she must make her choice, and take either the one or the other, but not both, and in doing so she will no doubt be guided by the amount which she will get upon either alternative. In particular, I think, she must take her chance of the exercise of the power by the trustees to make advances out of capital to the grandchildren.

I cannot doubt that it was the intention of the testator that if the widow elected to take her *jus relicte* she should renounce her conventional provisions. To give her both would dislocate the whole arrangements of the testator, and rearrange the whole provisions of his deed. The first question will therefore fall to be answered to that effect, and the second question is thereby superseded. With regard to the third question, if the widow elects to take her conventional provisions I think she will be bound by all the directions in the settlement. In particular, I think she will not be entitled to object to the trustees exercising discretionary powers which the truster has conferred upon them of advancing parts of the capital to certain parties, and in certain circumstances. The fifth, sixth, and seventh provisions in the deed are just conditional legacies depending upon the discretion of the trustees. If the trustees, in the sound and reasonable exercise of their discretion, find it proper and necessary that these advances be made, then they must form a deduction from the residue of the estate.

I am therefore of opinion that the trustees have the power to advance out of capital to the grandchildren if they see proper, and I do not think that the widow has any power of veto upon their doing so.

The only other question relates to the vesting of the residue, and I am of opinion that the vesting of the residue is necessarily postponed till the death of the last of the parties named in the deed, for it is not until that event happens that the class can be ascertained to whom the residue is payable. The resid legatees are the children who may be alive at the occurrence of the event mentioned, so that survivance is a condition of the vesting, and until this condition is purified no vesting can take place.

LORD CURRIEHILL concurred.

The LORD JUSTICE-CLERK was absent.

THIS interlocutor was pronounced:—"The Lords are of opinion, and

No. 145.

June 20, 1877.
'Caithness'
 Trustees v.
Caithness.

find (1) that the widow is not entitled to the conventional and legal provisions, but is bound to make her election; (2) this query superseded by the answer to the first query; (3) that the first parties are entitled, without the widow's consent, if they should see fit, in the exercise of a wise and prudent discretion, to encroach on the capital so as to give effect to any or all of the fifth, sixth, and seventh purposes of the trust-settlement; (4) that the shares of residue vest on the death of the last survivor of the testator, his widow, and Mrs Mary Ann Gordon or Wilson, and deern."

WEBSTER, WILL, & RITCHIE, S.S.C.—ROBERT STRATHERN, W.S.—
 GRAHAM BINNEY, W.S.—Agents.

No. 146.

June 22, 1877.
 Fraser v.
 Downie.

ROBERT FRASER, Appellant and Complainer.—*Kinnear—Mackintosh.*
 ROBERT DOWNIE, Respondent.—*Balfour—Lorimer.*

Property—Feu—Restriction.—All the feuars in a street held of a common superior under titles containing a restriction to the effect that "the houses to be built should all be single or self-contained lodgings." One of the feuars was proceeding to convert his house into business offices when an adjoining feuar objected. During the previous thirty years a large number of houses in the street had been converted, without objection, including two houses within the last three years in the immediate neighbourhood. *Held* that the right of the feuars to object had been lost by abandonment.

Question, whether a restriction in the above terms was a permanent obligation. *Opinion* (per Lord Shand), that the restriction applied only in the erection of houses, and not to the use of the houses when erected.

1st DIVISION.
 Dean of Guild
 of Glasgow.
 M.

ROBERT DOWNIE, accountant, proprietor of two contiguous self-contained dwelling-houses, Nos. 241 and 243 West George Street, Glasgow, intending to make certain additions and alterations with a view to converting them into writing chambers and counting-houses to be occupied by seven tenants, applied to the Dean of Guild for a lining.

The petition was opposed by Robert Fraser, the proprietor of adjoining houses in the street, on various grounds, among others that it would be contravention of Downie's title to convert the houses into offices.

The titles of both parties flowed from a common author, Archibald Campbell of Blythswood, and contained this restriction,—“Declaring that the houses to be built should all be single or self-contained lodgings.”

The Dean of Guild granted the lining. Fraser appealed, and brought relative suspension and interdict.

It appeared in evidence that all the feus in West George Street were held of the same superior and under similar though not identical restrictions, and that the process of converting dwelling-houses into business offices had been going on for thirty years, gradually extending westward. In the division of the street in which the houses of the parties were, consisting of seven houses on each side, two or three had been converted, all within the last three years.

It was disputed by Downie, but held to be established, that the restrictions in the titles, so far as binding, were mutually enforceable by the feuars.

At advising,—

LORD PRESIDENT.—The question whether the provision in the charter that

* There were also restrictions as to height, which Downie at first maintained that he was entitled to disregard, but he acquiesced in them by minute in the Court of Session.

uses are to be self-contained lodgings constitutes a permanent obligation, as regards the mode of occupation, is one which it is not necessary to determine. It appears clearly on the evidence that in West George Street there has been going on for a considerable time a process of conversion of self-contained lodgings into business premises. This process has already extended as far as the utmost part of Brandon Place, because I observe that two houses there had been converted into business premises as far back as 1874, one next door to the appellant and the other nearly opposite. If this had been totally unexpected it might have been intelligible that the appellant should not understand what was going on, as the change did not involve the structural alteration of the outside of the building; but he must have been aware of his peril, because the conversion had been carried out in the eastern part of the street to a great extent, and was extending westwards rapidly. If he had any objection he ought to have made it forward and protested at the time when his own part of the street was changed. But that he did not do, and I think he is not now entitled to maintain his objection.

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LORD DEAS.—I concur in the result arrived at by your Lordship; but I think it right to observe that all the alterations in the portion of West George Street now more immediately in dispute have been made within the last three or four years, and if there were nothing more in the case, there might be some room to object in holding Mr Fraser and others barred from objecting to proposed alterations on Mr Downie's premises, simply because they had not at once objected to similar alterations on some houses in the same compartment of the street. But when we take that fact in connection with the history of this whole street, and the manner in which it has been dealt with, both by the superior and the feuars, all hesitation is removed.

The street called West George Street is, and has all along been, divided into compartments by other streets crossing it; but the whole street, inclusive of the tenements, was laid out as what are familiarly known in Edinburgh and Glasgow as self-contained dwelling-houses, and the restrictions were directed to securing the amenity and uniformity of a street of that kind, a leading restriction being that the houses should not exceed in height two square stories and a half story. The feu-rights in the street were all granted either by the Parliamentary trustees of Blythswood or by the proprietor himself, and are therefore to be regarded as having flowed from one common author. I assume, for the purposes of this case, that the restrictions were well imposed. Some difference of opinion has been occasionally expressed as to whether the title of the feuars entitles them to enforce, *inter se*, the restrictions in their feu-rights rests upon the implied contract or upon the principle of *jus quaesitum tertio*; but, in either case, the feu-charter or feu-contract, in which the superior imposes these restrictions upon each individual feu, must be regarded as that which creates the common tie, for there is no express contract between the feuars themselves, and no direct grant by the superior to his feuars as a body.

The first loosening of the common tie in West George Street was the act of the feuars on the south side of one of the compartments, who in 1854 entered into an agreement, which was recorded in the General Register of Sasines in the month of that year, to depart from the restriction as to the height of the houses on that side of the compartment. An agreement to a similar effect was entered into by the feuars on the north side of the same compartment in 1858, and was

No. 146. recorded in the Register of Sasines on 2d February 1859. These agreements were followed by the addition of a story to a number of the houses on both sides of the compartment. In 1866, the Clydesdale Banking Company having purchased one of the feus on the north side of the compartment just referred to, commenced to erect upon it a large and handsome building, in a different style from the dwelling-houses, and intended to be three stories in height, to be used for the purposes of their business, whereupon the superior presented a suspension and interdict to stop the progress of the work, and brought a declarator to have it found and declared that the building would be a violation of the restrictions stipulated in the feu-right. The Court, however, found that, as the restrictions had been disregarded as to the style and height of other houses in the same compartment, and the superior had taken no proceedings against the feuars who had so disregarded them, he was not entitled to enforce the restrictions against the proprietors of the particular feu there in question—*Campbell v. The Clydesdale Banking Company*, 19th June 1868, 6 Macph. 943.

That judgment, I take it, virtually bars the superior from now objecting to the conversion of dwelling-houses, in all or any of the compartments of West George Street into business premises, and consequently he could not object although he were inclined to do so, to the proceedings of Mr Downie, so far as the latter has that object in view. I do not say that because the superior is barred from objecting, it necessarily follows that Mr Fraser and the other feuars are also barred from objecting *inter se*; but the proceedings and judgment of 1868 were, to say the least of them, calculated to call their attention to the advancing progress, in their own compartment, of the conversion of dwelling-houses into business premises, which had begun farther off in 1854 and 1858, and consequently go to strengthen and complete the bar against their now objecting to similar conversions in their own compartment. The acquiescence of Mr Fraser and his neighbours is really to be regarded as acquiescence in a gradual and steady change of the character of the whole street, which has in a manner forced itself on the locality (luckily to the gain, and not to the loss of the proprietors) by the necessities of a rapid and extraordinary increase in the trade, commerce, and population of the city of Glasgow.

It does not follow, however, that because the houses may be converted into business premises there are no restrictions left which it may still be right and reasonable to enforce. Your Lordship does not take that view, and in what you have said upon that subject I entirely concur.

LORD MURE.—I concur with your Lordship in the chair, and I merely wish to add, with reference to the observations of Lord Deas, as I understood your Lordship, that I reserve my opinion as to what the right of a vassal may be in a case of this description, where the superior may have waived his right to enforce restrictions. When a superior has conferred upon his vassal an absolute right to object to alterations proposed to be made by other vassals I should hesitate to hold that such a right can be put an end to by the superior waiving his own right to object. There must, I should think, be some act or omission on the part of the vassal himself to lead to that result.

LORD SHAND.—I concur with your Lordship in holding that there has been such an abandonment by the feuars generally, including the appellant, of the

conditions of the feu-rights on which the appellant now insists, as to preclude the appellant from succeeding in his objections. No. 146.

But, though it is not necessary for the judgment, I desire to add that I am not satisfied that the titles impose an obligation to occupy the houses as self-contained lodgings, or which could prevent their occupation as business premises. The restrictions as to the style and height of buildings directly affect the subjects, and are expressed in terms prescribing certain requirements and prohibiting deviations, and these would have been effectual if there had been no use of abandonment. But, with regard to the question of use or occupation, all that the deed provides is "that the houses to be built upon the ground above described shall all be single or self-contained lodgings." The building having been erected of this character, there is no provision limiting the mode of its use or occupation thereafter, and none prohibiting its use by several occupants, or use otherwise than as a self-contained lodging. Such serious restrictions on the use of property by its owner are not to be lightly inferred. I should rather say they must be distinctly expressed to be effectual. As I read this deed, the feuar was content to have self-contained buildings erected, in the knowledge that from the nature and situation of the property it would be the feuar's interest to use it, but that he left the feuar free to change that use, if, with the lapse of time, he saw fit to make a change. The opinion of the Lord Chancellor (Lord Penzance) in the case of *Inglis v. Boswell*, May 1849 (6 Bell's Appeals, 427), on the passage on page 439 of the report, is directly in point, and expresses the view which I entertain on this question, as the title is here expressed.

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Fraser v. Downie.

THE COURT refused the appeal, and repelled the reasons of suspension.

MACDONALD & HARE, W.S.—MACBRAIR & KEITH, S.S.C.—Agents.

DAVID BAIRD WAUCHOPE (Samuel Wauchope's Executor), First Party.— No. 147.
Kinnear—Mure.

MRS CATHERINE BALDOCK FAGAN or WAUCHOPE, Second Party.—
Asher—Hunter.

June 23, 1877.
Wauchope v. Wauchope.

Domicile—Succession.—A Scotchman entered the civil service of the East India Company in 1841, and remained in it until his death in 1875, when he was on a two years' furlough in Europe. The servants of the East India Company were transferred to the Crown in 1858 by 21 and 22 Vict., cap. 106. The Indian Council Act, 1865, of the Indian Council, sets forth, in an "Explanation," that a man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in her Majesty's civil or military service, or in the exercise of any profession or calling." Held that neither the Act of 1858 nor the Act of Council of 1865 affected the domicile the deceased had acquired before they were passed in British India, and that his domicile was that at the date of his death.

SAMUEL WAUCHOPE, C.B., was born in Scotland, of Scottish parents, in the year 1822. 2D DIVISION.
R.

In 1841 he entered the civil service of the East India Company (as a Civil Presidency); in 1842 he went to British India; and at the time of his death, which took place at Engelberg, Switzerland, on 23d July 1875, he was in the service of the Crown in British India, the government having been transferred to her Majesty in 1858 by the statute 21 and 22 Vict., cap. 106.

No. 147. During the period of his service he had visited Scotland twice on short leave, and once on furlough. In 1873 he left British India, having obtained leave of absence on furlough for two years, together with five days subsidiary leave, from October 23, 1873, and returned to Scotland, where he resided in a house rented by the year, the lease of which to Whitsunday 1876 was current at his death. During the summer of 1875 he went abroad on account of his health, and died of the date above mentioned. At the time of his death he had served the requisite number of years to entitle him to retire from service, but he had not retired from service, and was in receipt of furlough allowance at the time of his death.

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Wauchope.

In 1843 the deceased married at Calcutta Miss Catherine Baldock Fagan, who was Irish by birth. Of this marriage three children, daughters survived.

Mr Wauchope entered into no contract of marriage with his wife. On 21st July 1875, being two days before his death, he executed a will, his signature to which was attested in the English form.

Mr Wauchope left no heritable property in Great Britain, but he did possess of moveable estate in Scotland, moveable estate in England, and moveable and real estate in British India. There was no express exclusion of the legal rights of his widow.

In his will Mr Wauchope appointed his brother David Baird Wauchope his executor as regarded his property in Europe, and certain other persons executors in India. Mrs Wauchope having asserted a claim to one-third of the moveable estate of her late husband as falling to her *jure relicte* on the footing that Mr Wauchope's domicile was a Scotch one, a question arose as to Mr Wauchope's domicile, and a special case was presented to the Court. To this special case Mr D. B. Wauchope as executor nominate was the first party, and Mrs Wauchope, the deceased's widow, the second party.

It was maintained by the first party that Mr Wauchope had lost his domicile of origin, and acquired an Anglo-Indian domicile. If his domicile at his death was Anglo-Indian, it was admitted that his succession must be regulated by the law of England, and that by that law his widow was not entitled to any portion of his moveable estate disposed of by his will, except the legacy of furniture thereby bequeathed to her. On the other hand, it was maintained by the second party that, under the provisions of the Succession Act, 1865, of the Indian Council, the domicile of the deceased was Scotch, that his succession must be regulated by the law of Scotland, and that his widow was entitled *jure relicte* to one-third of his moveable estate.

The portions of the "Indian Succession Act, 1865," founded upon the case were the following:—(2) Except as provided by this Act, by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession. . . . (5) Succession to the immoveable property in British India of a person deceased is regulated by the law of British India, wherever he may have had his domicile at the time of his death. Succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death. . . . (9) The domicile of origin prevails until a new domicile has been acquired. (10) A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin. Explanation.—A man is not to be considered as having taken up his fixed habitation in British India merely by reason of his

residing there in her Majesty's civil or military service, or in the exercise of any profession or calling. . . . (11) Any person may acquire a domicile in British India by making and depositing in some office in British India (to be fixed by the local government) a declaration in writing under his hand of his desire to acquire such domicile, provided that he shall have been resident in British India for one year immediately preceding the time of his making such declaration. . . . (13) A new domicile continues until the former domicile has been acquired. . . . (19) If a man dies leaving moveable property in British India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of British India." No. 147.
June 23, 1877.
Wauchope v. Wauchope.

The questions submitted were:—“(1) Was the domicile of the deceased Samuel Wauchope Scotch at the time of his death? (2) (3)”

Argued for Mr Wauchope's executor;—By becoming a civil servant of the H. E. I. Company in India in 1842 Mr Wauchope became a domiciled Anglo-Indian for purposes of succession.¹ An acquired domicile could not be lost merely by leaving the country in which it had been acquired; it remained in force until a new one was acquired to take its place, and any change must be both *animo et facto*.² Mr Wauchope had, under the principle laid down in Bruce's³ case, already acquired an Anglo-Indian domicile when the Succession Act of 1865 was passed, and there was nothing in that Act to change his domicile.

Argued for Mrs Wauchope;—The moment that Mr Wauchope ceased to be the servant of a private company, and was transferred to the service of the Crown by the Act of 1858, he fell under the rule that servants of the Crown retained their domicile of origin.⁴

At advising,—

LORD JUSTICE-CLERK.—The questions which here arise as to the domicile of the late Mr Samuel Wauchope have not, as far as I am aware, been made the subject of any authoritative judgment. They are, first, whether the transference of the territory and administration of British India from the East India Com-

¹ *Bruce v. Bruce*, April 15, 1790, 3 Pat. App. 163, and 2 Bosanquet and Haller, 229, note; *Craigie v. Lewin*, Feb. 28, 1843, 3 Curteis' Eccles. Rep. 5.

² *Munro v. Douglas*, July 3, 1820, 5 Maddock, 379; *Forbes v. Forbes*, Feb. 1854, 23 L. J. Chanc. 724; *Moorhouse v. Lord*, March 19, 1863, 32 L. J. Chanc. 295, 9 Jur. 677; *Allardice v. Onslow*, Jan. 23, 1864, 10 Jur. 352; *May v. Udny*, June 3, 1869, 7 Macph. (H. L.) 89, 41 Scot. Jur. 457, L. R. 1 and Div. App. 441; *Kennedy v. Bell*, May 14, 1868, 6 Macph. (H. L.) 69, Scot. Jur. 476, L. R. 1 Sc. and Div. App. 307; *Aikman v. Aikman*, March 1861, 23 D., H. L. 3, 3 Macq. 854, 33 Scot. Jur. 363; *Whicker v. Hume*, Feb. 14, 1851, 20 L. J. Chanc. 369; *Hamilton v. Dallas*, Nov. 9, 1875, L. R. Chanc. Div. 257; *Savigny's Private International Law* (Guthrie's trans.) 59, note D; *In re Cap de Veille*, June 13, 1864, 2 Hurl. and Colt., Ch. 985.

Supra, note 1.

Munro v. Munro, Nov. 15, 1837, 16 Sh. 18, Lord Moncreiff, p. 35, 10 Scot. Jur. 58, H. L., Aug. 10, 1840, 1 Rob. App. 492, 13 Scot. Jur. 606; *Macdonald v. Lang*, Nov. 27, 1794, M. 4627; *Drevon v. Drevon*, June 13, 1864, 34 L. J. Chanc. 129, V. C. Kindersley, 134; *Hook v. Hook*, Feb. 7, 1862, 24 D. 488, Scot. Jur. 245.

No. 147. pany to the Crown has altered the status or domicile of the civil servants of the
 June 23, 1877. Crown in that country? and secondly, whether, if it be not so, that status and
 Wauchope v. domicile is affected by the recent Act of 1865 of the Indian Council, entitled
 Wauchope. "an Act to amend and define the law of intestate and testamentary succession
 in British India?"

In regard to the first of these questions, I assume it to have been conclusively decided in the case of Bruce, and the other decisions which followed on Lord Thurlow's judgment in that case, that residence in India in the service of the East India Company, either in a civil or military capacity, constituted an Indian, and therefore, for the purposes of succession, an English domicile. It may, no doubt, be a question whether the views on which this result was arrived at were altogether unimpeachable, but it has been confirmed in so many subsequent cases that it seems to me to be too late now to raise any contention on that subject. It was there held that a civil servant, covenanting with the East India Company and residing in India in the discharge of that contract, had sufficiently indicated his intention of establishing his domicile there, although, no doubt, he probably entertained the intention, more or less remote, of returning to the country of his birth. I do not think it necessary to enter at any length into the principle on which the combination of residence and intention—the *factum* and *animus*—are held to denote and determine a change of the domicile of origin. This principle has been considered of late in a great many instructive cases. It is enough that it has been conclusively held that service as a civilian with the East India Company, and continuous residence in that country, does obliterate the domicile of origin, and create what is called an Anglo-Indian domicile.

In the present case, the deceased Samuel Wauchope entered the East India Company's service as a civilian in the year 1841, and, with the exception of two short absences, he resided in India from 1842 to 1873, a period of thirty-one years. In 1858, more than fifteen years after Mr Wauchope had taken up his residence in India, the Act of that year was passed, transferring the functions of the East India directors and the government of the East Indian provinces to the Crown. It has been suggested in one or two recent cases that the decision in the case of Bruce proceeded on the fact that the East India Company was a trading company, and that service with it was equivalent to, if not identical with, service with a foreign Government; and that now that the service, whether in a civil or military capacity, in that country is service under the Crown, the principle of the judgment no longer applies.

I do not think it necessary to express any opinion on these doubts, excepting to say that I should be slow to hold that the coincidence of residence and intention on which the case of Bruce proceeded was in any degree altered by the transference of the government from the East India Company to the Crown. The Government took over the public obligations of the Company, and continued the services of those who had been previously employed by the Company on substantially the same terms. It is nearly twenty years since that transference was made, and, as far as I know, it has not as yet been found that any alteration on this question of domicile was thereby introduced.

But, however this question may be solved, it can have no application to the present case. There can be no doubt that Samuel Wauchope acquired an Indian domicile; the question is whether he has lost it, and as domicile can only

lost by an intention to abandon it, accompanied by abandonment, I think it clear that no such elements are to be found in the present case. No. 147.

The second question raises some considerations of interest and novelty. It depends upon the terms of the Act of the Indian Council of 1865. This Act, which is in substance and effect a codification of the law of intestate and testamentary succession for British India, contains a series of legal definitions and propositions, accompanied with illustrations applicable to the subject-matter treated of. Among other propositions is this one—" (10) A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin." Then follows these words—" Explanation.—A man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in her Majesty's civil or military service, or in the exercise of any profession or calling." It was maintained that these words of themselves had the effect of abrogating the Anglo-Indian domicile of Samuel Wauchope, and of reviving his domicile of origin. I cannot, however, read them as having any such effect. June 23, 1877.
Wauchope v.
Wauchope.

It is not necessary to dispute that, if by a law passed by competent authority a person resident in any country is declared not to be domiciled there, the provision must receive effect in whatever *forum* it is pleaded, for every country has the right of determining for itself under what circumstances a domicile within it shall be acquired; and if Mr Wauchope had continued to live in India under a law which enacted that he should not be domiciled there, it would have been very difficult to resist the conclusion that the intention to abandon the domicile of origin had ceased. It might be different if the law of the foreign country prescribed certain elements which should constitute a domicile within it. For in such a case it might quite well be that the *forum* in which the question was tried might, notwithstanding an international principle, apply its own law of domicile in any question occurring before it. But I imagine that no such conflict can arise in the present case, mainly because the words of this provision cannot, in my opinion, affect a domicile already acquired. Whatever be its true construction—and the words are far too popular and wanting in precision to make its interpretation altogether satisfactory—it is plain that the provision relates to the acquisition and not to the retention of a domicile. Indeed it is provided by No. 13 of the same code that a "new domicile continues until the former domicile has been acquired"—a proposition not very philosophically expressed, but in substance manifestly true. The existing domicile must continue until something has been done by the person leaving the domicile to abandon it in fact and in intention, and therefore, as the explanation adjoined article 10 only defines in what circumstances a man is not to be considered having acquired a new domicile and lost an old one, it cannot be applied to the case of a person who had already acquired an Indian domicile.

I think this sufficiently plain upon the words of the provision, and it would be contrary to all principles of legislation, and a most mischievous precedent, to apply these words inferentially to a case they do not express, and indeed exclude, and to give them a retrospective effect on the status, personal and domestic relations, deeds and conveyances, *mortis causa* as well as *inter vivos*, of all the civil servants in India at the date at which the Act passed. I am therefore of opinion that Mr Wauchope had acquired an Anglo-Indian domicile, and that he never lost it.

His Lordship then referred to the second and third questions.

No. 147.

June 28, 1877.
 Wauchope v.
 Wauchope.

LORD ORMDALE.—The first question to be answered is—"Was the domicile of the deceased Samuel Wauchope Scotch at the time of his death?"

After careful consideration I have come to be of opinion that this question must be answered in the negative. It is true that the late Mr Wauchope was born in Scotland, and therefore that his domicile of origin was Scotch. But in early life he went to India, where he entered the civil service of the East India Company, and continued in that country and service upwards of thirty years, during which time he visited Scotland twice on short leave and once on furlough.

Such being, generally, the state of matters, I think it so clear on the authorities, and especially the decision of this Court and the House of Lords in the well-known case of *Bruces v. Bruce*, in 1790 (Mor. 4617, 3 Pat. Appeals, 163) that it is impossible not to hold that the late Mr Wauchope, by entering and continuing in India in the service of the East India Company till 1858, when that company ceased to exist and its interests were transferred to the Crown, had then lost his domicile of origin and acquired an Anglo-Indian domicile.

It was contended, however, that the extinction of the East India Company in 1858, and the circumstance of the late Mr Wauchope becoming on that event a servant of the Crown, distinguishes the present case from that of *Bruces v. Bruce*, and renders the principle of the judgment in that case inapplicable. I am unable to think so. It is true that one of the reasons assigned for the judgment in *Bruce's* case was that the party whose domicile formed the subject of dispute was in the service of the company, and not in a British regiment which might have been in India only occasionally; but the position of the late Mr Wauchope was precisely of the same nature after as well as before 1858, when the East India Company ceased to exist and the Crown came into its place. It could no more be said of him, after his service was transferred to the Crown in 1858 than it could previously, that his service in India was only occasional. The reason and principle of the decision in the case of *Bruces v. Bruce* appears therefore, so far, to be clearly applicable to the present.

Neither can I see anything in the "Indian Succession Act, 1865," that can be held to affect the matter. The "explanation" which follows article 10 in that Act, to the effect that "a man is not to be considered as having taken up a fixed habitation in British India merely by reason of his residing there in His Majesty's civil or military service, or in the exercise of any profession or calling," appears to me to be no more than an announcement in a concentrated form of the settled law on the subject as exemplified by the case of *Bruces v. Bruce*, according to the terms of the judgment in that case, besides the circumstance of the party going to India and entering the service of the East India Company there were the further circumstances of his not having declared any fixed or settled intention of returning to Scotland to remain there.

If I am right in those views, it follows there is nothing in the present case to distinguish it from that of *Bruces v. Bruce*. In the present case it is no doubt the fact that the late Mr Wauchope was absent from India, and it may be said was in Scotland for a short time before his death, but he had not returned to the service in India, but, on the contrary, was in the receipt of furlough allowance down to his death. He had therefore kept up to the last his connection with India, and must, I think, be held to have intended to return there to resume the discharge of his active duties. And it does not appear that he ever declared his intention of ultimately and finally returning to Scotland.

LORD GIFFORD.—I assume that the information stated in this special case, No. 147, although I feel it to be very meagre, contains the whole facts now attainable by the parties material to the question at issue. Upon the facts so stated I am of opinion that the late Samuel Wauchope, at the time of his death on 23d July 1877, had an Anglo-Indian domicile, and that his succession must be regulated accordingly. June 23, 1877.
Wauchope v. Wauchope.

In the year 1841 Mr Wauchope, then only about nineteen years of age, entered the civil service of the East India Company, and in that service he next year went to British India. At that time the East India Company was a private company; its rights and interests were not transferred to or vested in the Crown till the statute of 1858.

Mr Wauchope appears to have entered the company's service in the usual way and on the usual terms. His appointment was of a permanent nature, and indefinite as to its duration. In point of fact that employment lasted till Mr Wauchope's death, being a period of about thirty-four years. He was in the same service at his death, although, as the rights and powers of the company had been transferred to her Majesty, he was at his death in the service of the Crown.

During that long period of service Mr Wauchope resided in British India, only visiting Scotland three times in all. He married in India in 1843, and he never took up any permanent domicile anywhere else. He died in Switzerland during an absence from his service, but he contemplated returning to it, for he was only absent from India on furlough, which had not expired at the time of his death.

I think it is fixed by the authorities referred to at the bar that a person acting permanent private employment in British India, and residing there in pursuance thereof, the employment being of indefinite duration, and involving continued residence in India, acquires an Anglo-Indian domicile, unless there be very strong circumstances and indications to the contrary. A mere indefinite intention ultimately to return to Scotland when a sufficient fortune is made, or adequate retiring pension is earned, will not *per se* prevent the acquisition of Anglo-Indian domicile. The present case is a stronger case than usual for finding that an Anglo-Indian domicile was acquired, for not only did Mr Wauchope marry and settle in India for thirty-four years, but he had no residence in Scotland, or anywhere else than in India, and he had no patrimonial estate or real estate of any kind in Scotland by means of which his connection with that country might be kept up.

From 1841 to 1858 the East India Company was just a private trading company with large possessions in India. If, then, Mr Wauchope had died previous to 1858, and before the East India Company and its whole interests were vested in the Crown, I think he must have been held a domiciled Anglo-Indian. I think this is the result of the authorities bearing on such a question, and to which your Lordships have referred. But it was contended that Mr Wauchope's becoming a servant of the Crown in 1858 raised a different presumption, at least from that which obtained before that date, and the Indian Succession Act of 1865 was strongly relied on, particularly the explanation annexed to section 10, which provides

“a man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in her Majesty's civil or military service, or in the exercise of any profession or calling.”

Now, if Mr Wauchope, instead of entering the service of the East India Com-

No. 147. pany in 1841, when it was a private company, had entered the Indian service of the Crown after 1858, and particularly if he had entered subsequent to the Indian Act of 1865, I think there would have been very strong grounds for maintaining that he had not thereby lost his Scotch domicile of origin, even although he remained in India for a very considerable time. At least in a case where the facts are so bare as those set forth in this joint case, and where there are no indications of change of domicile except the mere circumstance of residence and service, I think the abandonment of the domicile of origin would not thereby be presumed. But I cannot hold that the transference of British India to the Crown in 1858, even coupled with the Indian Act of 1865, had the effect of changing the legal domicile of all those who had gone out to India long before 1858, and who had, according to the then existing law, acquired an Anglo-Indian domicile prior to the change effected in 1858 and prior to the Indian Act of 1865. I do not think any such result can be ascribed either to the Vesting Act of 1858 or to the Indian Succession Act of 1865. It would require some very express and explicit enactment to produce an effect so startling as would be the change, whether inversion or reversion, of the legal domicile of the whole *personnel* then serving the East India Company in British India. I cannot give any such effect either to the transference of the East India Company to the Crown or to the Indian Succession Act of 1865.

I feel compelled, therefore, to decide the present case just as if it had arisen in 1858; and if I find upon the facts stated, as I do, that in 1858 Mr Wauchope was a domiciled Anglo-Indian, and if I find upon the facts stated, as I do, that nothing has occurred since 1858 whereby Mr Wauchope has lost his Anglo-Indian domicile and has acquired a new one, then I must conclude, as I do, that Mr Wauchope's domicile at his death was Anglo-Indian.

THIS interlocutor was pronounced:—"Find that the late Samuel Wauchope's domicile was in British India; and therefore find unnecessary to answer the other questions, and decern: Allow the expenses incurred by both parties to this special case to be paid out of the estate."

J. & F. ANDERSON, W.S.—R. B. RANKEN, W.S.—Agents.

No. 148.

WILLIAM STEWART, Pursuer.—*Asher—Lang.*

THE COLTNESS IRON COMPANY AND ROBERT DEWAR, Defendants.—
Balfour—Alison.

June 23, 1877.
Stewart v.
Coltness Iron
Company and
Dewar.

Reparation—Liability of Master for Injury to Servant—Process—Release of Averment.—In an action at the instance of a miner against colliery proprietors and their manager for damages for personal injury alleged to have been incurred by the pursuer in consequence of the proprietors or their manager having negligently or culpably failed to properly support and prop the roof of the mine. The Court, on consideration of a proof, found that the pursuer having failed to prove fault on the part of the defenders, they were entitled to absolvitor.

Observations (per Lord Justice-Clerk) upon the effect of the rules laid down in decided cases as to the liability of masters for the fault of their workmen.

Observations (per Lord Ormisdale) upon the relevancy of the pursuer's averments.

2D DIVISION.
Sheriff of
Lanarkshire.
R.

IN December 1876 William Stewart, miner, Maryhill, Glasgow, raised an action in the Sheriff Court of Lanarkshire to recover £500 in damages from the Coltness Iron Company, or Robert Dewar, manager of

one of their pits, called the Polkemmet Pit. The pursuer's averments were:—(Cond. 1) "The said defenders ought to be decerned to pay him the sum of £500 sterling of principal, or such other principal sum as may seem just, as and being *solatium* to and reparation or compensation for personal suffering, loss, injury, and damages, sustained and to be sustained by the pursuer in the circumstances aftermentioned." (Cond. 2) "The defenders, or their managers, roadsmen, or other servants (whose names the pursuer does not know, but for whom the defenders are responsible), did on or about this date (July 17, 1875), and prior thereto, carelessly, recklessly, negligently, and culpably, and in violation of the Coal Mines Regulation Act, 35 and 36 Vict. cap. 76, and relative special rules, and other statutes and rules, and of common law, fail to properly support and prop the roof of defenders' pit, known as Polkemmet Pit, in or near Fauldhouse, and to have an adequate supply of timber for props and other necessary purposes always ready at the place in said pit where the miners were, and particularly the pursuer was, on said date, at work, for the use of the miners in supporting the roofs and sides of their working places, all cut in proper lengths, and laid down at the working places." (Cond. 3) "In consequence of which culpable neglect and violation of and failure in duty, a large stone or part of the roof in foresaid pit, on foresaid specified date, fell on and crushed and injured the pursuer so as to render him unfit for work, and permanently disabled him, his spine or other part of his body being injured; and the pursuer at said time was earning 5s. sterling per day or thereby; and he not only suffered great pain and agony, but also damages to foresaid extent of principal."

The defenders pleaded;—(1) *Damnum fatale*. (2) The *culpa* or carelessness (if any such existed) occasioning said fall and the alleged injury having been on the part of a contractor, by whom the pursuer was employed, or on the part of a fellow-servant or fellow-servants with pursuer, in the employment of said contractor, or on the part of all or one or more of said parties, for none of whom the defenders were or are responsible, the defenders are entitled to absolvitor. (3) Or, alternatively with the second plea in law, the *culpa* or carelessness (if any such existed) occasioning said fall and the alleged injury having been on the part of a fellow-workman or workmen in the employment, along with pursuer, of the said Coltness Iron Company, and Thomas Houldsworth, J. H. Houldsworth, and J. M. Houldsworth, defenders, for none of whom defenders were or are responsible, the defenders are entitled to absolvitor. And (4) Contributory negligence.

A proof having been allowed to both parties evidence of a most conflicting nature was led as to whether prop-wood had been supplied in the pit in sufficient quantities, and as to whether complaints of a want of wood had ever been made to the manager or any of the responsible men in charge of the pit.

On 24th May 1876 the Sheriff-substitute (Guthrie) assolized the defenders.

Stewart appealed, and on 29th December the Sheriff-principal (Clark) pronounced this interlocutor:—"Recalls the interlocutor appealed against: Finds that on or about the occasion libelled the pursuer, while working in the employment of the defenders, the Coltness Iron Company, and whose manager the other defender was, received severe and permanent injuries in consequence of the falling upon him of a large stone from the roof of the workings by and through the fault of the defenders, or of those for whom they are responsible, in respect that a sufficient supply of prop-wood was not afforded to him at the working where he was employed:

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No. 148. Therefore finds the defenders liable in damages, and assesses the same at £100," &c.

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The defenders appealed to the Court of Session.
At advising,—

LORD ORMDALE.—This is an action at the instance of William Stewart, a miner, against the Coltness Iron Company, and their manager Dewar, in whose works at Polkemmet Pit he was employed in July 1876, and there received serious bodily injury by the fall of a stone upon him from the roof of the pit. The pursuer concludes for £500 as damages in respect of that injury.

The Sheriff-substitute assailed the defenders, but the Sheriff-principal altered and found them liable in £100 of damages.

The averments of the pursuer appear to me to be very peculiar, and after the numerous authoritative decisions which have been pronounced in regard to such actions I am surprised that these averments were sustained as relevant, or were ever remitted to probation.

The first article of the condescendence amounts to little more than that the defenders are, in the circumstances, liable to the pursuer in payment of £500. The second article is to the effect that "the defenders, or their managers, roadmen, or other servants (whose names the pursuer does not know, but for whom the defenders are responsible), . . . carelessly, recklessly, negligently, and culpably," &c., failed to prop the roof of the pit, or to supply wood for that purpose. And the third article bears that in consequence of that failure of duty the accident happened, and the pursuer was injured. Now, that appears to me to be a very loose and unsatisfactory statement. It does not condescend on any particular individual, or set of individuals, who are assumed to be responsible. It merely refers generally to the company and all their servants, without specifying or naming any of them. This mode of libelling his case was very disadvantageous to the pursuer himself, for it led to a vague and rambling proof, from which it is impossible to extract anything definite and certain. It also placed the defenders in a most embarrassing position, as they had no proper notice of the case which was to be made against them. The averment was simply that the Coltness Company, or some of their employees, with whose names the pursuer was unacquainted, were liable to him in damages in respect of the injury he had sustained.

Ever since the Bartonhill cases, 3 Macq. 266, and the case of Wilson v. Merry and Cunningham, as decided in the House of Lords, 6 Macph. H.L. 84, it has been held as settled that the owners of pits are not responsible for injuries sustained by the miners in their employment through the fault of their fellow-workmen, including the manager, engaged in the same common employment; and it is indeed impossible to understand, as has been frequently remarked by the most eminent lawyers, in the House of Lords as well as inferior Courts, both in England and Scotland, how large industrial works could be carried on upon any other footing. In the general case it is out of the question to expect personal superintendence by owners of such establishments. All that can be expected is that they appoint proper and competent managers and others to direct and superintend and carry out the operations. Accordingly, in actions against owners or employers, where personal fault is intended to be charged, that must be distinctly averred and proved. Or they may be made responsible for the fault of their employees, when it is averred.

oved that these persons were not competent or fit for their respective duties. No. 148.
 at there is no such averment in the record in this case, and no attempt appears
 have been made by the pursuer to prove incompetency on the part of any one
 the pit. The contrary, indeed, has been proved by the defenders. Nor has
 y other fault been brought home to the Coltness Company, or any of its
 rners.

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Again, as to the other defender Dewar, the manager, the record and proof
 pear to me to be also quite insufficient. In particular, it is not said or proved
 it was through his personal fault the accident happened. The effect of the
 idence as a whole on my mind is that not only Dewar, the manager, but also
 the other head persons in the pit, were quite competent and fit for their
 ties, and cannot be fairly charged with personal fault. I have therefore no
 itation in saying that, in my opinion, no case has, on any ordinary ground
 liability, been established against the defenders.

A special point, however, was attempted to be made by the pursuer, to the
 et that the company failed to supply prop-wood, or to have it ready at suite
 places in the pit, and that on this ground they are responsible to the pur-
 r. This might have been a ground of liability if satisfactorily averred and
 ved. But I am clearly of opinion that no such case has been established.
 the contrary, there is ample proof, I think, that there was a plentiful supply
 wood. Whether the wood was always brought to the proper places in the pit
 the persons whose duty it was to attend to that matter is another thing.
 e company, however, having supplied plenty of wood, no case can be main-
 ed against them on that point. And if the wood, being supplied, was not
 ried to and laid down in suitable places in the pit, that must have been the
 lt, not of the company, but of others employed in the pit. But the pursuer
 not shewn that Dewar, the only defender besides the company, was in fault
 that respect.

It was farther argued, however, as against Dewar, that he was liable on the
 und that he had systematically neglected the duties incumbent upon him by
 rules of the pit. I cannot, however, see how this has been made out. The
 nd of the special rules by which the pit was regulated defines the duties of
 anager. But it is clear that the manager could not possibly be everywhere
 nce, so as personally to see if the roof was safe, or that every miner had sup-
 d himself with the necessary prop-wood. That cannot, I think, be said to
 the manager's duty within the meaning of this rule, especially when we have
 rd to the other rules, and to the duties thereby imposed upon the oversman
 e 7),¹ roadsman (rule 28), and fireman (rule 40). Keeping these rules in
 r, and also the 59th, 60th, and 61st rules, which relate to the duties of the
 ers themselves, it becomes obvious that the manager's duty is and can be
 hing more than general superintendence. And it is also clear, I think, from
 rules, that it is the duty of the miners themselves to be careful for their own
 ty; but I rather think it is proved that the pursuer did not in this respect
 form himself to the rules.

For those reasons, I am very clearly of opinion that the pursuer has entirely
 al to establish his case, and therefore that the judgment appealed against
 ht to be reversed.

¹ See *supra*, p. 472, note.

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LORD GIFFORD.—I am of the same opinion. I agree with the Sheriff-substitute in the conclusion to which he has come, that "it is not proved that the accident was due to any fault on the part of either of the defenders," by this, I mean, personal or individual fault of the defenders, or of some of them, and the failure to bring home personal or individual fault leads to decree of absolvitur in favour of both defenders, because fault must be brought home to them before they can be made liable. The present is not a case where a stranger to the colliery is injured by the negligence of the servants or workmen of the mine-owner, and hence there is here no constructive liability of the defenders for the acts of their servants.

In the first place, and with respect to the case against the company and individual partners thereof, there is no averment far less proof that any of the partners failed in any duty which they undertook. For example, it is not said that the oversman or manager appointed by them was unfit for their duty, or that the company failed to appoint officers at all. On the face of it, therefore, the case against the company and its partners falls to be dismissed.

The only case which, with any plausibility or relevancy, it has been attempted to make out is that against the manager of the company personally, for he is charged with having neglected to provide prop-wood at proper places throughout the mine. Now, that is a relevant complaint, and, if proved, would infer liability. But the pursuer has failed to bring it home to the manager. It is in evidence that there was plenty of prop-wood at the pit-head, at the pit-bottom, and also in some of the roads. The complaint made is that it was not at the working faces. But it was not the personal duty of the manager to convey the prop-wood from the proper stores or deposits thereof to the working faces. The manager can only be made responsible for that if the complaint is made to him, and if he knew that those whose duty it was to bring forward the wood to the working faces had failed or refused to do so. But there is no evidence to this effect. No one has proved or even suggested that he complained to the manager that he could not get prop-wood at his working face. No one has said that the manager knew or ever had any reason to suspect that the rules of the pit were being violated, and although there was plenty of prop-wood it was not taken forward so as to be handy for use.

The case of the pursuer, however, fails still more completely on this point when we consider the special rules as to bringing forward the prop-wood, for by the special rules the drawers are bound to convey the prop-wood to the working face, and not a single drawer was called to prove that he could get no wood. That is fatal to the case. The drawers are generally the private assistants of the miners, and paid by the miners themselves to take the coal to the pit-bottom, and if prop-wood is wanted to bring it back to the face in the empty hutches. The miner has himself to blame if he does not make his drawer bring what he requires. Still further, it was plainly the duty of the miners, if they could not get prop-wood, to stop working. They would be entitled to the same wages all the same, but they were not bound to go on working in a pit which was unsafe from want of propping. In every point of view, therefore, I think the pursuer's case has entirely failed.

LORD JUSTICE-CLERK.—I do not differ from the proposed judgment.

But for the series of decisions relative to the conditions which are implied in every contract of service I should have been inclined to hold that in so far as

these regulations related to matters in which any individual servant had an interest, they constituted the counterpart of the obligations incumbent on the servant, and were things which the master by himself or his servants undertook to do as his part of the contract. It would not have occurred to me that it made the slightest difference whether the work was a large or a small one, or whether the master was or was not expected to do these things personally. But has now been conclusively fixed that the obligation incurred by the master under such a contract is one of an entirely different description, namely, to appoint competent servants to discharge these duties; and that there was no obligation whatever to supply these miners with prop-wood on the part of the duly persons with whom the pursuer contracted, so that, as the law now stands, the miner is bound to work, and the master is not bound to supply him with the necessary materials to enable him to work in safety, but only to appoint persons fairly competent to do so.

But then it is said, this duty is placed on others, with whom the miner has a contract, and that his remedy lies against them. The present case is not a practical example of the security thereby afforded—if the defenders' argument be sound. The manager throws it on the oversman, the oversman on the man, the fireman on the drawer, until, however gross or glaring the neglect, is impossible to fix liability on any one. It comes to this, according to the defenders, that no one contracted with the miner to give him prop-wood; that there were persons who had undertaken to do this by a separate contract with another; but that who these persons are it is impossible to say.

This is the result of the decisions; and they are quite conclusive on the present case so far as the Coltness Company is concerned. The company never undertook to furnish the pursuer with prop-wood, and, therefore, cannot be responsible for not having furnished it; and, as far as they are concerned, they must be assolizied, if the servants appointed were competent, and there is no proof that they were not.

The case against the manager stands somewhat differently. If I were to hold proved that prop-wood was not duly supplied I have no doubt whatever that *prima facie* at least the manager is responsible, and must discharge himself. If the manager's obligation comes in place of that of the master it must be read as part of the conditions of the service. Now, the manager was bound to see that prop-wood was supplied to the miners—not to do it himself, but to see it done. This is plain from regulation No. 2. It was therefore for the manager to shew that this duty was performed, and, on that matter, I should have had no doubt, had it been proved, as it lay on the pursuer to prove, that the prop-wood was supplied. But the evidence on this head is so conflicting that, rather reluctantly, I am obliged to concur in the judgment, although remaining under the impression that the regulations were most imperfectly carried out in the work.

THIS interlocutor was pronounced:—"Find that the respondent (pursuer) has failed to prove that the injury libelled was occasioned by the fault of any of the appellants (defenders): Therefore sustain the appeal, recall the judgment appealed against, and assolzie the appellants (defenders) from the conclusions of the summons, and decern: Find the respondent liable in expenses to the appellants in both Courts, and remit."

No. 149.

WILLIAM TAYLOR KEITH, Pursuer and Respondent.—*Naray.*GEORGE OUTRAM AND COMPANY, Defenders and Appellants.—*Asher—Lang*

June 27, 1877.

Keith v.

Outram & Co.

Process—Expenses—Amendment of Record—Court of Session Act, 1868, 31 and 32 Vict. c. 100, sec. 29.—An action of damages for slander contained in a newspaper article was appealed by the defenders from the Sheriff Court for jury trial. An issue was adjusted, and notice of trial was given. The defenders then proposed to amend the record, by adding an averment and plea of *veritas*. Amendment and counter issue allowed, on condition of the defenders paying the whole expenses of the pursuer since the closing of the record in the Sheriff Court.

1st DIVISION.

Sheriff of

Lanarkshire.

M.

THIS was an action in the Sheriff Court of Lanarkshire brought by William Taylor Keith against George Outram and Company, printers and publishers of the "Glasgow Herald" newspaper, concluding for damages for slander alleged to be contained in a newspaper article.

The defenders pleaded privilege, but no averment or plea of *veritas* was stated.

The record was closed by the Sheriff-substitute on 17th January 1877 and the defenders appealed for jury trial.

On 3d March this issue was adjusted:—"It being also admitted that the said article or words are of and concerning the pursuer, Whether the said article falsely and calumniously represents to the public that the pursuer was a swindler, and a person guilty of fraudulent and dishonest practice to the loss, injury, and damage of the pursuer?"

Notice of trial was given for the summer sittings.

The defenders then proposed to amend their statement of facts and plea in law by adding an averment that the statements contained in the newspaper article complained of were true, and by giving a more detailed narrative than was contained in the original defences of the actings of the pursuer to which the article referred.

The defenders maintained that the amendment was competent,¹ and that they were also entitled to a counter issue of *veritas*.

The pursuer contended that the amendment raised a new question which was not raised by the original record, and was not competent.

The defenders then lodged this counter issue:—"Whether the statements contained in the said article are true?"

LORD PRESIDENT.—We are all of opinion that this amendment is competent but it is necessary that an issue should be put in. That should have been done when the amendment was lodged.

But there are some important conditions on which alone we can allow the amendment. This defence, like all other defences, ought to have been stated when the defenders came into Court. That is the rule both in this Court and in the inferior Courts. I can conceive that amendments may be added to the record by a defender at a late stage which do not involve any great hardship to the pursuer, and where no large award of expenses would be necessary as a condition to their being allowed. But this defence belongs to a different class. If the defenders had stated this defence when they ought to have done so it would then have been for the pursuer to consider whether he would go on with the case. Now that the amendment is allowed that will be a matter for his con-

¹ *Gelot v. Stewart*, March 4, 1870, 8 Macph. 649, 42 Scot. Jur. 321; *Armstrong v. Burt*, Nov. 14, 1872, 11 Macph. 62, 45 Scot. Jur. 46.

deration. It is the duty of the Court, when an amendment is allowed, to place the pursuer in the same position as if the defence had been stated at the proper time. The only expense then incurred was the expense of bringing the action to Court, and the pursuer might have abandoned the action then on paying the defenders' expenses. All that he has since done may be thrown away if he is now induced to abandon the action.

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This rule is not confined to this defence, but to all defences which put it upon the pursuer to consider whether or not he will go on with his action. When the Court allow such an amendment the payment of all expenses incurred since the defence ought to have been stated must be imposed upon the defender. At the same time, the particular circumstances of any case will always fall to be taken into consideration.

LORD DEAR.—This action was raised in the inferior Court, and concluded for damages on account of an alleged libel, published in the "Glasgow Herald" newspaper, the innuendo being that the pursuer was thereby represented as a swindler and a person guilty of fraudulent and dishonest practices. In defence the defenders stated that they had given an accurate report of a criminal charge, made by the public prosecutor against the pursuer. They farther alleged that they had a probable cause for their comments on the subject, but they did not undertake to prove the *veritas*. This they now propose to do, by amending the record by taking a counter issue upon the *veritas*. The question is on what condition the amendment is to be allowed? In other circumstances payment of expenses since the making of the record might be sufficient. But if the *veritas* had been pleaded at the outset the pursuer, who knows the whole facts best, would have had an opportunity of considering whether he would persevere with his action. I think that in that state of matters he should have expenses from the outset.

LORD MURE and **LORD SHAND** concurred.

THE COURT pronounced this interlocutor:—"On condition of the defenders paying to the pursuer the whole expenses incurred by him in both Courts since 17th January last, allow the defences, No. 6 of process, to be amended in terms of the said proposed amendment, and the counter issue, also now proposed by the defenders, to be added to the issue for the pursuer, adjusted and settled on the 3d March last, No. 13 of process: Appoint the said issue for the pursuer and counter issue for the defenders to be the issues for the trial of the cause: Of consent appoint the cause to be tried at the ensuing sittings of this Division of the Court; and remit to the Auditor to tax the account of the foresaid expenses incurred by the pursuer, and to report."

WILLIAM ROSS GARSON, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 150. WM. ROSS ROBERTSON AND ANOTHER, Pursuers.—*Asher*—*McKechnie*.
WM. RAMSAY AND OTHERS, Defenders.—*Nevey*—*J. A. Reid*.

June 29, 1877.
Robertson, &c.
v. Ramsay, &c.

Agent and Client—Account—Fees for Drawing a Bond with a Heritable Security—Consideration.—Persons in prosecuting a claim to an estate obtained an advance of £2000, on granting in return a personal bond binding themselves to pay £10,000 in the event of success, and a heritable security for £10,000 over the estate. *Held* that the rate of charge by the agent for preparing these deeds was to be regulated by the consideration given and not by the amount which the claimants would have to pay in the event of their establishing their right to the estate.

1st Division.
Lord Rutherford
Clark.
B.

THIS was an action by Andrew Ross Robertson, with consent of Mr Jane Ross or Macpherson, his aunt, against William Ramsay and the trustees of the late Matthew Walker, as representing the late firm of Walker and Ramsay, writers in Glasgow, concluding for repayment of an alleged overcharge in a business account of Messrs Walker and Ramsay. The following narrative is taken from the Lord Ordinary's note :—"In February 1876 the pursuer, along with Mrs Macpherson, entered into a transaction with Mr Henry Leck, whereby, for the consideration of £2000, they granted to him a bond* for £10,000, payable in the event of the succeeding to the Shandwick estates," (which were then the subject of litigation). "They further granted a disposition of these estates in favour of Mr Leck; and, on the other hand, he gave them a back-letter acknowledging that the disposition was granted, *inter alia*, in security of the bond. The defenders acted as the agents for both parties in carrying out this transaction.

"The defenders in settling with the pursuer accepted £90 in payment of their account. The account as made up amounted to £100, 14s. 6d. but they give a discount of £10, 14s. 6d. The principle on which the account was framed was to charge the expense of the transaction against the pursuer and Mrs Macpherson as if they were the borrowers of £10,000, according to the rule that the borrower pays the expense of the loan.

"The Lord Ordinary remitted the account to Mr Baxter, the Auditor of the Court, for his report, and he has reported that the fees of the agents should be regulated by the consideration in respect of which the bond was granted."

The account included an item "drawing bond for £10,000 to Henry Leck, Esq., £73, 10s.," and from this the Auditor struck off £56. There were other small items struck off, leaving an overcharge of £60, 14s. 6d. but as a discount of £10, 14s. 6d. had been allowed at the settlement the overcharge amounted to £50.†

* The bond bore :—"In consideration of the sum of £2000 sterling paid us by Henry Leck, accountant in Glasgow, we do hereby bind and oblige ourselves jointly and severally, and our several respective heirs, executors, and successors without the necessity of discussing them in their order, to make payment to said Henry Leck and his heirs and executors, or assignees, of the sum of £10,000 sterling, and that so soon as and at the date that we or either of us shall succeed to the said estate of Shandwick, in the county of Ross, with a fifth part more of the foresaid principal sum of liquidate penalty in case of failure, and the interest of said principal sum of £10,000 sterling at the rate of £5 per centum per annum from the date of said succession until paid."

† In the joint table of fees adjusted by the Societies of Writers to the Signet and S.S.C., and the Faculty of Procurators of Glasgow, for transactions after 1st January 1876, under the head "Fees for documents and agency according

The defenders pleaded, *inter alia*, that they were entitled to absolvitor, No. 150. with expenses, in respect (2) that the pursuer could not sue for repetition of sums paid by him for professional services in the full knowledge of the premises; and (3) that the sums paid by the pursuer were justly due when paid.

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The Lord Ordinary pronounced this interlocutor:—"Decerns against the defenders for the sum of £50 sterling, with interest at the rate of five per centum per annum from 26th February 1876 till payment: Finds the pursuer entitled to expenses," &c.

The defenders reclaimed, and argued;—The question was whether the security was for £10,000 or £2000. Mr Leck never was to receive £2000, but hoped to receive £10,000. This was the sum which he wished to have heritably secured, and it was this sum for which the agents undertook responsibility. The agent's responsibility was what regulated the rate of charge.

Argued for the pursuer;—The transaction was not properly a loan, but the purchase of a contingent interest in the success of a litigation. The due of the interest was the sum paid for it, viz., £2000, and that ought regulate the agent's charge.

At advising,—

LORD PRESIDENT.—It is not now said that the pursuer in this action is too late bringing his claim, and the question is whether the account is overcharged. In order to determine whether there is an overcharge or not it is necessary to examine the nature of the transaction which Messrs Walker and Ramsay were employed to carry through. A Mr Leck advanced to the pursuer the sum of £2000, and in return he obtained a personal bond for the sum of £10,000, and a heritable security consisting of an absolute disposition and back-letter of one-half *pro indiviso* of the estate of Shandwick. Mr Robertson Ross, and his aunt's Macpherson, were claimants to the estate of Shandwick as the nearest heirs-portioners of the last heir in possession of that estate, and it was in expectation of their success in that claim that this money was advanced. What Mr Leck obtained in return was the chance of obtaining a sum five times as large as what he gave, in the event of the success of the claim. There is no need to advert to the nature of the heritable security.

The account before us is charged on the footing that the matter to be dealt with was a personal bond with a heritable security for £10,000, and if that be the right view of it an *ad valorem* fee, which is the charge made, is the proper charge.

The Lord Ordinary made a remit to the Auditor of Court, and has now reported the view reported to him, that the transaction was not one of loan, but purchase, and that Mr Leck bought from the pursuer and his aunt a chance of obtaining £10,000 for a present payment of £2000. I confess I do not care what the nature of the transaction is. It must be either a loan or a sale, or it is a legitimate transaction at all. I may say it appears to me to look like a bet, and perhaps that is another aspect of it. I am very clearly

rice or value," the *ad valorem* fees (scale I.) are thus stated—"Charge. Price exceeding £500;—for each £100, £1, 1s. Above £500—the above rate for the first £500, and for each additional £100,—10s. 6d." Under this scale fall deeds and dispositions in security Deeds constituting burdens When the agents act for both parties the one-half of the *ad valorem* fee is allowed in addition."

No. 150. of opinion, with the Lord Ordinary, that according to the rule in the table

June 29, 1877. of fees now in use the consideration is the proper sum upon which to charge
Robertson, &c. the *valorem* fee.

v. Ramsay, &c. It was very ingeniously argued that the responsibility of the agents was not limited to £2000, but that it might amount to £10,000. There would be a great deal of force in that contention if the holder of the bond were secured with what would at some future date for certain be worth £10,000. But here the chance, depending on the result of a litigation, was all the lender got, and although the agent's liability might be for £10,000, yet in another view it might be *nil*, so that the consideration given must be the measure of the rate of the agent's remuneration. If it was a fair transaction that was the value of the right which the lender acquired. I therefore see no reason to doubt that the conclusion to which the Auditor and the Lord Ordinary have come is quite right.

I do not, however, intend to express any opinion upon the amount of the agent's responsibility.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT adhered.

A. NIVISON, S.S.C.—RONALD & RITCHIE, S.S.C.—Agents.

No. 151.

June 29, 1877.
Mackenzie v.
Mackenzie's
Trustees.

COLIN LYON MACKENZIE, Pursuer.—*Balfour*—*C. J. Guthrie*.
JAMES THOMSON GIBSON-CRAIG AND OTHERS (Mackenzie's Trustees).
Defenders.—*Rutherford*.
MISS HELEN LYON MACKENZIE AND OTHERS, Defenders.—*Rutherford*.
COLIN LYON MACKENZIE JUNIOR, Defender.—*Moncreiff*—*Keir*.

Succession—*Heir of Entail*—*Next of Kin*—*Accumulations*—*Thellusson Act* 1800 (39 and 40 Geo. III., c. 98).—The granter of a trust-disposition, on the supposition that he had executed an entail of an estate, directed his trustees to lay out the residue of the trust-funds in the purchase of land near the entailed estate as soon as a favourable opportunity occurred, and to entail the land so purchased on the heir of entail in possession of the estate, and to pay to him three-fourths of the interest or profits of the residue until a purchase could be made, the surplus interest being applied to increase the amount of the disposable fund. The trustees did not purchase any lands under this direction for thirty-four years after the truster's death. In an action of declarator afterwards raised by the heir of entail in possession against the trustees and the truster's next of kin he asked (1) that the Thellusson Act applied to the accumulations so made by the trustees after the lapse of twenty-one years from the truster's death; and (2) (dec. by Lord Deas, *rev.* judgment of Lord Rutherford Clark) that the person entitled to the accumulations under the Act as the person "who would have been entitled thereto if such accumulation had not been directed" was the heir of entail, who would have been entitled to the rents if the lands had been purchased, and not the truster's next of kin.

1ST DIVISION.
Lord Rutherford
Clark.
B.

THE late Colin Mackenzie of Newhall, who died on 1st October 1844, left a trust-settlement, which proceeded on the following narrative:—"Considering that I have, of the date of these presents, executed a deed of entail of my lands of Drumendden and Easter St. Martins, in the counties of Ross and Cromarty, in favour of my nephew, Colin Mackenzie, merchant in Inverness, and the heirs-male of his body, whom I have named the other heirs of tailie therein specified, and that it is my desire

and intention that the said entailed estates shall not only be freed and relieved of all debts and burdens, but that the same shall be increased by new purchases from my free means and estate after the several other purposes aftermentioned shall be fulfilled." The deed then conveyed the whole of his property, which consisted only of moveables, to Mr James T. Gibson-Craig and others as trustees, who were directed, after paying certain legacies and annuities, "to lay out and invest the whole free proceeds of my trust-estate, with the interest which may accrue thereon (subject to the explanations underwritten), in the purchase of lands and estates as near to the foresaid lands of Easter St Martins and Drumcudden as they can conveniently be had, and shall afterwards settle and secure the lands and estates so to be purchased by a valid and formal deed or deeds of entail upon the same series of heirs (so far as then subsisting), and under the same provisions, limitations, restrictions, clauses irritant and resolutive, and other clauses, as are contained in the foresaid deed of entail executed by me; . . . declaring, in explanation of the foregoing appointment to invest the free proceeds and interest accruing thereon, that purchases may be made by my said trustees from time to time as they may judge most eligible, according to the state of the trusts and the opportunities which may offer of making suitable and convenient purchases, and that they shall not be bound to wait till the whole of the foregoing other purposes are fulfilled before making their first purchases, but that, so soon as they shall at any time have realised any free disposable sum or sums of money and a favourable opportunity of making a purchase or purchases shall occur, the same may immediately be so applied from time to time, but no purchase shall be made with any sum or sums of money necessary to be retained for answering any of the foregoing purposes till such purposes are completely fulfilled; and likewise declaring that when any purchase shall be made the free rents and profits of the lands so purchased, after the deducting public burdens and expense of collection, shall be payable by my said trustees to the heir of entail in possession for the time of the said entailed estates of Easter St Martins and Drumcudden; and further declaring, that in the event of any free disposable sum or sums of money being at any time realised, and no opportunity of making an eligible purchase occurring at the time, my said trustees shall be bound to make payment to the heir in possession of the said entailed estates of three-fourths of the free interest or profits of such disposable sum or sums of money until a purchase shall be made, the surplus interest being applied to increase the amount of disposable funds, but the amount of the said three-fourths shall be fixed and determined periodically by my said trustees themselves, and their statement thereof shall be final and conclusive against the said heir of entail and all other persons in his right."

The trustees paid the legacies and fulfilled the purposes of the trust. They paid to the heir in possession of the estate of St Martins and Drumcudden three-fourths of the interest of the funds in their hands, retaining one-fourth as part of the capital to be invested in land in terms of the settlement.

On 13th December 1876 the heir of entail in possession of the estates Easter St Martins and Drumcudden, Colin Lyon Mackenzie, brought action against (1) the trustees, (2) Miss Helen Mackenzie and certain other persons, as representing the next of kin of the late Colin Mackenzie of Newhall, and (3) the pursuer's son, Colin Lyon Mackenzie junior, as next heir of entail to Easter St Martins and Drumcudden, concurring for a declarator that the direction that one-fourth of the interest should be applied to increase the free disposable sum or sums of money "

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No. 151. was null and void under the Thellusson Act.* There were also conclusions for payment.

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The pursuer pleaded ;—The directions in the said trust-disposition and deed of settlement to accumulate the said surplus or one-fourth part of the free interest or profits of the said disposable sum or sums of money, being contrary to the provisions of the Act labelled, the same are null and void, from and since the expiry of twenty-one years from the date of the death of the testator ; and the pursuer being the person who would, but for the direction to make the said accumulations, have been entitled thereto, is entitled to decree in terms of the conclusions of the summons.

Miss Helen Mackenzie and others, as representing the next of kin, pleaded ;—The trust-funds accumulated subsequent to 1st October 1863 are intestate succession of the said Colin Mackenzie, and as such fall to be divided among the representatives of his next of kin as at the date of his death in 1842.

Colin Lyon Mackenzie junior, as heir next entitled to succeed to the estates of Drumcudden and Easter St Martins, lodged defences, and pleaded ;—(1) The claims of the pursuer are not, in the circumstances stated, maintainable with reference to the terms of the Thellusson Act and the trust-deed of the late Colin Mackenzie. (2) The pursuer having acquiesced in the trustees' administration under the said deed, and received payment in terms thereof of three-fourths of the free interest or profits realised since 1st October 1863, is barred from insisting in his present claim, and the interest or surplus profits so accumulated fall to be invested forthwith along with the funds from which they are derived in the purchase of lands to be entailed, as directed by the trust-deed of the late Colin Mackenzie.

The Lord Ordinary pronounced an interlocutor assailing the defences.†

* By the Act 39 and 40 Geo. III. c. 98, entitled "An Act to restrain Trusts and Directions in Deeds or Wills, whereby the profits or produce of Real or Personal Estate shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited," it is enacted, "That no persons shall, after the passing of this Act (28th July 1800), by any deed, deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle, dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such granter or granters, settlor or settlers, or the term of twenty-one years from the death of any such granter, settlor, deviser, or testator, . . . and in every case where any accumulation shall be directed otherwise than as aforesaid such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such persons as would have been entitled thereto if such accumulation had not been directed."

† "NOTE.—The Lord Ordinary is of opinion that the Thellusson Act applies. There is no allegation that the trustees have not acted in conformity with the trust, and the accumulations are the result of a direction to accumulate, express or implied, contained in the trust-deed.

"The question remains, who is entitled to the accumulations? They are claimed by the pursuer as the person who would be entitled thereto if the accumulations had not been directed.

"The pursuer is the heir of entail in possession of the entailed estates of Easter St Martins and Drumcudden. The trustees are directed to employ the trust-funds in the purchase of lands and estates as near to St Martins and Drumcudden as they can conveniently be had, and thereafter to settle them by a deed of entail on the same series of heirs, so far as then subsisting, as is contained

The pursuer reclaimed, and argued;—(1) The Thellusson Act applied to the accumulations. The test whether the Act applied or not was not the object of the maker of the deed but the result of the deed. If the accumulations arose in the fair administration of the trust that was enough to make the Act apply to the case. (2) The accumulations should go to the person who would have got the money if there had been no direction to accumulate. If there had been no direction to accumulate the interest and profits would have gone along with the three-fourths of the residue to the pursuer as heir of entail in possession of the estate. The leading intention of the truster was that this fund should benefit the heir of entail, who was to get the lands. If he was to get the lands he was entitled to the interest of the fund on the principle that the person who was entitled to get the fee was entitled to get the income.¹

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Argued for the representatives of the testator's next of kin, Miss Helen Lyon Mackenzie and others;—There was here a direction to accumulate one-fourth of the income of the residue of the trust-estate for an indefinite period. This was struck at by the Thellusson Act, so far as it implied accumulations after twenty-one years from the testator's death, and there having been to that extent a failure of the purposes of the trust these accumulations being undisposed of by the deed became intestate succession.² The Court was not at liberty to speculate as to what might have

the entail in which St Martins and Drumcudden are held. The trust-deed declares that when any purchase is made the rents and profits of the lands shall be payable to the heir in possession for the time of the estates of St Martins and Drumcudden, and that, until the purchase, the heir in possession of the estates shall be entitled to three-fourths of the interest of the trust-funds and accumulations. The truster therefore provides by express direction for the event which has happened, of no purchase being made. Till the purchase is made three-fourths of the income of the trust-funds is payable to the heir in possession of St Martins and Drumcudden. The remainder is to be accumulated, and it is only when lands are bought that the full income becomes payable to the heir in possession for the time.

“Under the trust-deed, therefore, the pursuer cannot claim more than three-fourths of the income of the trust funds. But he contends, that as the direction to accumulate is illegal, he is in the same position as if the truster had simply directed the lands to be purchased and settled on him as the institute of entail, that, on the principle of Lord Stair's case, he is entitled to the income of the trust-funds until the lands are bought. In the opinion of the Lord Ordinary, this argument is not well founded. The trust-deed in this case fixes the interest to the heirs of entail until the lands are purchased, and there is no room for the assumption on which the case of Lord Stair proceeded. Hence the Lord Ordinary conceives that the pursuer cannot claim the accumulations. He cannot do so under the trust-deed, and he has no other right. It seems to the Lord Ordinary that the accumulations are to be dealt with as intestate succession, on the principles recognised in the cases of Lord Keith's Trustees, and Lord v. Colvin. There is no disposal of residue into which would fall any bequests which failed, in whatever cause.”

Lord Stair v. Stair's Trs., Feb. 21, 1826, 4 S. 488, May 24, 1826, 2 W. and 414; Howat v. Howat's Trs., Feb. 17, 1838, 16 S. 622, 10 Scot. Jur. 312; Campbell's Trs. v. Campbell, June 30, 1838, 16 S. 1251; Dickson's Trs. v. Scott, v. 2, 1853, 16 D. 1, 26 Scot. Jur. 16; Moncreiff v. Menzies, Nov. 25, 1857, D. 94, 30 Scot. Jur. 59; Ogilvie v. Kirk-Session of Dundee, July 18, 1846, D. 1229; Combe v. Hughes, May 3, 1865, 34 L. J., Ch. 344; Ferrier v. Glasgow, Jan. 21, 1876, ante, vol. iii. p. 396.

Keith's Trustees, July, 17, 1857, 19 D. 1040, 29 Scot. Jur. 497; Lord v. Colvin, July 15, 1865, 3 Macph. 1083, 37 Scot. Jur. 568; Green v. Gascogyn, L. J., Ch. 268.

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been the intention of the testator had he foreseen that the direction to accumulate would to a certain extent become imperative. The right of the testator's next of kin could only be defeated by a conveyance in favour of some one else, and there was no such conveyance in the deed. The case was therefore to be distinguished from *Ogilvie v. Kirk-Session of Dundee*, where there was the appointment of a residuary legatee, and also from *Combe v. Hughes*, where the direction was to accumulate the interest of a share of the residue which by a prior part of the deed was bequeathed to the testator's daughter, who was held entitled to the accumulations.

Argued for the defender, Colin Lyon Mackenzie junior, the next heir of entail;—The Thellusson Act did not apply, because there was no express or implied direction to accumulate in the deed. The trustees might have purchased land and conveyed it to the heir of entail soon after the truster's death. It was only by the acquiescence of the heir that the accumulations were allowed. As the accumulation had been made the funds ought to go according to the testator's direction. Therefore the trustees were bound to invest them in land.

At advising,—

LORD PRESIDENT.—The question here is, whether under the Thellusson Act the accumulation directed in the trust-deed of the late Mr Mackenzie of Newhall, dated 1st August 1838, is not illegal after twenty-one years from the death of the testator, *i.e.*, since 1863, Mr Mackenzie having died in 1842? I am of opinion, with the Lord Ordinary, that the Thellusson Act does apply, and that the accumulations since 1863 are in violation of the Act.

The question now comes to be, what is to be done with the profits so accumulated, and that depends on the words of the Act itself, which provides for that event thus,—“ In every case where any accumulation shall be directed otherwise than as aforesaid such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.” The question we have to solve is who is the person who would have been entitled to the interest or profits if they had not been directed to be accumulated? On the one hand, it is maintained that the interest or profits so directed to be accumulated become intestate on the death of the testator. On the other hand, the pursuer maintains that they belong to him because if there had been no direction to accumulate he would have been entitled to them under the trust-deed.

I am of opinion that this latter contention is right, and I differ from the Lord Ordinary. I think that the pursuer is the person who would have been entitled to the interest if there had been no direction to accumulate. Observe what the capital sum is. It is money which the trustees are to invest in land, to be entailed on the pursuer as institute, and the heirs of his body afterwards. If there had been no direction as to the disposal of the income during the period which elapsed before the purchase of land was made it cannot be doubted that the income would have gone to the pursuer. That is the inevitable result of the case of *Lord Stair* and the cases which followed on it. The same view of the rights of an institute of entail may be illustrated by reference to the provisions of the Entail Amendment Act. If the heir in possession had been in a position to disentail his lands he might equally have disentailed this very money which has produced the rents and profits. That shews that, subject to the conditions

of the existing entail, the pursuer is absolute owner of the money and of the No. 151.
entailed lands. He is no more limited as to the money than as to the land.

The ground of the Lord Ordinary's judgment is that this is not the ordinary June 29, 1877.
case of a direction to purchase land without any provision as to what is to be Mackenzie v.
done with the money in the meantime. After the lands are purchased the rents Mackenzie's
are to go to the heir of entail in possession of Easter St Martins and Druncudden, Trustees.
but before that only three-fourths are to go to the heir and one-fourth is to be accumulated. Does that make any difference? I do not think it does. He restricts the right of the heir of entail to three-fourths, in order to enable the trustees to accumulate one-fourth. It is the same thing as if he had directed the whole to be accumulated. The accumulations, being illegal, go to the party who, but for the direction to accumulate, would have been entitled to get them, and he is the heir of entail under the provisions of the trust-deed. This is quite settled by the case of Ogilvie's Trustees v. Kirk-Session of Dundee, 8 D. 1229, in the Court of Session, and by the case of Combe v. Hughes, 34 L. J. Chan. 344, in England. The principle is laid down with great accuracy and precision also in the case of Lord v. Colvin, 23 D. 111, and 3 Macph. 1083. It seems quite clear, and I have nothing to add.

LORD DEAS.—The late Colin Mackenzie, Esq., executed a deed of entail of is lands of Druncudden and Easter St Martins in favour of a certain series of heirs, and he also executed a trust-deed, by which he conveyed his whole other means and estate (which turned out to be entirely personal) to trustees for payment of his debts and certain other primary purposes, after satisfying which he directed the trustees “to lay out and invest the whole free proceeds of my trust-estate, with the interest which may accrue thereon (subject to the explanations underwritten), in the purchase of lands and estates as near to the foresaid lands of Easter St Martins and Druncudden as they can conveniently be had, and all afterwards settle and secure the lands and estates so to be purchased by a valid and formal deed or deeds of entail upon the same series of heirs (so far as then subsisting), and under the same provisions, limitations, restrictions, clauses contingent and resolute, and other clauses, as are contained in the foresaid deed of entail executed by me,” with power to effect the purchases from time to time as the trustees might judge most eligible, according to the state of the lands and the opportunities which might offer to make suitable and convenient purchases; declaring that upon any purchase being made the free rents and profits “shall be payable by my said trustees to the heir of entail in possession of the said entailed estates of Easter St Martins and Druncudden; and farther declaring that, in the event of any free disposable sum or sums of money being at any time realised, and no opportunity of making an eligible purchase occurring at the time, my said trustees shall be bound to make payment to the heir in possession of the said entailed estates of three-fourths of the free interest or profits of such disposable sum or sums of money until a purchase shall be made, the surplus interest being applied to increase the amount of disposable funds,”—the amount of the said three-fourths to be fixed periodically by the trustees, whose statement thereof should be final and conclusive against the heir of entail and all in his right. Then followed a clause in the following terms:—“*Decimo*, after the residue or free proceeds of my said trust-funds shall be so invested in the purchase of lands and estates, and the same settled and secured in manner aforesaid, I appoint my said trustees to cede the natural possession of the lands

No. 151. and estates so purchased and entailed by them to the heir of entail in possession for the time of the said lands of Easter St Martins and Drumcudden, and deliver over to them the whole title-deeds thereof," &c.
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The import of these clauses admittedly is, that so long as the whole funds were not invested in the purchase of lands, to be entailed along with the lands of Easter St Martins and Drumcudden, one-fourth of the free income yielded by the funds not so invested should be accumulated for the purpose of adding to the lands to be entailed.

This accumulation went on from the date of the truster's death, on 1st October 1842, and was still in progress when the present action was raised, in December 1876,—a period of upwards of thirty-four years,—no opportunity having (it is alleged) occurred during that period (or up to the present time) of purchasing lands which were supposed to answer the description of lands as near to the entailed lands as could conveniently be had.

It is not, as I understand it, disputed that the accumulation of one-fourth of the annual income during the twenty-one years immediately following the truster's death falls ultimately to go to increase the sum applicable to the purchase of lands to be entailed along with the lands of Easter St Martins and Drumcudden; but the question is, who is to be entitled to the accumulation so arising between the expiry of the twenty-one years and the date of this action, which accumulation is obviously struck at by the Thellusson Act—(His Lordship here read the Thellusson Act).

The pursuer claims the fund here accumulated after the lapse of the twenty-one years as income to which he would have been entitled had there been no direction to accumulate any part of the income for the purchase of additional lands. The defenders claim it as intestate succession accruing to them as the next of kin, or in right of those who were next of kin at the date of the truster's death.

The pursuer says that, upon the principle of Lord Stair's case, 2 W. and S. 414. and other cases of that class, if no accumulation of any part of the income had been directed he would have been entitled to the whole income of the trust-fund from and after the lapse of a year subsequent to the truster's death, as being a reasonable period for the purchase of lands, just as he would have been entitled to the income of the lands themselves, if purchased and entailed. This may be conceded. But when the pursuer farther says that he is, therefore, to be held the person described in the Act who "would have been entitled thereto if such accumulation had not been directed," the sequence in the deduction is by no means clear.

That the truster intended accumulation in the present case cannot be doubted for he expressly provides that a certain proportion of the income shall be accumulated and a certain other proportion shall not be accumulated. In all the cases cited the income awarded to the heir from the expiry of a year after the truster's death was so awarded upon the presumption that the truster did not intend the heir to be, in any event, deprived of the income for more than a year, whether an investment had been then found or not. But it is difficult to see how that presumption can apply here, for the truster foresaw and has provided for any hardship there might have been in withholding from the heir an appropriate income for an indefinite period, and he has accordingly fixed what the heir's income shall consist of and what it shall not consist of in the interval till a purchase is made. It shall, he has said, be three-fourths of the income of the trust-fund, but it shall not be the whole of that income.

The truster withheld a portion of the income absolutely till a purchase should

made, thereby laying on the heir a *compulsitor* to insist—which he alone could do—that the trustees should, in due time, invest the whole fund in land, or cause otherwise he would not receive the whole income. Your Lordship proposes to remove that *compulsitor* by giving the heir the whole income, the consequence of which, apparently, will be that the truster's purpose of investment will continue to be, as it has hitherto been, indefinitely postponed, or may perhaps be altogether defeated.

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The entailed lands of Easter St Martins and Drumcudden are situated in the parishes of Ross and Cromarty, forming a very extensive district as your Lordship knows. The trust-deed does not prescribe either contiguity or vicinity to these lands as a necessary characteristic of the lands to be purchased. They must, of course, be in Scotland, otherwise they could not be placed under a Scotch entail. But except that they must be in Scotland there is no limitation of locality at all, further than that they are to be as near to the lands of Easter St Martins and Drumcudden "as they can conveniently be had." If they cannot conveniently be had as near to these lands as could have been desired, the right and the duty of the trustees seems to me to have been and to be to look to a purchase further off, and the right and the duty of the heir to have been and to be to insist on this being done, as a condition, on which alone, he can claim one-fourth of the income which the truster directed to be withheld from him if the purchase should be made. Twenty-one years, one would think, was long enough to test opportunities of nearness, and when, at the end of that time, it is found that the law prohibited further accumulation for the truster's purpose, I think it was the duty, both of the heir and of the trustees, to have seen that the necessary measures were adopted to procure an investment in land within as short a distance as circumstances permitted, although not such as would have been adopted while accumulation legally applicable to a purchase was still going on. In the place of this sixteen years additional have now elapsed (thirty-seven years in all) and still no land whatever has been purchased, nor is there an allegation in the record either of exertion made to effect a purchase, or difficulty experienced in the way of obtaining one either near to the lands of St Martins and Drumcudden or at a distance from them. I hesitate, in these circumstances, to give the accumulated income in dispute to the heir to whom the truster not only did not give it, but from whom he purposely withheld it.

The truster certainly did not constitute the heir his residuary legatee. That he did not pretend. I do not mean to go over the cases cited in which sums of money accumulated contrary to the Thellusson Act were awarded, wholly or partially, to persons other than the next of kin of the testator or their representatives; but I think it will be found, on careful examination, that, in all of them, this award was made on the footing that these other parties were wholly or partially (and to the extent to which they were so preferred) residuary legatees. That, as I have said, cannot be pleaded here for the heir of entail. Nor can I discover that the truster has either given him or intended to give him the illegal accumulation in any other character. It must be recollected that the rule enunciated in *Lord Stair's* case was not a rule of law, but a rule of construction merely, of the testator's intention,—and this not an absolute rule of construction but of convenience merely, in the ordinary run of cases, where there is nothing special, or more or less favourable, to the claim of the heir of entail to the income. And it is very difficult to spell out an intention here on the part of the truster to give the heir from whom he had expressly withheld a fourth of the income, to

No. 151. be accumulated for the purchase of land, should be entitled individually to appropriate the proceeds in the event of the purchase being so long delayed that the accumulation had become illegal under the statute law, and for whatever period, however long, during which that delay may be continued. I rather think that is a *casus improvisus* in the deed,—a state of matters for which the truster has made no provision, either expressly or by any distinct implication,—and, that being so, my leaning is in favour of adhering to the Lord Ordinary's interlocutor.

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LORD MURE.—I concur with the Lord Ordinary and your Lordship that the direction to accumulate in the trust-deed is struck at by the Thellusson Act.

The question remains, what is to be done with these accumulations? I think that is regulated by the statute, which declares that they are to go "to such person or persons as would have been entitled thereto if such accumulations had not been directed,"—that is to say, these parties are to get them for their own use, either to purchase land or to apply them to any other purpose. It appears to me, therefore, that they now belong to the pursuer of this action, because by the force of the trust-deed they would have gone to him along with the other three-fourths, if there had been no direction to accumulate. The leading provision of this part of the trust-deed constitutes, in my opinion, a gift to the pursuer and the other heirs of entail of the proceeds of the trust money which was directed to be laid out in the purchase of lands to be entailed. These proceeds would therefore have gone to the pursuer in the absence of any express provision to that effect under the authority of the cases of Lord Stair and Ogilvie's Trustees a year after the death of the truster. If nothing more had been said in the trust-deed, that would, I think, have been the results in law of its leading provisions; and the observations of the Lord-Justices Knight Bruce and Turner in the case of Combe appear to me to apply. But it has been argued that the explanations in the subsequent parts of the clause take this case out of these authorities. I have not been able to come to that conclusion, because if there had been no further explanatory directions the whole proceeds of the realty would undoubtedly have belonged to the heir of entail. So that the question is reduced to this,—Does the circumstance that the truster appointed three-fourths to be paid over directly to the heirs, and the other one-fourth to be accumulated, but which, in respect of the provisions of the statute, could not legally be done after twenty-one years, deprive the heir of the money thus illegally accumulated? I am of opinion with your Lordship in the chair that it does not; and that by force of the express words of the statute the pursuer is now entitled to prevail.

LORD SHAND.—I am of the opinion expressed by the majority of your Lordships. It is maintained that the Thellusson Act does not apply because it does not appear on the face of the deed that the testator intended that the accumulations should continue beyond twenty-one years, as he expected that the direction to purchase land would be fulfilled within that time. But it has been settled by the case of Lord v. Colvin, 23 D. 111, 3 Macph. 1083, and by other cases here and in England, that it is not the intention of the truster which determines the question of the application of the Thellusson Act. If *de facto* the accumulations extend beyond twenty-one years they are struck at by the Act.

The question remains, assuming that the accumulations are prohibited, to whom do they go? It appears to me that the whole series of cases, beginning

with that of Lord Stair v. Stair's Trustees, have a material bearing on this question. By these decisions it is settled that where there is a direction to purchase lands to be entailed, which comes into operation at once on the death of the truster, and is not deferred till the occurrence of some future event, and where it is the duty of the trustees therefore to proceed to purchase and to entail without delay, the institute and other heirs in their order are entitled to receive the income of the fund after the lapse of a year, just as they would draw the rents if the purchase had been made. However long a time may elapse before the purchase is made the heir of entail is entitled to the income of the fund.

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The general direction in this deed as to the application of the residue of the estate is in the ordinary terms which have been the subject of decision in the cases I have referred to. The truster directs his trustees to lay out and invest the whole proceeds of his trust-estate and interest thereon in the purchase of lands to be entailed, and the truster evidently contemplated that the purchase might take place within a short time after his death. In the absence of a direction to accumulate, the interest of the whole fund would thus have gone to the pursuer as the first person entitled to the succession to the entailed estates.

The deed, however, contains a subsequent and separate clause, providing that the surplus interest exceeding three-fourths of its amount should be accumulated with the capital, so as to increase the amount of the fund to be applied in purchasing lands. This clause, though effectual for twenty-one years, is struck at by the statute for all time thereafter. The direction, so far as regards all time after the lapse of twenty-one years, is declared to be null and void, and the interest is directed by the statute to "go to and be received by such person . . . as would have been entitled thereto if such accumulation had not been directed."

Who would have been entitled to this surplus interest "if such accumulation had not been directed?" I think the answer to this inquiry must be, the heir of entail in possession. The deed must be read as if expressed in all respects as it is, but without this illegal direction to accumulate a part of the interest, and, so read, the surplus interest belongs to the heir of entail for his own personal benefit and use.

This view is very well illustrated by the cases of Ogilvie v. Kirk-Session of Dundee, July 18, 1846, 8 D. 1229, and Combe v. Hughes, May 2, 1865, 34 L. J., Ch. 344, to which reference was made in the course of the argument. I cannot express the principle better than in the language of Lord-Justice Knight Bruce in the latter case:—"We must, I think, consider that, had the will not contained any direction as to accumulation, but had been in other respects as it is, or had it been expressly confined in its direction for accumulation to the period of twenty-one years next after the testator's death, and had been in other respects as it is, the income of the share called by the testator his daughter's share would in the first case, of the residue, have belonged to herself during the husband's lifetime." So the test is to consider what the result would have been here if there had been no direction to accumulate, and the deed had been in other respects as it is. The heir of entail would then have received this money.

In giving the money to him we are giving direct effect to the literal interpretation, and, as I think, to the true meaning of the statute. The Lord Ordinary says in his note—"The trust-deed in this case fixes the interest of the heirs of

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entail until the lands are purchased, and there is no room for the presumption on which the case of Lord Stair proceeded." It seems to me that in this way the Lord Ordinary gives effect, contrary to the statute, to the direction to accumulate, because it is in the clause directing accumulation that he finds the expressions which enable him to reject the claim of the pursuer. Without that clause of direction, which the statute declares shall be null and void, there is nothing limiting or fixing the interest of the heirs of entail in the interest so as to alter the ordinary rule. I think we must read the deed as if that direction to accumulate after twenty-one years were not contained in it.

I only desire further to distinguish this case from those which have weighed with the Lord Ordinary in coming to his decision that the surplus interest must be dealt with as intestate succession. There is, I think, an obvious distinction between the present and the cases of Lord Keith's Trustees, 19 D. 1040, and Lord v. Colvin, 23 D. 111, 3 Macph. 1083. Here the direction to purchase and entail might at once have been carried out. In the other cases there was a direction which necessitated a postponement of the purchase of lands, with the result, that till the defined date there could be no heir of entail interested either in the capital or interest. If that had been the case here I should have agreed with the Lord Ordinary. A passage from the opinions of Lord Ivory and Lord Curriehill will illustrate my meaning. Lord Ivory says (19 D. 1062)—"As the case stands, the entail cannot be executed until the death of the Countess Flahault. Therefore Mrs Villiers cannot take anything under the directions of the deed. She is not an heir of entail until the very moment when the entail is ordered to be executed. It is not like the case of a trustee being directed to entail from this moment, and where the heir during the period that it is impossible to purchase lands gets the interest of the money. She has no interest or legal right until the time that the trustees are directed to execute the entail and they are forbidden to execute it until the Countess Flahault dies. The effect of that is, that the accumulated rents (which are now made null by force of statute) belong to nobody. They are intestate, and therefore must go to the two daughters." So too Lord Curriehill says,—"The distinction between this case and that of Ogilvie's Trustees is this—in that case the accumulation was directed to take place merely for the purpose of increasing the amount of the fund and at the period when the accumulation was to cease the fund was to be invested. But here that is not the case. The trustees are forbidden to make any investment until the arrival of an event which has not yet taken place; and it is still a matter of uncertainty who will be the institute under the entail when that contingency shall be purified. In the meantime, neither Mrs Villiers or any other person can claim this yearly revenue under the settlement; and there being no direction at all regarding them to which effect can be given, these go to the legal representatives as intestate succession." The facts were similar to the case of Lord v. Colvin. I concur entirely in the law laid down in these cases. There was in these cases a postponement of the right of any person even in the capital sum, and there being no provision about the payment of the accruing interest on that fund, the accumulations would have gone to the residuary had there been a destination of residue. In the absence of a clause of that kind they became intestate succession. Here there is a direction to purchase and entail at once, and when the direction to accumulate flies off, and is practically struck out of the deed, it follows that the fruit of the fund belongs to the heirs of entail. I am therefore of opinion that the interlocutor of the Lord Ordinary

should be recalled, and that the pursuer should be found entitled to the surplus interest in question. No. 151.

THE COURT pronounced this interlocutor :—" Recall the said interlocutor : Find that the pursuer, as heir of entail in possession of the estates of Easter St Martins and Druncudden, is entitled to the whole income of the free residue of the trust-estate in the hands of the defenders, the trustees of the late Colin Mackenzie of Newhall, which had accrued since the 1st October 1863, with any interest which may have accrued on the said income in the hands of the said trustees : To the above extent and effect decern in terms of the declaratory conclusions of the libel, and remit to the Lord Ordinary to proceed further as shall be just."

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JAMES W. MONCREIFF, W.S.—Agents.

ERSKINE CAMPBELL COLQUHOUN AND OTHERS (Sir John Murray Nasmyth's Executors), Petitioners.—*Balfour—Pearson.*

SIR JAMES NASMYTH, Respondent.—*Kinnear—R. Johnstone.*
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Entail—Improvement Expenditure—Rutherford Act, 1848, 11 and 12 Vict. 36, secs. 15 and 18.—Where an heir of entail in possession has made improvements on the estate prior to 1848, and constituted three-fourths of the expenditure a debt against succeeding heirs, but has died without creating over the state a security, either by bond of annualrent for such three-fourths or by bond and disposition in security for two-thirds of such three-fourths of the improvement expenditure, held that his executors were entitled under the 15th section of the Rutherford Act to require the succeeding heir of entail to execute in their favour a bond of annualrent for such three-fourths of the improvement expenditure, and that the heir had not under the 18th section of the statute the option of substituting therefor a bond and disposition in security over the estate for two-thirds of such three-fourths.

THE late Sir John Murray Nasmyth of Posso, Baronet, while heir of entail in possession of the estates of Posso, &c., under two deeds of entail dated respectively 1809 and 1824, executed certain improvements on the estates of the nature contemplated by the Montgomery Act, 10 Geo. III.

51. These improvements were all executed prior to the year 1848. The expenditure amounted to £6643, 17s.

In 1837 Sir John Nasmyth, adopting the procedure provided in the Montgomery Act, obtained decree constituting three-fourths of the expenditure, or £4982, 18s. 3d., a debt against the succeeding heirs of entail.

Sir John Murray Nasmyth died in 1876, without having created any security, either by way of bond of annualrent or of bond and disposition in security over the estate in respect of the improvement expenditure. He succeeded in the entailed estate by his son, Sir James Nasmyth. By his last will and testament he appointed Erskine Campbell Colquhoun and others his executors.

On 9th March 1877 Erskine Campbell Colquhoun and others, as Sir John Murray Nasmyth's executors, presented a petition, founded on sec. 51 of the Rutherford Act,* craving the Court "to grant warrant to and

* The Act 11 and 12 Vict. cap. 36 enacts, section 15,—“That where any heir of entail in possession of an entailed estate in Scotland shall have executed improvements on such estate prior to the passing of this Act, and recorded the same in terms of the said last recited Act (the Montgomery Act, 10

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authorise" Sir James Nasmyth, and to "decern and ordain him to make and execute over the entailed estate in favour of them or of any creditor who might advance to them the said sum of £4982, 18s. 3d, a bond or bonds of annualrent for the said sum, in ordinary form, in terms of the statute."

On 27th March 1877 Sir James Nasmyth himself presented a second petition founding on sections 15 and 18* of the Rutherford Act, craving the Court to authorise him to make and execute over the entailed estate a bond and disposition in security in favour of Erskine Campbell Colquhoun, &c. as his father's executors, or in favour of any creditor who might advance to him the money with a view to payment to the said executors, for two-third parts of the said sum of £4982, 18s. 3d, or of such lesser sum as should amount to two years' free rent of the entailed estate as the same should happen to be at the term of Whitsunday 1877, and that in ordinary form, containing all the clauses usual in bonds and dispositions in security granted over estates in Scotland held in fee-simple.

To each petition answers were put in by the other party.

To the petition at the instance of Sir John Murray Nasmyth's executors, Sir James Nasmyth objected "(1) The petitioners have no title to make the application. (3) Under and in terms of the 18th section of the Act 11 and 12 Vict. cap. 36, the respondent is entitled to grant, in his option, either a bond of annualrent or a bond and disposition in security in respect of said improvement debt; and, in the circumstances, he is entitled to elect to grant a bond and disposition in security, as prayed for in his petition above referred to."

To the petition at Sir James Nasmyth's instance Sir John Murray Nasmyth's executors objected "(1) The petitioner has no title to make the application, and the same is not warranted by the sections founded on (2) The petition should be dismissed as incompetent, in respect of the de-

Geo. III. c. 51), and died without having executed a bond of annualrent as hereinbefore authorised, or having charged the estate as hereinafter authorised, and where decree shall have been obtained, in terms of the said last recited Act, for three-fourth parts of the sums expended thereon, it shall be lawful for the executor or personal representative of such heir of entail, or for any party to whom such heir may have conveyed or assigned such debt, to make application by summary petition to the Court of Session, praying the Court to decern and ordain the heir in possession of such entailed estate, to execute, in favour of any party such petitioner may think fit, a bond of annualrent, in ordinary form, over such entailed estate, or any portion thereof, binding himself and his heirs of tailzie to make payment of an annualrent during the period of twenty-five years from the date of the death of the heir of entail who shall have executed the improvements, such annualrent not exceeding the sum of £7, 2s for every £100 of such three-fourth parts aforesaid, . . . which bond such heir of entail in possession shall be bound to execute accordingly at the sight of the Court."

* Sec. 18.—"That in all cases in which it may be competent for an heir of entail in possession of an entailed estate in Scotland, or in which such heir of entail may be called upon to grant a bond of annualrent in terms of this Act, it shall be lawful for such heir of entail, and such heir of entail may be called upon to charge, under the authority of the Court of Session as aftermentioned, the fee and rents of such estate . . . with two third parts of the sum on which the amount of such bond of annualrent, if granted, would be calculated in terms of this Act, by granting, in favour of any creditor who may advance the amount of such two third parts, bond and disposition in security over such estate . . . for such amount, with the due and legal interest thereof from the date of such advance till repaid." . . .

pendence of the petition at the instance of the present respondents. (4) No. 152. The 18th section of the Act 11th and 12th Victoria, cap. 36, does not confer any option upon the heir of entail in possession in the circumstances of this case; and, at all events, he is not now entitled to exercise any such option.”]

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The Lord Ordinary, on 28th May 1877, in the petition at the instance of Sir John M. Nasmyth's executors, pronounced this interlocutor:—“The Lord Ordinary, having heard counsel for the parties, sists the petition *in hoc statu*.”

In the petition at Sir James Nasmyth's instance the Lord Ordinary, on the same day, pronounced this interlocutor:—“Finds that this petition is incompetent, and that the petitioner has a title to insist therein.”*

Against both these interlocutors Sir John M. Nasmyth's executors claimed.

LORD PRESIDENT.—We have two petitions before us, which are each intended to create a charge against an entailed estate in respect of three-fourths of a sum of improvement debt constituted in the lifetime of the last heir of entail. One is by Sir John Nasmyth's executors; another is by Sir James Nasmyth, the present heir of entail in possession.

The result of the Lord Ordinary's judgment is that the heir has it in his option to grant a bond and disposition in security for two-thirds of the three-fourths of the improvement debt, or to grant a bond of annualrent for the whole three-fourths of that fund. This of course depends upon the construction of the Rutherford Act, but certainly not upon the eighteenth section alone. It depends a great deal more upon the fifteenth section, under which the executor's right to call on the heir in possession to grant a bond of annualrent is dealt with. Taking the fifteenth and eighteenth sections together, and not leaving out of view the provisions of the fourteenth section, I am of an opposite opinion to that of the Lord Ordinary. I think that, under the circumstances of the case, which falls to be dealt with under the fifteenth section of the Act, the heir in possession when called on by the executors of the last heir to grant a bond of annualrent has no option to substitute therefor a bond and disposition in security for two-third parts of the sum on which the amount of such bond of annualrent would be calculated.

The thirteenth and fourteenth sections of the Rutherford Act provide for the case where an heir of entail in possession of an estate held under a tailzie dated prior to 1848, who has executed improvements on the estate either prior or subsequent to the passing of the Act, and has obtained decree for three-fourths of the improvement expenditure under the Montgomery Act, himself proposes to create a security over the estate for such expenditure. These sections authorise the heir in possession making the improvements to charge the estate with a bond of annualrent for the three-fourths of the sum expended contained in his decree,—such bond to endure for twenty-five years, the interest being calculated at a rate not exceeding £7, 2s. per cent. The result would be that the creditor of such bond at the end of the twenty-five years would have received payment of three-fourths of the original expenditure, with corresponding interest.

* “NOTE.—. . . The Lord Ordinary is of opinion that the petitioner, being heir of entail in possession of the estate, has, under the 18th section of the Rutherford Act, the right of deciding for himself which mode of charging the debt upon the estate shall be adopted.” . . .

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But it may often happen that the heir of entail who executes the improvements may omit to create the security during his lifetime. In such case it was thought by the Legislature only just that the heir's right should pass to his executors, because it was at the expense of his own personal estate that the heir himself made the improvements. It is for this case that the fifteenth section provides. It is applicable to the case where an heir of entail "shall have executed improvements on such estate prior to the passing of this Act, and recorded the same in terms of" the Montgomery Act, "and died without having executed a bond of annualrent as hereinbefore (*i.e.*, in the thirteenth section) authorised, or having charged the estate as hereinafter (*i.e.*, in the eighteenth section) authorised, and when decree shall have been obtained, in terms of" the Montgomery Act, "for three-fourth parts of the sums expended thereon,"—that is to say, in order to let in the application of the clause, the heir who has executed the improvements, beyond recording the same, must have done nothing at all to create a charge upon the estate. In that case the statute provides that "it shall be lawful for the executor or personal representative of such heir of entail, or for any party to whom such heir may have conveyed or assigned such debt, to make application by summary petition to the Court of Session, praying the Court to decern and ordain the heir in possession of such entailed estate to execute, in favour of any party such petitioner may think fit, a bond of annualrent in ordinary form over such entailed estate," &c., for three-fourths of the improvement expenditure. It is not left to the heir of entail in possession to take action; it is made lawful for the executors of the deceased heir to initiate the proceedings; and it is added, "which bond such heir of entail in possession shall be bound to execute accordingly at the sight of the Court."

Now, certainly enacting words could hardly be more clear and distinct. They confer on the executors, in the circumstances of the present case, a right to demand, and impose on the heir an absolute obligation to grant, such bond of annualrent. I do not mean to say that it is impossible that, by subsequent sections, the Legislature should have qualified this positive enactment, so as to give to one or other of the parties, and possibly to both, a right of option in the matter. But where an absolute right and an absolute obligation are created by a substantive enactment, it requires a very distinct qualification to modify such absolute right and absolute obligation. Now, the eighteenth section of the statute is the only one founded on as importing such qualification. It says: "that in all cases where it may be competent for an heir of entail in possession of an entailed estate in Scotland, or in which such heir may be called upon to grant a bond of annualrent in terms of this Act, it shall be lawful for such heir of entail, and such heir of entail may be called upon, to charge under the authority of the Court of Session the fee and rents of such estate" "with two third parts of the sum on which the amount of such bond of annualrent, if granted, would be calculated in terms of this Act, by granting, in favour of any creditor who may advance the amount of such two-third parts, bond and disposition of security over such estate," &c.

Now, the construction that the present heir of entail puts upon this enactment is, that it gives him a right to answer the demand of the executors by a bond of annualrent by tendering a bond and disposition in security for two-thirds only of the three-fourths of the improvement expenditure.

As I read the clause, however, it contemplates two cases—first, when the heir of entail having made improvements, and constituted them, proposes, for the

own behoof, to create a security ; second, where a previous heir of entail having made and constituted improvements, but not having created a security during his own life, his executors are entitled to demand that the succeeding heir shall create a security in their favour, or in that of their nominee.

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Accordingly the words throughout are alternative. Construing the clause according to the view I take of it, the result is (1) that where it is competent for the heir of entail to grant a bond of annualrent it shall be lawful for him to grant a bond and disposition in security ; and (2) where the heir of entail may be called upon to grant a bond of annualrent he may be called upon to grant a bond and disposition in security. This reading appears to me to be quite consistent with the provisions of the other sections of the statute to which I have referred, and it is further recommended by its being the natural construction of the eighteenth section itself.

I am therefore of opinion that the executors here are entitled to demand a bond of annualrent for the full amount of the three fourth parts of the improvement expenditure, and that the heir of entail has no option but to grant it.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THESE interlocutors were pronounced :—

In the petition for Sir John Murray Nasmyth's executors—" Recall the interlocutor reclaimed against, and remit to the Lord Ordinary to repel the first and third pleas stated for the respondent, Sir James Nasmyth, to sustain the title of the petitioners, and to proceed in the matter of their petition as shall be just : Find the petitioners entitled to expenses since the date of the Lord Ordinary's interlocutor, and remit," &c.

In the petition at the instance of Sir James Nasmyth—" Recall the interlocutor reclaimed against, and remit to the Lord Ordinary to refuse the petition, and find the respondents entitled to expenses."

GIBSON & STRATHERN, W.S.—GIBSON-CRAIGS, DALZIEL, & BRODIES, W.S.—Agents.

DAVID HORNE, Pursuer and Respondent.—*Balfour—Asher*. No. 153.
ARCHIBALD MACLEAN MORRISON, Defender and Appellant.—*Fraser—Rhind*.
Partnership—Joint Adventure—Proof—Trust—Act 1696, c. 25—Mandate—Joint and Principal.—In an action for payment of a share of profits of an alleged joint adventure the pursuer alleged that the defender, his co-adventurer, contrary to instructions, taken the title to heritage, belonging to the joint adventurers, in his own name. The defender denied the existence of the joint adventure, and pleaded that, under the Act 1696, c. 25, the pursuer's averment, that an averment of trust, could only be proved by the defender's writ or oath, that as the pursuer averred that he had not trusted the defender to take title in his own name the Act did not apply, and that the pursuer was entitled to prove his averments *prout de jure*.
sue.—Form of issue adjusted.

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Morrison.

DAVID HORNE, builder, Glasgow, sued Archibald Maclean Morrison, 1st Division, Sheriff of Lanarkshire. M.
er, Glasgow, for £850, being half the profit said to have been realised in a joint adventure in the purchase and resale of ground in Glasgow.
The pursuer stated (Cond. 1)—" In or about the end of March or beginning of April 1876 the defender and pursuer agreed to be joint adventurers in the purchase of ground at Firpark, Dennistoun, Glasgow."
d. 2) "The interest of the parties in said joint adventure was to be

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equal." (Cond. 3) "The defender was to act as the law-agent of and for the joint adventurers." (Cond. 4) "By way of carrying out the joint adventure said ground was, in or about the beginning of April 1876, purchased from William Wilson, builder, and John Herbertson, joiner, both in Glasgow, at the price of £1190." (Cond. 5) "The said purchase was made and the missive with the said Wilson and Herbertson entered into by the defender as agent and for behoof of the joint adventure, or as one of the joint adventurers, in his own name." (Cond. 6) "Shortly after said purchase the defender, acting as aforesaid, sold said ground at a profit of £1700 or thereby to Mr George Lamb, property valuator in Glasgow, and others." (Cond. 9) "The defender has never made payment of the pursuer's half as joint adventurer foresaid of said profit."

The defender admitted the purchase of the property and resale, but denied the joint adventure.

The defender pleaded;—(1) The pursuer's averments, at all events so far as material, can be established only by the defender's writ or oath.

The Sheriff-substitute pronounced this interlocutor:—"Repels the first plea stated for defender, and before farther answer allows both parties a proof of their averments, and to each a conjunct probation."

The defender appealed to the Court of Session.

Argued for the defender;—(1) The case raised a question of trust, and proof should be limited to the writ or oath of the trustee under the Act 1696, c. 25;¹ (2) the action ought not to be allowed to proceed until the title which the defender had granted to the purchaser was set aside in an action of reduction.

Argued for the pursuer;—Partnership and mandate might be proved *prout de jure*. In order to bring the case under the Act 1696 as one of trust it would be necessary that the agent should have been instructed to take the title in his own name, whereas the averment was that the defender had no authority to take the title in his own name.²

The pursuer was allowed to amend his statement on payment of £8s. of expenses. He then stated, in addition to condescendence 5—"The defender had no authority or instructions from the pursuer to enter into the missive in his own name. On the contrary, the arrangement between the parties and the pursuer's instructions to the defender were, and the defender's duty was, to take the missive in the joint names of himself and the pursuer."

The defender stated these additional pleas in law:—(1) The action is incompetent while the missive of sale remains unreduced. (2) The action is not relevant, in so far as it is averred that the missive of sale was taken in the defender's name, contrary to instructions, without an allegation that this was done fraudulently.

At advising,—

LORD PRESIDENT.—The plea which stood originally on this record was the— "The pursuer's averments, at all events so far as material, can be established only by the defender's writ or oath." The plea was founded on the statute 1696, and I think the Sheriff was right in repelling that plea. I am clearly

¹ Alison v. Forbes, July 31, 1771, M. 12,760; Duggan v. Wight, March 1797, M. 12,761; Mackay v. Ambrose, June 4, 1829, 7 S. 699; Marshall Lyell, Feb. 18, 1859, 21 D., 514, 31 Scot. Jur. 283.

² General Assembly of the General Baptist Churches v. Taylor, June 17, 1843 D., 1030; Forrester v. Robson's Trustees, June 5, 1875, ante, vol. ii. p. 75; Dickson on Evidence, sec. 576; Boswell v. Selkirk, March 9, 1811, Hunt Dict. p. 350.

opinion that the statute has no application to the facts averred here. The averment of the pursuer is that he entered into a joint adventure with the defender on the footing that the joint adventurers were to have equal shares in the adventure, and that the defender was authorised to make the purchase for behoof of the joint adventure. In the original condescendence it was not made quite clear that in taking the title in his own name he had gone beyond his mandate. An amendment has been made in the fifth article of the condescendence which makes the statement quite clear that the defender had no authority to take the title in his own name, and that "on the contrary, the arrangement between the parties and the pursuer's instructions to the defender were, and the defender's duty was, to take the missive in the joint names of himself and the pursuer," and that notwithstanding that the defender took the missive in his own name.

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The defender says that the pursuer is barred by the statute 1696 from proving that the purchase was made for the joint adventure otherwise than by the defender's writ or oath. The statute only applies when one man alleges that he has trusted another to take a title in his own name. In regard to the defender's new pleas, viz., "The action is incompetent while the missive of sale remains unreduced"—"The action is not relevant, in so far as it is averred that the missive of sale was taken in the defender's name, contrary to instructions, without an allegation that this was done fraudulently,"—I think that either of these pleas can be sustained. The missive does not require to be taken out of the way. The taking it out of the way would have no effect unless what followed could also be taken out of the way. But the disposition to a *bona fide* third party which followed the missive cannot be set aside. The missive is therefore binding except in a question *inter socios*. As to the necessity for alleging fraud, I do not see that fraud is required. The missive might have been taken carelessly, foolishly, in good faith, and yet there might be a relevant allegation that it was taken in the agent's name instead of in the joint name of the pursuer and defender. Having taken the disposition in his own name the fraud would con- in the defence of this action. I do not think there is any objection to the pursuer's case, and as the parties are agreed to go to a jury I think we ought to order issues.

JORD DEAS.—I am of opinion, with your Lordship, that this case, as stated in the inferior Court, and still more clearly as now stated in this Court, does not raise a question of trust, but an ordinary question of mandate,—just as if a law-agent were verbally authorised to go to a public sale and purchase an estate for a client, and nothing was said as to the name in which the purchase should be made. The agent might, in such a case, purchase the estate in his own name, and afterwards become a consenting party to a disposition being granted to his client. That is a very common mode of acting. But if the agent should take to his head to say that he had made the purchase for himself that would raise a mere question of verbal mandate, which might be proved *prout de jure*. **Sheriff** was right even as the record stood before him, and if the parties had concurred in asking an issue I should have been inclined to send the case to the Sheriff to proceed with the proof.

JORD MURE concurred.

JORD SHAND.—I am of the same opinion. It would be a very serious

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matter if the pursuer of an action, in such circumstances as are here stated, were limited in his proof to the writ or oath of the defender. In the case of *Boswell v. Selkirk*, March 9, 1811, Hume, p. 350, we have a clear statement of the circumstances to which the enactment applies:—"This enactment was obviously meant for those cases where, for some reason of convenience, and in pursuance of an agreement of parties, the documents or investiture of some right—for instance, the title-deeds of a house, the tack of a farm, the bond for a sum of money—have been taken in the name of one of the parties as if for himself, though truly in trust for the other party, to whom the beneficial interest in the subject truly belongs." The important element, then, is that the original trust must be constituted by agreement of parties. Where, however, you have no trust constituted by agreement, but the title taken in violation of the agreement or understanding of the parties, the question is one of mandate, and inquiry *prout de jure* is competent. I think that issues in this case might be dispensed with, and the case be tried on the record as it stands.

THE COURT pronounced the following interlocutor:—"Adhere to the interlocutor of the Sheriff-substitute, by which he repels the first plea stated for the defender in the inferior Court: Repel also the first and second pleas for him, added to the record in this Court: Appoint the pursuer to lodge such issues as he proposes for the trial of the cause in six days: Find the pursuer entitled to the expenses of this discussion, which modify to the sum of £12, 12s. sterling, and for which sum decree against the defender for payment to the pursuer."

The Court approved of the following issue:—"Whether, in the end of March or beginning of April 1876, the defender and pursuer agreed to be joint adventurers, with equal interests, in the purchase of the said ground? Whether, in breach of his duty under the said agreement, the defender entered into the said purchase and resale in his own name and whether the defender is indebted and resting owing to the pursuer in the sum of £850 sterling, being one-half of the said profit, with interest from 15th May 1876, or any and what part of the said sum?"

J. & A. HASTIE, S.S.C.—WILLIAM OFFICER, S.S.C.—Agents.

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WILLIAM LITTLE, Pursuer.—*Campbell Smith*.
 NORTH BRITISH RAILWAY COMPANY, Defenders.—*Darling*.

July 4, 1877.
 Little v.
 North British
 Railway Co.

Process—Reclaiming Note—Court of Session Act, 1868, secs. 23 and 54—S. March 10, 1870, sec. 2.—Held that an interlocutor repelling a preliminary plea, and "appointing the pursuer to lodge such issue or issues as he proposes for the trial of the cause," was an interlocutor importing an allowance of proof and might be reclaimed against within six days without the leave of the Lord Ordinary.

1ST DIVISION.
 Lord Adam.
 B

THIS was an action of damages for personal injury at the instance of William Little, Denny, against the North British Railway Company.

The defenders pleaded;—(1) The defenders are not liable in reparation to the pursuer, in respect that at the time of the occurrence in question there was no contract of carriage between them and him, or any one on his behalf.

The Lord Ordinary, on 27th June 1877, pronounced this interlocutor:— No. 154.
 “Having heard counsel for the parties on the defenders’ first plea in law, repels the said plea, in so far as directed to the relevancy of the action, and appoints the pursuer to lodge such issue or issues as he proposes for the trial of the cause within six days.”
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The defenders, on 3d July, presented a reclaiming note without leave of the Lord Ordinary.

A question was raised by the Court as to whether the interlocutor was one containing an “allowance of proof,”¹ and whether, therefore, the reclaiming note was competent without leave of the Lord Ordinary.

The defenders argued that an order on the pursuer to lodge issues imported an allowance of proof, and might be reclaimed against without leave of the Lord Ordinary within six days.²

LORD PRESIDENT.—The terms of the Act of Sederunt referred to allow parties to reclaim without leave of the Lord Ordinary against all interlocutors containing an appointment of proof or its equivalent. I had some doubt on the point at first, but on consideration I have come to be of opinion that the interlocutor before us does contain the equivalent of an order for proof, or does import an allowance of proof. If the only preliminary or prejudicial plea in an action is a plea against its relevancy, and where the interlocutor of the Lord Ordinary sustains the relevancy and appoints parties to lodge issues, I cannot but hold that that imports an allowance of proof. In the present case the plea repelled not in so many words a plea on relevancy, but it is only in so far as directed to the relevancy of the action that it is repelled. I am therefore for sustaining the competency of the reclaiming note.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT sustained the competency of the reclaiming note.

THOMAS LAWSON, S.S.C.—ADAM JOHNSTONE, L.A.—Agents.

SIR ARCHIBALD DOUGLAS STEWART, Bart., Pursuer.—*Mackay.*
FRANC NICHOLS STEWART, Defender.—*M’Laren—Murray.*

No. 155.

Entail—Power to Feu with right to Water Supply from remainder of Entailed Estate—Estate afterwards separated—Servitude aqueductus.—An heir of entail in possession obtained power to feu a part of the entailed estate in terms of a form of feu-charter approved by the Court, whereby the feuars were taken bound to “take and pay for,” by way of annual assessment, a water supply provided from another portion of the entailed estate not within the limits of the feuing ground. The feuing ground was afterwards excambied for other lands sold by the heir of entail in fee-simple, and thus became vested in the heir of entail as a fee-simple proprietor. In a question between a succeeding heir of entail and the successor in the fee-simple estate of superiority of the feus, held (1) that the feu-charters granted before the excambion had created servitudes of *aqueductus* over the entailed estate in return for annual payments which were due to the heir of entail in possession as owner of the servient tenement, and not to the superior of the feus; (2) that feu-charters granted after the excambion were ineffectual to create such servitude.
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 Stewart.

¹ 31 and 32 Vict. c. 100 (Court of Session Act, 1868), sec. 27, sub-sec. 3, and ss. 28 and 54; A. S. March 10, 1870, sec. 1, sub-sec. 3, and sec. 2.

² *Clark v. M’Allister*, June 6, 1876, *ante*, vol. iii. p. 780; *Mason v. Stewart*, Feb. 21, 1877, *supra*, p. 513.

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Steuart.

1ST DIVISION.
Lord Ruther-
furd (Clark.
B.

IN 1857 Sir William Drummond Stewart, then heir of entail in possession of the lands of Murthly, &c., obtained authority to feu the lands of Inchewan, part of that estate, in terms set forth in a model feu-charter approved of by the Court.

There was no spring or stream of water on the part of the lands of Inchewan authorised to be feued, and, accordingly, a supply of water for the use of the feuars was introduced from another portion of the entailed estate. The springs on Birnam Hill were collected in a reservoir, and a pipe was also taken from a neighbouring burn, all which sources of supply were beyond the limits of the lands of Inchewan authorised to be feued.

The charters granted by Sir W. D. Stewart in conformity with the model deed contained a clause to the following effect:—"As I have introduced at my own expense water for the general use of the feuars the said shall be entitled to the use thereof along with the other feuars, and shall be bound to take and pay for the same, at the same rate as the other feuars, any assessment for said water, not to exceed the rate of one shilling per pound on the yearly rental, or the valuation (if unset at the time) of the said feu and the buildings thereon; but declaring that the said shall have no claim against me or the heirs of entail succeeding to me as aforesaid for any deficiency in the supply of water, should such occur from any cause not attributable to me or them."

The cost of introducing the water supply was in part at least charged on the entailed estate.

In 1864 Sir W. D. Stewart executed a deed of excambion by which he excambed the fee-simple estate of Stenton for the part of the entailed lands of Inchewan authorised to be feued, which lay to the north of the Perth and Dunkeld turnpike road. These lands of Inchewan were thereafter held by him in fee-simple, and at his death in 1871 were conveyed by his settlement to Mr Franc Nichols Steuart.

Further feus were given off after the excambion, but though the charters bore to be granted by Sir W. D. Stewart, not as heir of entail but as "heritable proprietor of the piece of ground hereinafter disposed," they contained an obligation on the feuars to take and pay for the water.

Sir W. D. Stewart collected an assessment from the Inchewan feuars for the use of the water down to the time of his death. Thereafter a question arose between Sir Archibald Douglas Stewart, as heir of entail in the estates of Murthly, &c. and Mr Franc Nichols Steuart, as Sir W. D. Stewart's successor in the fee-simple lands of Inchewan, as to which of them was entitled to collect the water-rate from the feuars on those lands for the future. An action of declarator was accordingly raised by Sir A. D. Stewart against Mr Franc Nichols Stewart.

The defender pleaded;—(2) The defender being superior of the several subjects contained in the feu-charters founded on by the pursuer, and as the whole obligations contained in these charters must run between the superior and the vassals or proprietors of the *dominium utile* of the subjects, and as the water-rates in question are payable under obligations in these charters, it follows that the defender, as the superior, is entitled to payment of these water-rates. (3) The pursuer not being the superior with reference to the feu-charters in question, and not being the general representative of Sir William D. Stewart, there is neither privity of estate nor privity of contract between him and the defender's feuars, and he is therefore not the creditor in the said obligation for payment of water-rates.

The Lord Ordinary, on 13th February 1877, pronounced this interlocutor:—"Finds, declares, and decerns against the defender, in terms of the conclusions of the libel: Finds the pursuer entitled to expenses,"

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&c.*

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The defender reclaimed.

* "NOTE.—The question presents itself in a different form as regards the feus granted after the excambion and those granted before it. For while the pursuer contends that it was beyond the power of Sir William Stewart to communicate to the former class of feuars the benefit of a water supply derived from the entailed estate, he does not maintain that it was not within his power to confer that privilege on the latter class. With respect to the former, his case is that he is entitled to stop the supply, but that as he is willing to continue it he is entitled to the rate. As regards the latter, he says that as the supply is taken from the entailed estate the right to exact the rate was, according to the true and equitable construction of the feu-charter, reserved to the heirs of entail and not to the superior of the ground which was feued.

"In regard to the feus granted after the excambion the Lord Ordinary is of opinion that the pursuer is right. He thinks that Sir William Stewart had no right to give to the feuars a water supply from the entailed estate. The water had been legitimately introduced for the benefit of the previous feus, and the vassals obtained a valid right to it. But when the lands of Inchewan were separated from the entailed estate Sir William could not, as proprietor, obtain a benefit to himself and his heirs general which was derived from the entailed estate. If the feus had been granted by the defender as his successor the pursuer would, it is thought, have been entitled to refuse any further supply of water than was necessary for the feus granted before the excambion. Sir William cannot, in this question, be in a better position than his successor, and therefore, in the opinion of the Lord Ordinary, he had no power to communicate the water supply to the feuars.

"The result, in strictness, would be that the pursuer should take measures to cut off the water supply from the feuars. But as he is willing to give it, and they are willing to take it, the pursuer seems entitled to the declarator which he asks as in a question with the defender.

"The question in regard to the feus granted before the excambion is more difficult, inasmuch as it is not maintained that the water supply was illegally given to them. The defender contends that the obligation to pay the rate is contained in a feu-charter under which he is superior, and with which the pursuer has no connection. The argument is forcible, but the Lord Ordinary has come to be of opinion that it is not well founded.

"At the time when the charters were granted Sir William held the lands as heir of entail, and it follows that whatever benefits were stipulated in favour of the superior were stipulated in favour of the heirs of entail. There is a feu-duty stipulated for the lands themselves, and a water-rate for a supply of water, derived from another part of the entailed estate. When the separation takes place it is, in the opinion of the Lord Ordinary, the fair construction of the charter that what is paid for the lands shall be payable to the superior, but what is paid for the water supply shall be payable to the owner of the estate from which it is derived. If there had been a slump payment for all the benefits granted to the feuair it might have been difficult to make a separation. But as the separation has been made in the feu-charter itself there seems no reason why the different owners should not be entitled to enjoy the benefit derived from their separate estates.

"The pursuer produced documents to shew that, in settling the excambion, the feu-duties were taken as the value of the lands. The Lord Ordinary doubts whether this can be taken into account when the excambion is itself unchallenged. But, taken along with the fact that the cost of procuring the supply of water was in part, and probably in whole, charged on the entailed estate, it goes far to satisfy him that his judgment is in accordance with substantial justice."

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LORD PRESIDENT.—I am quite satisfied with the Lord Ordinary's grounds of judgment.

In 1857 Sir W. D. Stewart, then heir in possession of the entailed estate of Murthly, Grandtully, &c., obtained from the Court power to feu part of the entailed estate, consisting of that part of the lands of Inchewan which is laid down on the plan No. 20 of process. He proceeded to feu, accordingly, in terms of a form of feu-charter approved of by the Court, the use of which became therefore one of the conditions of his power to feu. This model feu-charter contained a clause with reference to a proposed water supply for the feus to be brought from another part of the entailed estate, binding the feuars to take the water to be supplied and to pay their share of an assessment for the same. Accordingly, when Sir W. D. Stewart granted a feu-charter under his power to feu he did in effect create in favour of the feuar a right of water supply from a part of the entailed estate at some distance from the lands feued by means of pipes laid under the entailed estate. On behalf of himself and his successors he stipulated for an annual payment by way of assessment on the whole land feued.

So far then as the feus granted while the lands feued remained under the entail are concerned there can, I think, be no difficulty. The obligation of the feuar under his feu-charter is to pay for, and his right is to receive, a water supply. His right is a servitude right in which his feu is the dominant and the entailed estate the servient tenement. For that right, it is true, he pays an annual sum. But the purchase of a servitude is no new thing, and I cannot see why a servitude should cease to be a servitude because it is paid for annually instead of by a slump payment. That being so it follows that the servitude being paid for by an annual payment, the owner of the servient tenement for the time must be entitled to receive that payment. It does not matter in the least that it is constituted by feu-charter. It is constituted by writ under the hand of the person capable of subjecting the remainder of the entailed estate to the burden, and he subjected it in consideration of a continuous payment to himself and his successors, not as mere superiors of the subjects feued but as proprietors of the whole entailed estate from which the feuing part was in no way separated under the power to feu.

The case is different when we come to the feus granted after the excambion. The deed of excambion bears nothing on its face about water supply, but it exchanges the two parcels of land as being of the same value. It left the rights of the feuars exactly in the same position as before. It did not prejudice the existing vassals. They remained in possession of a servitude *aqueductus* on the estate of Grandtully. But when Sir W. D. Stewart went on to grant additional feus after he had become fee-simple proprietor, and to give his new feuars right to water supply from the entailed lands of Grandtully, he did what it was beyond his power to do. As proprietor in fee-simple of the lands of Inchewan he could not possibly give his feuars right to take water from the entailed estate of Grandtully. Therefore, if the feuars are to continue to draw a supply of water from the estate of Grandtully it can only be by agreement with the heir of entail in possession of that estate, and he is of course entitled to demand the assessment as the consideration.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor reclaimed against: Find that the defender has no right to draw water from the estate of Grandtully."

water-rate or other annual consideration payable by the owners of the feus upon that portion of the lands of Inchewan included within the brown line on the plan No. 20 of process, formerly part of the entailed estates of Grandtully and others in the summons mentioned, and now the property of the defender, the said Franc Nichols Stewart, which were granted by the late Sir William Drummond Stewart, Baronet, in respect of water introduced by the said Sir William Drummond Stewart, as heir of entail of the said entailed estates, from another part or other parts of the said estates, and at the expense of the entailed estate and the heirs of entail: To that extent and effect declare and decern in terms of the conclusions of the libel: Find the pursuer entitled to expenses," &c.

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DUNDAS & WILSON, C.S.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

THE ROYAL BANK, Appellants.—*Balfour—Mackay.*
JAMES BAIN (Brown's Trustee), Respondent.—*Kinnear—Strachan.*

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July 6, 1877.
Royal Bank v.
Bain.

Bankruptcy—Preference—Trustee—Heritable Creditor—Pointing of the ground—19 and 20 Vict. c. 79 (*Bankruptcy Act*, 1856), sec. 102 and sec. 118—*and* 38 Vict. c. 94 (*Conveyancing Act*, 1874), sec. 55.—The Bankruptcy Act 1856, by section 102, enacted that the act and warrant of confirmation in favour of the trustee should *ipso jure* transfer to and vest in him, absolutely and redeemably, as at the date of the sequestration, the whole property of the debtor, to the effect therein set forth. As regards the heritable estate it enacted that it should be vested "to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration, and as if a pointing of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and the creditors' right to point the ground, as is hereinafter provided." By section 118 pointings of the ground which had not been carried into execution within sixty days before sequestration, and pointings of the ground after sequestration, were made available in competition with the trustee only for the interest on the debt for the current half year, and for one year's arrears of interest. Section 118 was repealed by the Conveyancing Act of 1874.

In a question between the trustee in a sequestration and a creditor having a security prior to the date of sequestration who had executed a pointing of the ground after that date but before the confirmation of the trustee, *held* that the repeal of section 118 of the Act of 1856 left the right of the pointing creditor to be regulated by section 102 and the common law, and that he had right in the moveables attached, his heritable right being prior to that of the trustee.

THE Royal Bank held a bond and disposition in security over certain heritable property in St Andrews belonging to Thomas Brown, tailor, for payment of a cash credit to the amount of £1000 with interest. This bond was dated and recorded in the Register of Sasines in April 1872. Brown was sequestrated on 10th June 1876. The bank executed a pointing of the ground on 16th June, in virtue of the bond and disposition in security. James Bain was confirmed trustee on 30th June.

The bank lodged a claim in the sequestration for £1049, 3s. 11d., being the balance due on the cash credit kept in the name of the bankrupt, and claimed to be ranked preferably upon the price of the heritable subject in virtue of the bond and disposition in security, and also to be ranked preferably on the price of the moveables on the ground which had been

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The trustee admitted the claim of the bank to be ranked preferably on the price of the heritable subject, but rejected the claim to rank preferably on the price of the moveables. The bank appealed.

The Lord Ordinary pronounced this interlocutor:—"Recalls the said deliverance in so far as he has rejected their claim to be ranked preferably on the price of the moveable goods and effects situated upon the said heritable subjects in virtue of the pouncing of the ground mentioned in the claim."*

* "NOTE.—The summons of pouncing the ground was executed after the date of the sequestration, but before the date of the confirmation of the trustee, and the question is, whether the appellants have thereby acquired a right preferable to that of the trustee over the moveables on the ground forming the subject of their heritable security?

"Had this case occurred prior to the Bankruptcy Act of 1839 (2 and 3 Vict. cap. 41), it is quite settled by the case of *Campbell's Trustees v. Paul*, 13th January 1835, 13 S. 237 (7 Scot. Jur. 125), that the appellants would have acquired a preferable right. That case decided that a heritable creditor who had raised and executed a summons of pouncing the ground against his debtor in the natural possession of the estate after the sequestration, but before the confirmation of the trustee, had a real right in the moveables as accessories to the lands, and was entitled to a preference over the moveables in competition with the trustee, to the full extent of his debt, principal and interest, covered by the heritable security. As this preference over the moveables was found in some instances to be extremely prejudicial to the interest of personal creditors it was thought expedient to limit the heritable creditor's right to pounce the ground, and place it under proper regulations when the Bankruptcy Act of 1844 was passed—*Barstow v. Mowbray*, 18 D. 846, March 11, 1856 (28 Scot. Jur. 341).

"This was effected by the 78th, 79th, and 95th sections of that Act. The Act was repealed by the 2d section of the Bankruptcy (Scotland) Act, 1856. The clauses in question, however, were substantially re-enacted by the later Act of which they form sections 102 and 118.

"By the 102d section it is enacted, that the act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him, absolutely and irredeemably, as at the date of the sequestration, the whole property of the debtor, to the effect therein set forth. As regards the heritable estate, it is enacted that it shall be vested 'to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration, and as if a pouncing of the ground had then been executed, subject always to such preferential rights as existed at the date of the sequestration, and are not null and void, and the creditors' right to pounce the ground, as is hereinafter provided.'

"The right reserved to the creditor to pounce the ground is to be found in the 118th section of the statute, which provides that 'no pouncing of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration, and no decree of mairs and duties on which a charge has not been given sixty days before the said date, shall (except to the extent hereinafter provided) be available in any question with the trustee: provided that no creditor who holds a security over the heritable estate preferable to the right of the trustee shall be prevented from executing a pouncing of the ground, or obtaining a decree of mairs and duties after the sequestration: and such pouncing or decree shall, in competition with the trustee, be available for the interest only on the debts for the current half-yearly term, and for the

The trustee reclaimed, and argued ;—A poiding required to be executed before it attached anything. The trustee was in the position of a poiding

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arrears of interest for one year immediately before the commencement of such term.

"The result of these enactments as regards poidings of the ground would appear to be to enlarge the rights of the trustee as against the heritable creditor, to the extent of giving him a preference which he had not before, in all cases where the poiding had not been carried into execution sixty days before the date of the sequestration, and of restricting the preference which the heritable creditor could acquire by poiding after sequestration, or within sixty days of it, to the interest on the debt for the current half-yearly term, and for the arrears of interest for one year preceding.

"Had this continued to be the law the Lord Ordinary does not doubt that in respect of the execution of the summons of poiding the ground by the appellants in this case their right over the moveables on the ground would have been preferable to that of the trustee, but only for the interest on their debt for the current term, and for the arrears of interest for the preceding year—(Budge v. Brown's Trustees, 10 Macph. 958, July 12, 1872 (44 Scot. Jur. 536).

"But the 118th section of the Bankruptcy Statute was repealed by the 'Conveyancing (Scotland) Act, 1874,' section 55 of which enacts that 'section 118 of 'The Bankruptcy (Scotland) Act, 1856' is hereby repealed; and it is provided that all heritable creditors who have been in possession under their securities, and whose rights to the rents collected by them has not been challenged by action previous to the commencement of this Act, shall be entitled to retain and apply all rents collected by them in the same manner as they might have done if the provisions of the section hereby repealed had not been enacted.'

"The repeal of the 118th section is unfavourable to the trustee, in respect that it deprives him of the preference which he might have acquired over a creditor whose poiding of the ground had not been carried into execution sixty days before the date of the sequestration.

"The question at issue between the parties in this case is, whether (as maintained by the appellants) the repeal of the 118th section has also the effect of restoring the law as regards the rights of a creditor executing a poiding to the state in which it was prior to the Bankruptcy Act of 1839, and so of enabling him to acquire or assert a preference for the whole amount of his debt by poiding after the date of sequestration? Or, whether (as maintained by the respondent) its effect is not to deprive the creditor of the right of acquiring or asserting any preference whatever by poiding after the date of the sequestration?

"The question appears to the Lord Ordinary to turn upon the construction of the vesting clauses of the Bankruptcy Act of 1856. The Act provides (section 102) that the whole heritable estate shall be vested in the trustee, absolutely and irredeemably, as at the date of the sequestration, to the same effect as if a decree of adjudication for payment and in security of debt subject to no legal exception had been pronounced in his favour and recorded at the date of the sequestration, 'and as if a poiding of the ground had then been executed.'

"But the right thus conferred on the trustee is given subject to such preferable securities as existed at the date of the sequestration, and the creditor's right to poid provided by the 118th section. It was maintained by the respondent that the only limitation on the trustee's right to the moveables (as regards an heritable creditor) was the restricted right of poiding reserved to the heritable creditors by section 118, and that, as this restricted right is afterwards taken away by the Conveyancing (Scotland) Act, the result is that it leaves the right of the trustee without any qualification.

"The effect of this view of the repeal of the 118th section is, that it would restore to a creditor, who has carried a poiding of the ground into execution, even if within sixty days of the date of sequestration, the preference which he could thereby have acquired before the Bankruptcy Act of 1839; while, on the

No. 156. creditor at the date of sequestration under section 102 of the Bankruptcy Act of 1856, and the moveables then vested in him, and he might have removed them. They could not be affected by a poiding executed subsequent to the date of sequestration.¹

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Argued for the Royal Bank ;—The preference in poidings of the ground was according to the dates of the heritable rights of the creditors, not according to the dates of the executions of poidings. The right of the bank was prior to the sequestration, and therefore the poiding was preferable to the right of the trustee, which only dated from the sequestration. The trustee at all events could not claim a preference until confirmation.²

At advising,—

LORD PRESIDENT.—(After stating the facts)—The Lord Ordinary has sustained the poiding of the ground to the full extent, and his judgment is based on the 55th section of the Conveyancing Act of 1874, which repeals the 118th section of the Bankruptcy Act of 1856. If it had not been for that repealing clause the Lord Ordinary expressly states that he could not have sustained this poiding of the ground. As regulated by the Act of 1856 the heritable estate of the bankrupt, under section 102, is vested in the trustee “to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration,

other hand, it would put it out of the power of a creditor to acquire a preference if his poiding shall not have been carried into execution before the date of sequestration. It appears to the Lord Ordinary that this would be a very reasonable state of the law.

“The Lord Ordinary, however, thinks that the sounder view of the law is that a preferable security existed over the moveables in question in favour of the heritable creditor at the date of the sequestration. This right required, no doubt, to be asserted by the creditor, and might be lost if not timeously asserted, but if timeously asserted the creditor was preferred to the trustee. There is no doubt that this was the law before the Bankruptcy Statute of 1839. Lord Ross says in Barstow’s case that that statute made no change in the law except in limiting the preference to the current term’s interest and one year’s arrears. The Lord Ordinary concurs in that view, and he thinks that the effect of the repeal of the 118th section is to destroy the limitation, and to restore the law to the position in which it was prior to the statute of 1839.

“If, then, the heritable creditor had a preference at the date of the sequestration, which was capable of being afterwards declared or asserted, the Lord Ordinary does not think that there is anything in the Act to prevent the assertion of the right as against the trustee after sequestration. The Act says that the estate shall be vested in him ‘as if a poiding of the ground had been executed.’ But preference among heritable creditors does not depend on the priority of diligence, but on the priority of their infeftments. The Lord Ordinary does not think that a trustee is in a better position than an ordinary heritable creditor; and he thinks that the fact that a creditor had executed a poiding of the ground would not prevent a prior creditor from asserting his preference, and it is settled law that the execution of a summons of poiding is sufficient for this purpose. The Lord Ordinary is therefore of opinion that the trustee’s deliverance is wrong on this point.”

¹ 2 Bell’s Com., 5th ed., p. 58; Hay v. Marshall, July 7, 1824, 2 W. and S. 71; Bell’s Pra. 699; 2 Montgomerie Bell’s Lectures, 2d ed., 1186; Wilson v. Tullis, June 18, 1817, F. C.

² Ross’ Lectures, 392 and 455; Stair, iv. 23, secs. 5, 19, and 20; Eskine, 28, 32; Bell v. Caddell, Dec. 3, 1831, 10 S. 100.

and as if a pointing of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and the creditors' right to point the ground, as hereinafter provided." Now, no prior creditor could have any available security over the moveables on the heritable estate of the bankrupt except by a pointing of the ground, and the section would have left the law as it stood before but for the words "as hereinafter provided;" and what is there referred to is the 118th section, which has the effect of limiting the right of the pointing creditor—"No pointing of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration, and no decree of mails and duties on which a charge has not been given sixty days before the said date, shall (except to the extent hereinafter provided) be available in any question with the trustee, provided that no creditor who holds a security over the heritable estate preferable to the right of the trustee shall be prevented from executing a pointing of the ground, or obtaining a decree of mails and duties after the sequestration, but such pointing or decree shall, in competition with the trustee, be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term." When the Conveyancing Act of 1874 repealed the 118th section it appears to me that it left as the regulating enactment the vesting clause of section 102, except that it took out of it the reference to section 118, which it does upon its face contain, there being no longer any 118th clause.

How stands the matter under section 102? The trustee is to be in the same position "as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt," had been pronounced and recorded in his favour, and as if a pointing of the ground had been executed. But prior heritable securities are saved, as all this is to be done "subject always to such preferable securities as existed at the date of sequestration." The trustee is to be in this favourable position, that he is to have right to the moveables, as if he had executed a pointing of the ground; but that will not prevent a prior creditor from executing a pointing of the ground. The creditor would have been entitled to point in virtue of his prior heritable right, and having executed his pointing the trustee cannot compete with him. Stripped of the 118th section, the common law right of the creditor revives. I am therefore satisfied with the interlocutor of the Lord Ordinary.

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Royal Bank v.
Bain.

LORD DEAS.—We all know that pointings are divided into real and personal, and that the two are quite different in their nature and effects. Personal pointing is the ordinary diligence by which any creditor may attach and sell his debtor's moveables for payment of his debt. Pointing of the ground is competent only to a real creditor in virtue of his *debitum fundi*, and is resorted to only in the comparatively rare case when, by miscalculation or emerging circumstances, the value of the heritable subject proves or is likely to prove inadequate to cover the heritable debt. It is consequently much less familiar to practitioners than personal pointing, which is of everyday occurrence. There can be no room for doubt, however, as to the nature and effect of a pointing of the ground at common law. It is a combination of a real petitory action and a real diligence. Pointing of the ground originated in the ancient brieve of distress, and in Rankton's time it was still known by that alternative name—(*vide Institutes*, vol. ii. tit. 5, secs. 7 and 8). Until the passing of the Act 1469, c. 36, the goods

No. 156. on the ground belonging to tenants were liable to be distrained at any time for the whole amount of the landlord's debt, with no other remedy to the tenant than a right of relief against the landlord, in so far as the value of the goods distrained exceeded the amount of the rent payable. But by that statute this right to distrain the tenant's goods was prohibited, except to the extent of the rents due or current at the time. Subject to this limitation a pointing of the ground, wherever competent, is still, at common law, the most stringent diligence known, except a writ of extent at the instance of the Crown.

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Creditors whose debts are *debita fundi* are not all in precisely the same position. Those whose debts arise by act of the law, such as a superior for his feuduty and casualties, being, as Bankton explains (2, 5, 21), preferable to those whose debts are constituted by voluntary deeds. But laying aside those whose debts are held to arise by act of the law, all other real creditors who have executed pointings of the ground are preferable *inter se*, not according to the priority of their pointings, but according to the priority of their real rights.

Thus Bankton says (2, 5, 22),—"The great effect of such *debita fundi* is, that, both as to bygones and in time coming till they are purged, or the lands disencumbered of the same, they are effectual against the ground preferably to the proprietor, and all deriving right from him. In competition among themselves the superior is preferable for the feuduty in the vassal's charter and his casualties in manner above set forth, because his right is founded on the original grant to the vassal; and conventional *debita fundi* are preferable according to the date of their respective rights and infeftments whereby they are constituted, and the registration of the same," that is, registration in the record of sasines.

Thus also Lord Stair (4, 23, 5) says,—“The ground of any lands may be apprised by pointing of the ground for any sum wherewith the vassal's infeftment is burdened, or the land may be adjudged for the same sum, and neither the apprising nor the adjudication will come in *pari passu* with appraisings or adjudications for personal debts, but will be ranked according to the date of the infeftment, wherein the burden is expressed, especially if it be not otherwise expressed in the disposition and charter, but in the seisin,” and this both for principal and annualrent, but still not as in competition with the superior “because the real burden is not a burden on the superior's rights, but upon the vassal's.” We have the same doctrine laid down by Mr Erskine, b. iv. tit. 1. secs. 11, 12, and 13, which I need not quote.

Certain restrictions upon the common law effect of pointings of the ground as in a question with the trustee in a mercantile sequestration, were introduced for the first time, by the Bankruptcy Statutes of 1839 and 1856. But it will be found that while these statutes limited the extent to which the real creditor was entitled to recover under his pointing of the ground, they did not, in any respect, alter the common law nature of the pointing of the ground itself.

The prior Bankruptcy Statutes had neither altered the nature of that common law right nor placed any limitation upon the amount for which it was available. This, which is clear enough on the face of these earlier statutes themselves, will be found to be confirmed by the decisions which followed upon them.

It is true that in *Hay v. Marshall*, 7th July 1824, (3 S. and D. 157), 25. 22d March 1826 (2 W. and S. 71), it was held that the mere *debitum fundi* of the heritable creditor did not entitle him to a preference over the personal creditors in a sequestration where he had not executed a pointing of the ground while the moveables were still intact upon the ground. But that was upon the

well understood principle that, although a right to seize and appropriate the No. 156.
 moveables is inherent in the *debitum fundi*, this right must be asserted by July 6, 1877.
 executing a poinding of the ground while the moveables are still there, in order Royal Bank v.
 to bring the right into active operation against the trustee and creditors in the Bain.
 sequestration. The existence of the right to seize is not enough. The seizure
 must be actually made. The heritable creditor must put forth his hand, and
 thereby assert the right which belongs to him, while the goods are still there,
 and all this the law holds that he does by the mere execution of a poinding of
 the ground, which secures his preference against everybody except the superior
 or a prior heritable creditor who may come forward in the poinding and claim
 to be preferred—(Stair, 4, 27, 20). In that case of *Hay v. Marshall* the goods
 had been sold and removed, and the price was in the pocket of the trustee, as
 the property of the personal creditors, before the heritable creditor came into the
 field, and the question arose, not in a competition for the *ipsa corpora* of the
 moveables, but in the course of a ranking on the price. In these circumstances
 the result of Lord Gifford's elaborate judgment, in the House of Lords, was
 clearly right, but I may be excused for doubting whether his Lordship had penetrated
 the *arcana* of this abstruse branch of Scots law and practice as developed
 in Mr Ross's Lectures on Conveyancing and other treatises (more instructive than
 inviting), to the extent it would have been necessary for his Lordship to have
 done, and I have no doubt he would have done, had the question arisen in different
 circumstances, such, for instance, as it did in the case of *Bell v. Caddell*
 (Treasurer of the Bank of Scotland), Dec. 3, 1831 (10 S. and D. 100).

In that case the heritable creditor had executed a poinding of the ground
 before the date of the sequestration. The bankrupt statute in force at the time
 was 54 Geo. III. c. 137, under the vesting clauses of which (secs. 30 and 40), the
 sequestration was declared to operate as a poinding in favour of the trustee.
 But the word "poinding" was held not to apply to or include poinding of the
 ground, and consequently the heritable creditor was held entitled to carry out
 his diligence notwithstanding of the sequestration. In an able note on the
 subject, Lord Mackenzie, Ordinary, following the institutional writers, made the
 important observation—"Poindings of the ground, *inter se*, it seems perfectly
 certain, are not equal, nor depend on priority of time of execution; that proceeding
 in the first infeftment is preferable."

The next case, *Campbell's Trustees v. Paul*, 13th January 1835, 13 S. and D.
 37, arose under the same statute, 54 Geo. III. c. 137. The poinding of the
 ground had there been executed after sequestration, but before the date of confirmation
 by the trustee. It was found, in these circumstances likewise, that the
 heritable creditor had secured his preference over the trustee. Whether, if the
 trustee had been confirmed prior to the date of executing the poinding of the
 ground, this would have made any difference in the result, it was not necessary
 to inquire, as the facts did not raise that question.

It is thus clear enough that between the date of the Act 1469, c. 36, and the
 date of the Bankruptcy Act of 1839 (2 and 3 Vict. c. 4), there had been no
 innovation upon the common law applicable to poindings of the ground.

The effect of the Act of 1839, secs. 78, 79, and 95, was simply to limit the
 reference of the heritable creditor under his poinding of the ground to the
 interest for the then current term, and the interest (if in arrear) for the previous
 twelve months. The Act made no other change upon the law as it then stood.
 Accordingly in *Bartow v. Mowbray*, 11th March 1856 (18 D. 846) a poinding

No. 156. of the ground executed by a heritable creditor prior to the trustee's confirmation was found preferable to the trustee and creditors to the extent of the interest for the three half years allowed by the statute. The second Lord Mackenzie was Ordinary in that case, and he observed in his note, quite correctly, that, as regarded the vesting of the moveable estate, there was really no difference between the effect of section 78 of the Act of 1839 and section 30 of the previous Act of 54 Geo. III. c. 137.

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It is not necessary, however, to quote or comment in detail upon the vesting clauses of the Act of 1839, because that Act was superseded and repealed by the Act of 1856, which bears, section 102,—“The act or warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him or any succeeding trustee for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration,” (*inter alia*), “the whole heritable estate belonging to the bankrupt in Scotland, to the same effect as if a decree of adjudication in implementation of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration, and as if a pointing of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and the creditor's right to point the ground as hereinafter provided.”

Upon this clause it is obvious to remark that, assuming the trustee to have become a heritable creditor as at the date of the sequestration, and to have, as such, then executed a pointing of the ground, this would not entitle him to compete with a subsequent pointing of the ground executed by a heritable creditor whose real right was duly constituted prior to the sequestration, the preference of heritable creditors *inter se* being, as has been seen, regulated not by the dates of their pointings of the ground, but by the dates of their real rights. As to the title conferred by the above section (102) on the trustee as purchaser and adjudger as at the date of the sequestration, it is clear that neither of these titles could stand in the way of the prior heritable creditor following out his real right by a pointing of the ground.

The right of the prior heritable creditor to point the ground was not, however, left unrestricted by the Act of 1856, any more than it had been by the Act of 1839. On the contrary, section 118 of the Act of 1856 provided that “a pointing of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration, and no decree of mauls and duties on which a charge has not been given sixty days before the said date, shall (except to the extent hereinafter provided) be available in any question with the trustee; provided that no creditor who holds a security over the heritable estate preferable to the trustee shall be prevented from executing a pointing of the ground, or obtaining a decree of mauls and duties after the sequestration; but such pointing or decree shall, in competition with the trustee, be available for the interest only of the debts for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of said term.”

There, again, as in the Act of 1839, there is no change made upon the common law nature of a pointing of the ground. On the contrary, the prior heritable creditor is recognised as holding a security preferable to the right of the trustee, and which may be made available by a pointing of the ground after the date of the sequestration, but the amount to be recovered under that pointing

is restricted to the interest on the debt for the current half year, and for the arrears of interest for one year immediately before the commencement of such term. No. 156.

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Bain.

Thus, then, we find, I think, the common law applicable to poidings of the ground left untouched by the Bankruptcy Acts, with the single exception that a limitation was placed by section 118 of the Act of 1856 upon the amount to be recovered under the poiding. Then comes section 55 of the Conveyancing Act of 1874, by which section 118 of the Bankruptcy (Scotland) Act, 1856, is expressly and unqualifiedly repealed. The consequence seems to me to be inevitable,—that the common law applicable to poidings of the ground stands as it did before the Bankruptcy Acts of 1839 and 1856 were passed, and if that be so it cannot be doubtful that the prior heritable creditor is, in the present case, entitled to prevail over the trustee in the sequestration. It is of no relevancy to inquire why the Legislature may have chosen first to innovate on the old law of poiding of the ground by two successive statutes, and then by a third to restore the old law to its original position. It is a maxim that the Legislature can do no wrong, although it is admitted it may do things very odd. But I am not prepared to say that it is more odd to restore to heritable creditors, by the Act of 1874, the same rights they had till recently immemorially enjoyed than it was to have diminished the value of these immemorial rights to a minimum by the Acts of 1839 and 1856.

LORD MURE and LORD SHAND concurred.

THE COURT adhered.

DUNDAS & WILSON, C.S.—DAVIDSON & SYME, W.S.—Agents.

MRS MARY SANDERSON EDMONSTON OR SYMINGTON AND OTHERS, Pursuers. No. 157.

—Asher—Keir.

ANDREW JAMES SYMINGTON, Defender.—Fraser—Scott.

July 6, 1877.
Symington,
&c. v. Symington.

Expenses—Husband and Wife—Separation and Aliment—Custody of Children—Expenses of Wife in enforcing Decree.—In an action of separation and aliment at the instance of a wife against her husband on the ground of the husband's adultery judgment of separation was pronounced by the First Division of the Court on 19th March 1874, but the right to the custody of the children of the marriage was not settled, and the interlocutor was not signed till the 20th, when the wife was found entitled to the custody of the whole children. On the evening of the 19th the husband left the country, taking with him the children, and proceeded to the Continent, and thence to America, where he took up his residence. On 24th March, in accordance with instructions given by the husband before leaving Scotland, an appeal was taken on behalf to the House of Lords against the judgment of 20th March. On 11th June following the wife obtained an order for interim execution pending the appeal. Having been kept informed, through solicitors in New York, of her husband's movements in America, the wife followed him there, and through the intervention of the American Court, in pursuance of the order for interim execution of 11th June, obtained possession of the children, and returned with them to Scotland. The House of Lords, on 18th March 1875, so far altered the judgment of the Court of Session as to restore to the husband the custody of the children of the marriage.

The wife thereafter raised an action against the husband to recover the expenses which had been incurred in tracing and following him and in

No. 157. enforcing the order for interim execution. *Held* that she was entitled to recover all reasonable and proper expenses incurred by her in carrying into execution the orders and interlocutors of the Court regarding the children of the marriage, including the warrant of 11th June 1874 for interim execution pending appeal.

July 6, 1877.
Symington,
&c. v. Symington.
1st Division.
Ld. Craighill.
M.

IN an action of separation and aliment at the instance of Mrs Mary Sanderson Edmonston or Symington, against her husband, Andrew James Symington, on the ground of his adultery, the First Division of the Court pronounced an interlocutor on 20th March 1874.¹ By this judgment Mrs Symington was judicially separated from her husband, and was found entitled to the custody of the whole children of the marriage between her and Mr Symington, being three boys and two girls, all then in pupillarity.

The judgment of the First Division on the question of separation had been pronounced on the 19th March, though the question as to the custody of the children was not settled or the interlocutor signed till the 20th. On the evening of the 19th Mr Symington, who was then in Glasgow, set out with his children for Hull and thence crossed to Hamburg.

Mrs Symington immediately instituted inquiries, with a view of tracing and following Mr Symington, in the course of which she incurred an account of £105, 11s. 8½d. to her Glasgow agents, Messrs Maclay, Murray, and Spens, and of £37 to her brother, the Rev. Biot Edmonston, for travelling expenses.

It was ascertained that Mr Symington had gone to Havre and afterwards to New York, taking with him the children.

On 24th March 1874, in accordance with instructions previously given to his agents, an appeal to the House of Lords was presented for Mr Symington against the interlocutor of the First Division of 20th March, and on the 26th an order for service was issued, which was served on Mr Symington's agents on 27th March.

On 12th May 1874 Mrs Symington presented a petition for interim execution pending the appeal at Mr Symington's instance, the prayer of which was granted on 11th June following.²

Upon finding that Mr Symington had crossed to America Mrs Symington communicated with Messrs Butler, Stillman, and Hubbard, solicitors in New York, with a view of having him followed and his movements watched. Accordingly, he was placed by Messrs Butler and Company under the surveillance of a private detective, under a system termed in America "shadowing."

Upon obtaining the order for interim execution pending appeal Mrs Symington herself went to America, and through the intervention of the American Court, proceeding upon the order for interim execution of 11th June, obtained the custody of her children, and brought them back to Scotland. In the course of these proceedings in America Mrs Symington incurred an account of £390, 8s. to Messrs Butler and Company.

On 18th March 1875 the House of Lords, on the appeal for Mr Symington, so far altered³ the judgment of the First Division as to give back to Mr Symington the custody of the three sons of the marriage, subject to regulations to be made by the Court of Session.⁴

On 9th October 1875 Mrs Symington, with concurrence of the parties to whom the various sums were due, raised an action against Mr Symington

¹ *Ante*, vol. i. p. 871.

² *Ante*, vol. i. p. 1006.

³ *Ante*, vol. ii. (H. L.) p. 41.

⁴ *Vide* July 16, 1875, *ante*, vol. ii. p. 974

ton to recover the expenses which she had incurred in following him and No. 157.
putting into execution the interim order of 11th June 1874.

She pleaded;—(1) The debts in question having been incurred for necessary purposes by the defender's wife, the defender is liable for the same. (2) *Separatim*, the said debts having been incurred by the principal pursuer in consequence of the wrongful proceedings of the defender, he is bound to relieve her thereof, as concluded for. July 6, 1877.
Symington,
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The defender pleaded;—(1) The whole accounts alleged to be incurred for following the defender and recovering the children cannot be charged against the defender, in respect that the principal judgment in the process of separation was suspended and remained in abeyance till the disposal of the appeal to the House of Lords. (2) The pursuers are not entitled to recover any part of the expense either of applying for or carrying out interim execution. (3) Further, they are not entitled to recover such expenses so far as incurred for travelling to foreign countries and taking proceedings therein, in respect that the order for interim execution on the decree was merely interlocutory, and not enforceable by a foreign Court.

The defender also objected that the accounts sued on were extravagantly charged, and contained large items which could not be recognised in any circumstances, as proper charges between parties to a litigation.

The Lord Ordinary, on 23d November 1876, after finding the facts above narrated, and in addition, “(3) that one of the purposes, and the chief purpose for which the defender went away as aforesaid, was to prevent his children from being taken from him till an appeal should be presented and disposed of in the House of Lords; (4) that though the defender left Scotland suddenly he did not leave by stealth, nor did he, while on his way to, or while in America, use an assumed name, or have recourse to other expedients for the sake of concealment,” found as matters of law “(1) That the facts being as above set forth the pursuer was not entitled to use or impledge the credit of the defender in the proceedings which resulted in the expenses that are now the subject of suit, as for a necessary; and (2) that the expenses, so far as incurred under or in relation to the order for interim execution, are not coverable from the defender, as the application for, and the use of, that order was a privilege which she used at her own risk: Therefore stains the defences, assoilzies the defender, and decerns: Finds no expenses due either to or by either the pursuer or the defender, and decerns.”*

* “NOTE.—Even had the Lord Ordinary sustained the grounds of action he could not have sanctioned the incurring of all the expense which is covered by the conclusions of the summons. The pursuer's anxiety may so far be excused; but there is a measure of moderation which must be exacted even from those circumstances of whose position rather stimulate zeal than impose discretion. However, the defender has, upon far wider grounds, been assoilzied, it is unnecessary to analyse the accounts for the purpose of pointing out what was properly and what was improperly incurred. As the pursuer was separated judicially from the defender she was not entitled to use or to pledge his credit in incurring of the debt in which the action has originated. Alimony she had. Her action on the judgment of the Court was suspended by the appeal to the House of Lords, and the interim execution was a privilege and not a necessity. To say otherwise would be in effect to say that it was necessary to act upon a judgment, which, in the Court of last resort, was found to be so far erroneous, and which that reason was so far, in this case, to a material extent, varied.

The Lord Ordinary is aware of no authority for throwing the expense of proceedings on an order for interim execution upon the party against whom they have been used. And so to do in a case in which the judgment in

No. 157. The pursuer reclaimed.¹

At advising,—

July 6, 1877.
Symington,
&c. v. Symington.

LORD PRESIDENT.—This is an action at the instance of Mrs Symington for the purpose of recovering from her husband the amount of certain expenses incurred by her in carrying into execution interlocutors of this Court in the previous action of separation at her instance. The Lord Ordinary, after findings in fact, “Finds, as matters of law, (1) that the facts being as above set forth, the pursuer was not entitled to use or impledge the credit of the defender in the proceedings, which resulted in the expenses that are now the subject of suit, as for a necessary; and (2) that the expenses, so far as incurred under or in relation to the order for interim execution are not recoverable from the defender, as the application for and the use of that order was a privilege which she used at her own risk.” I am unable to concur in the law so stated by the Lord Ordinary. I think the action must be sustained. To what extent the pursuer is entitled to recover the sums concluded for, or how far the accounts lodged in process represent expenses that can reasonably and properly be charged against the defender, are questions which remain for after consideration. The observation of the Lord Ordinary is sound that “there is a measure of moderation which must be exacted even from those the circumstances of whose position rather stimulate zeal than impose discretion.” But the question in the meantime is whether the Lord Ordinary is right in saying that no part of these sums can be recovered as a necessary or proper part of the expenses incurred in a litigation at the instance of the pursuer against her husband. The Lord Ordinary has made a mistake in point of fact. He says that the pursuer was judicially separated from the defender when these expenses were incurred. No doubt a great part of the expenses were incurred after our decree of separation, pronounced on 20th March 1874; but that judgment was taken to appeal four days after it was pronounced, and pending the appeal its effect was suspended. Even if the parties had been judicially separated at that date I am by no means sure that the Lord Ordinary is right in drawing the very sweeping conclusion that under no circumstances was the pursuer entitled to use or pledge the defender's credit. But it is unnecessary to inquire into that. The Lord Ordinary says, further, that the application for and enforcing of the order for interim execution was a privilege which the pursuer used at her own risk. In short, his Lordship seems to consider the order for execution as a sort of luxury which the pursuer

furtherance of which that order had been granted was to a material extent varied would, he thinks, violate the principle upon which orders for interim execution are obtained, and inflict unmerited hardship on those who were forced to fulfil a judgment before it was final.

“On the question of expenses the Lord Ordinary has had difficulty. But there is a discretion in the Court even in cases in which one of the parties to the action has been entirely successful; and using that discretion in the way thought best, the Lord Ordinary has, for the sake as well of the defender as of the pursuer, found no expenses due by or to either party.”

¹ *Authorities referred to.*—24 and 25 Vict. c. 86 (Conjugal Rights Act, 1861), sec. 9; Paul, March 8, 1838, 16 S. 822; Lady Cardross v. Earl of Buchan, Dec. 17, 1842, 5 D. 343, 15 Scot. Jur. 139; Clark v. Henderson, Feb. 6, 1873, ante, vol. ii. 428; Paul v. Roy, 1852, 21 L. J. Chan. 361; Shedden v. Patrick, 1853, 22 L. J. Q. B. 283; Wilson v. Ford, 1868, L. R. 3 Exch. 63; Brown v. Ackroyd, 1856, 25 L. J. Q. B. 193; Bazeley v. Forster, 1868, L. R. 3 Q. B. 559; M'Cready v. Taylor, June 7, 1873, 7 Ir. Rep., C. L. Ser. 256.

was only entitled to indulge in at her own expense. That appears to me to be a very extraordinary view of an order for execution. The question whether a judgment of the Court taken to appeal should be carried into execution pending the appeal is one for the discretion of the Court, and if the Court are of opinion that it should, it seems to me to be as much the right of the party to have it carried into execution as to obtain the original judgment.

I think that the pursuer is entitled to recover all reasonable and proper expenses incurred in carrying out the orders of the Lord Ordinary and the Court in regard to the children of the marriage, including the order for interim execution, and that with this finding we should remit the whole accounts to the Auditor in order to have his opinion as to what part of the sums claimed fall under this head.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Lord Ordinary of 23d November 1876: Find that, under the conclusions of the summons, the pursuer is entitled to recover from the defender all reasonable and proper expenses incurred by her in carrying into execution the orders and interlocutors of the Lord Ordinary or the Court regarding the children of the marriage between the pursuer and the defender, including the warrant, dated 11th June 1874, for interim execution pending appeal of the judgment pronounced by this Court in the action of separation at the pursuer's instance against the defender on the 20th March 1874: Remit to the Auditor of Court to examine the whole accounts sued for, and to report what portions of the same fall, in his opinion, within the terms of the above finding, reserving in the meantime all questions of expenses."

J. & R. D. ROSS, W.S.—JOHN GALLETLY, S.S.C.—Agents.

THE LORD PROVOST AND MAGISTRATES OF THE CITY OF EDINBURGH,
Pursuers.—*McLaren—Mackay.*

THE PROVOST AND MAGISTRATES OF THE BURGH OF LEITH, Defenders.—
Asher—Harper.

THE COMMISSIONERS OF THE HARBOUR AND DOCKS OF LEITH, Defenders.—
Muirhead

THE LEITH HERITAGES COMPANY (LIMITED), Defenders.

Property—Servitude—Right of Way—Jus spatiandi.—Held that the uninterrupted use by the public from time immemorial of a piece of vacant and unfenced lying ground as a general access to the shore of Leith, fortified by a possessory judgment of the Court in 1793 in an advocacy of a Sheriff Court process interdict, did not entitle the magistrates of Leith, as representing the public, to prevent the one half of it being enclosed, a sufficient access to the shore being afforded by means of the other half.

UNDER the charter of King Henry and Queen Mary of 4th October 1565, and the Golden Charter of King James VI. of 15th October 1603, and other charters from the Crown, the magistrates of Edinburgh, as representing the community thereof, were formerly proprietors of the town, port, harbour of Leith, and of the land upon which the same was originally situated, and also of other lands adjacent thereto, and still remain proprietors of such lands so far as not feued out by them. Amongst the subjects thus belonging to the corporation of Edinburgh

No. 158.

July 10, 1877.
Magistrates of
Edinburgh v.
Magistrates of
Leith, &c.

1ST DIVISION.
Lord Rutherford
Clark.
B.

No. 158. was a strip of ground lying between Salamander Street and the shore of Leith. A portion of this ground at the west end was towards the end of the 18th century feued to the Edinburgh Glass House Company, and another portion at the east end was similarly acquired by the Leith Glass House Company. Between these two pieces of ground there remained unfeued a vacant space about an acre in extent at the foot of Bath Street.

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In 1788 the corporation agreed to grant a feu of the vacant piece of ground to the Edinburgh Glass House Company for an addition to their works. No charter was, however, granted, for in the following year, upon the Edinburgh Glass House Company proceeding, with the consent and concurrence of the then magistrates of Edinburgh, to enclose the ground, a petition for interdict was presented in the Sheriff Court, at the instance of certain inhabitants of the burgh of Leith, to prevent them shutting up the piece of ground, which was alleged to be a public access to the shore.

Interdict was granted, and on the process being advocated the Court of Session, on 17th December 1793, confirmed the interdict, and found that the whole space between the works of the two Glass House Companies must remain open for the benefit of the public.

In 1838, by the Act 1 and 2 Vict. c. 55 (an Act to regulate and secure the debt due by the city of Edinburgh, &c.), the port and harbour of Leith were transferred to commissioners, and *inter alia* the western half of the vacant ground above mentioned was vested in these commissioners, "to form a passage from Bath Street to the sands of Leith."

The remaining or eastern half of the above mentioned vacant piece of ground being claimed by the magistrates of Leith for the public, on the ground that it had for the prescriptive period been open for the benefit of the public, and had been used as a public and patent access to the sands and race ground of Leith, and also a place of public recreation, this action was raised by the magistrates of Edinburgh for declarator of their exclusive right of property in the piece of ground, and for interdict against all trespass thereon.

The magistrates of Leith were called as representing the public, and also the harbour commissioners, and the Leith Heritages Company as representing the old glass companies, the proprietors of the adjoining feus, as defenders.

The magistrates of Leith stated in their defences:—(Stat. 5) "The said piece of ground has remained open to the public in terms of said judgment (of 17th December 1793) and been used by the public as a public road and access to the sea beach or sands, both for carts and foot passengers, since the date of said decision, and also as a place of public recreation. It has also been used as an access to various premises on both sides of the said open piece of ground. More particularly, for the last forty years at least, the said ground or road, measuring 2320 superficial square yards thereby, as shewn on the plan produced herewith, has remained open to the public as a vacant piece of ground, and been in possession of the public, and used as such, and as an access to the beach. It is also of advantage as an open space for the benefit of the public health, and has been enjoyed as such from time immemorial, or at least for forty years and upwards."

They pleaded;—(1) *Res judicata*, in respect of the judgment of the Court, of date 17th December 1793; (2) the said ground having from time immemorial, or at least for forty years and upwards, been open to and used by the public, as set forth in the present defenders' statements, they should be assoilzied.

The commissioners for the harbour and docks of Leith only reser-

the action to the limited extent, as stated in their plea, that "the pursuers are not entitled to decree in such terms as will include, by description or otherwise, any part of the western half of the ground in question, which belongs to the defenders, and the defenders are entitled to have their said half properly laid off, and their rights therein protected."

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No appearance was made for the Leith Heritages Company.

A proof before answer was allowed to the pursuers, and to the defenders, the magistrates of Leith, the import of which sufficiently appears from the note of the Lord Ordinary.

The Lord Ordinary, on 15th February 1877, pronounced this interdictor:—"Finds and declares that the pursuers are the proprietors of the ground libelled: *Quoad ultra* assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses," &c.*

* "NOTE.—It was not disputed that the pursuers are proprietors of the ground in question, and the only question related to the uses which the public had over

"For time immemorial there has existed an open piece of ground at the foot of Bath Street, Leith, and lying between Salamander Street and the sea. It appears that at one time the public were in use to bathe opposite this ground, and a bathing house existed on it, which apparently was occupied by the person who let out bathing coaches. It is not quite certain when the bathing house appeared, but the Lord Ordinary thinks that it must be more than forty years ago.

"The accounts of the city chamberlain shew that the ground was in use to be let down to 1834. But though this was the case there was no restriction on the use of it by the public. They had access to the sea on both sides of the bathing house, and after that house ceased to exist they had access to the sea over the whole ground.

"In 1789 the Edinburgh Glass House Company, the feuers of the adjoining ground, with the consent of the pursuers, proposed to enclose a part of the ground. This was resisted by certain inhabitants of Leith, and a process of interdict was raised in the Sheriff Court. The process was advocated, and on the 12th December 1793 the Court confirmed the interdict which the Sheriff had granted, and found that the whole ground must remain open for the benefit of the public, reserving all questions as to the bathing house. Since that time no attempt has been made to limit the uses of the public. Accordingly the whole ground has been used as an access to the sea, and it has been put to some uses for the purpose of recreation though not in a very definite way.

"In 1833 the town of Leith became a parliamentary burgh. But the city of Edinburgh retained its property. In 1838, under the authority of 1 and 2 Vict., c. 55, it conveyed one half of the open ground to the Leith Dock Commissioners, to form a passage from Bath Street to the sands. The remainder, which is the portion now in question, was conveyed in security to the creditors of the city.

The pursuers contend that the only right which the public possessed over the ground was a right of passage, that the portion conveyed to the Leith Dock Commissioners is sufficient for the exercise of that right, and that in consequence the remainder may be dealt with by the pursuers as they think proper.

The defenders urge that the decree of 1793 is *res judicata* in their favour.

The Lord Ordinary cannot assent to this view. The process originated in the Sheriff Court. But the jurisdiction of that Court did not extend beyond the limitation of possession till the question of right was decided, and it is thought that the Court of Session could not in an advocacy exercise a wider jurisdiction than belonged to the Sheriff.

But although the decree does not sustain the plea of *res judicata* it is of

No. 158. The pursuer reclaimed.¹
At advising,—

July 10, 1877.
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Leith, &c.

LORD PRESIDENT.—The ground in question is situated within the burgh of Leith, between Salamander Street on the south, and the shore on the north. On the east and west sides it is bounded by buildings. It is, in short, building ground within the burgh. It has been left open and unenclosed for a very long time, but I have no idea that because a building stance remains for forty years unbuilt upon and unfenced it thereby becomes *juris publici*. If that were good law the result would be that it would be impossible that any piece of private property within a town capable of being traversed by the public as this was could remain open and unfenced without the proprietor substantially losing his right of beneficial enjoyment of his property. That seems to me to be quite extravagant. But, in point of fact, the ground has not been of any practical use to the public, except as an access from Salamander Street to the shore, and in later years to a road on the south side of the new docks.

The defenders say it was used as a place of public recreation or play ground, that games of various kinds were played upon it, and that this has been going on constantly since the judgment of 1793. But this averment is negatived by the evidence. Games have no doubt been played from time to time upon it by boys, as will always be the case with ground remaining unbuilt on and unfenced. But what the defenders are really claiming on behalf of the public is a *jus spatiiandi*, a kind of right which, as distinguished from a right of way, was, in the case of *Dyce v. Hay*, found to have no existence in the law of Scotland.

I am therefore for recalling the Lord Ordinary's interlocutor. I think, in place of assoilzieing the defenders from the whole conclusions of this action, except the mere declarator of property, decree ought to be pronounced in favour of the pursuers, in terms of the whole conclusions of the summons.

LORD DEAS.—The vacant ground in question, running from Salamander Street towards the sea, seems to be not more than equal to the breadth of two good

material importance in this case. It determines what was the state of possession at the time, and what, in accordance with the decree, has been the state of possession since that time. The whole ground having been left open for the benefit of the public, the question is, can the public be now restricted to the use of one half? The Lord Ordinary thinks that it should be answered in the negative.

"This is not the ordinary case where a servitude of public right of road is claimed over the property of another. It resembles more the case of *Sanderson v. Lees* (22 D. 24), where it was held that the uses which for time immemorial the public had had over the links of Musselburgh formed a quality of the right of tenure. The subject, no doubt, is different in character. But the community are interested in having the ground in question kept open, considering the long enjoyment which they have had of it under the interdict which was granted in 1793. The Lord Ordinary thinks that he must refuse the pursuers the decree which they ask."

¹ *Authorities referred to.*—*Sanderson v. Lees*, Nov. 25, 1859, 22 D. 24; 11 Scot. Jur. 14; *Dyce v. Hay*, July 10, 1849, 11 D. 1266, 21 Scot. Jur. 14; *Hume v. Young*, May 25, 1852, 15 D. (H. of L.) 14, 1 Macq. 305, 24 Scot. Jur. 465; *Hume v. Young*, Dec. 18, 1846, 9 D. 286, 19 Scot. Jur. 109; *Burntisland case*, 1846, note of Lord Ordinary (Cunninghame) in *Hume v. Young*, 9 D. 293-4, 21 Scot. Jur. 112; *Jenkins v. Murray*, July 12, 1866, 4 Macph. 1046, 28 Scot. Jur. 532; *Mackintosh v. Moir*, 9 Macph. 574, 43 Scot. Jur. 402.

streets, perhaps not so much. One-half of that breadth is proposed to be left for the public use. The question, therefore, relates only to the other half. No. 158.

There appears to have been a time when uses were made of that ground which might have raised a question had they not been long discontinued. Bathing machines for the use of the public were kept upon the ground, and from which the corporation drew rents. There was a hut for the keeper, and a wooden erection for his horses. But there has been nothing of this kind within the period of prescription. After 1834 no rent was received or even asked, and all trace of beneficial occupancy disappeared. I find no proof of anything in the nature of a servitude beyond a right of access to the sea, and even that has ceased to be of use for bathing purposes, owing to the construction of the new docks, and the formation of the railway. Within the last forty years no use whatever has been made of the ground, except what is made by men and boys, every day in the year, of the streets of a burgh like Leith. The playing at "boobs," that is, marbles, seems to have been the great amusement there, but everybody knows that marbles are frequently played by children upon the streets and pavements where the traffic is small; and running about or standing lounging is still more common. As to the quoits and the shinty, when the proof is examined I think it appears that there have not been above two or three instances of either of these within the memory of man, and it would be a new question whether playing quoits and shinty over a bit of ground or street like this could constitute a servitude in place of a nuisance. The right to a road of this kind is so far of the nature of a servitude in favour of the public that it may be restricted if a sufficient breadth for all purposes be left. There is no right in the public beyond that. I do not think it is disputed that the road left, of which the public are to have the use, is abundantly sufficient for any right of passage that can be asserted by them, and therefore I entirely agree with your Lordship that there is no room for the view taken by the Lord Ordinary.

July 10, 1877.
Magistrates of
Edinburgh v.
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Leith, &c.

LORD MURE and LORD SHAND concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor reclaimed against: Repel the defences, and decern in terms of the declaratory and other conclusions of the libel: Find the defenders, the provost, magistrates, and town-council of Leith, liable to the pursuers in expenses," &c.

W. WHITE-MILLAR, S.S.C.—W. H. COUPER, L.A.—TORREY & PITCAIRN, W.S.—Agents.

MRS JESSIE BAILLIE OR GIBSON AND OTHERS (Gibson's Trustees),
Pursuers.—*Asher—Mackintosh.*

No. 159.

ROBERT FRASER, Defender.—*Trayner—Lorimer.*

July 10, 1877.
Gibson's
Trustees v.
Fraser.

Process—Summons, amendment of—Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 29.—A summons concluded for implement of an agreement, consisting of eight heads, between the outgoing and incoming tenants of a farm, was averred in the condescendence that certain points were agreed to by the parties verbally, and that then the agreement was reduced to writing, and agreed to in draft by both parties, and followed by *rei interventus*, but that the defender afterwards refused to sign it. After a proof the Lord Ordinary dismissed the action. The pursuer reclaimed, and proposed to amend his summons without altering the condescendence, by limiting the conclusions to one of the eight heads of the agreement, which he averred was verbally agreed to (before

No. 159. the agreement was reduced to writing), and afterwards followed by *rei interventus*. Motion refused, on the ground that the amendment would raise a different question between the parties from that intended by the summons.

July 10, 1877.
Gibson's
Trustees v.
Fraser.

1ST DIVISION.
Lord Ruth-
furd Clark.
B.

THIS was an action by the trustees of the late Patrick Gibson, tenant of the farm of Cairnbank, near Montrose, against Robert Fraser. The summons concluded for declarator "that an agreement was entered into between the pursuer and defender, whereby it was agreed as follows:—" (1 and 2), that the defender should take over the turnip crop of the pursuers' farm, and other articles, at a valuation; (3) that certain persons should be arbiters; (4) that the prices should be payable at certain dates; (5) that the defender should take over the servants; (6) "that in respect the pursuers agreed to give the defender immediate access to the steading for the purpose of repairing and enlarging the same, the defender, in consideration thereof, should accept and accepted of the whole houses, buildings, stone dykes, fences, hedges, ditches and drains on the said farm (excepting the dwelling-house, and range of stables, &c., of which possession was not to be ceded), as in the condition in which the outgoing tenant was bound to leave them; and the defender agreed and bound and obliged himself to free and relieve the pursuers of all claims competent to the landlord in respect of the said houses, buildings, stone dykes, fences, hedges, ditches and drains (excepting as aforesaid);" (7) regarding the expense of the arbitration; lastly, that the parties should implement the agreement under a penalty of £100. There was also a conclusion that the defender should be ordained "to implement and fulfil the said contract or agreement, and to execute along with the pursuer a minute of agreement in the terms of the said contract or agreement as before narrated," and an alternative conclusion for damages.

The action was raised in October 1876. The pursuers set forth that Gibson's lease of Cairnbank expired at the ensuing Martinmas, and that in the course of July and the early part of August it had been arranged and agreed between them and the defender, who was the incoming tenant (Cond. 3) that he should take over the turnip crop and other articles as concluded for in the summons; further (Cond. 4) that he should accept of the houses, fences, &c. as they were, and relieve the pursuers of any claim by the landlord, in consideration of which he was to obtain immediate access to the steading. These averments were in substance denied.

It was also averred (Cond. 5) that the pursuers and defender had a meeting on 22d August and considered a draft minute of agreement embodying these arrangements in terms of the conclusions of the summons, which the pursuers had previously sent to a person acting for the defender, and that the pursuers had the draft extended and sent for signature. "So far," it was averred, "as the various points of agreement mentioned in the summons had not been adjusted previously, as set forth in the preceding articles, they were adjusted and agreed upon at the said meeting when the said draft was gone over." (Cond. 6) "Consequent upon the conclusion of the various arrangements set forth in the 3d and 4th articles of the condescendence, the defender, on or about 16th August, was allowed to enter into possession of the steading of said farm, and he did enter into possession thereof, and erected his stacks upon the stathels and boses agreed to be taken over, and made use of various portions of the steading. Further following on what took place at the said meeting in Mr Shiell's office on 22d August, the defender (1) took over the pursuer's servants; (2) took over possession of the machinery of the threshing-mill; (3) proceeded to use the courts and portions of the steading other than those taken possession of on 16th August; (4) carted into and around the steading about 130 loads of building material; and (5) used a quantity

of straw for covering stacks, in terms of an arrangement come to at said meeting. Notwithstanding all this, however, the defender, on the minute of agreement being sent to him for signature, refused to sign the same, and repudiated the said agreement." No. 159.

The pursuers pleaded;—The defender having entered into the agreement libelled with the pursuers, and having refused to implement the same, the pursuers are entitled to decree as concluded for.

The Lord Ordinary, after a proof, dismissed the action.*

The pursuers reclaimed, and proposed to amend the summons by deleting all the heads of the alleged agreement except the sixth, so that the first conclusion should run "that it should be found and declared that in respect the pursuers agree to give," &c. as above, and by deleting also in the second conclusion the words "and to execute along with the pursuers a minute of agreement in the terms of the said contract or agree-

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* "NOTE.—The Lord Ordinary regrets that he has been obliged to pronounce this decision. But from the form of the action he does not think that he can do otherwise. No proposal was made to amend the summons.

"The only purpose of the action is to declare that the pursuers and defender entered into an agreement consisting of eight different heads. It is contained in an informal writing prepared by Mr Shiell, as the agent of the pursuers, and sent to the defender on 18th August 1876. It was not signed by the defender, but the pursuers alleged that *rei interventus* followed.

"It is plain from the evidence that, before the writing was drawn up, no such agreement as that which it expresses was ever entered into between the parties. Certain obligations existed on the pursuers and defender as the outgoing and incoming tenants. But these were ascertained by the lease, and, with perhaps a small exception relating to the time when the turnips were to be removed, it had never been proposed to make them the subject of any agreement. Indeed, at the time when the writing was sent to the defender, it is not contended by the pursuers that anything had been agreed on, except that the defender was to take over a number of farm articles, and that, in consideration of his obtaining immediate access to the steading, he should take over the houses and fences as being in the condition in which the pursuers were bound to leave them. The defender does not deny that he agreed to take the farm articles, but he maintains that he never undertook to accept the houses and fences.

"After the writing was communicated to the defender a meeting took place on 22d August. The pursuers say that the defender approved of it and agreed to sign it, and indeed that it would have been signed then and there but that it was only in scroll. The defender says that he refused to sign it in consequence of his objection to the clause relative to the houses and fences, but he does not seem to have stated much, if any, objection to the other clauses. It is certain, however, that when it was sent to him on the 23d of August for his signature he refused to sign it, and returned it.

"The Lord Ordinary is of opinion that the pursuers have not established that the agreement libelled was concluded between them and the defender. It was intended to be reduced to writing, and the defender refused to sign it. Even assuming that the defender agreed to it, there was *locus penitentiae* until it was signed; and in regard to the question whether the agreement as a whole was ever concluded, the Lord Ordinary is of opinion that nothing followed between the 22d and 24th of August to prevent the defender from resiling. On the 24th of August the defender definitely refused to sign, and his refusal was never withdrawn.

"The real question between the parties was whether the defender agreed to take over the buildings and fences as in good order. On this question there is a painful conflict of evidence. But the Lord Ordinary forbears to express any opinion upon it, as, owing to the form of the action, he cannot decide it. He is thought it proper to dismiss the action, and not to asscilzie."

- No. 159. ment as before narrated." It was not proposed to alter the condescendence.
 July 10, 1877. The defender opposed the amendment, and referred to the case of
 Gibson's Trustees v. Forbes v. Watt, Nov. 9, 1870, 9 Macph. 96.
 Fraser. At advising,—

LORD PRESIDENT.—The 29th section of the Act of 1868 gives very large powers of allowing amendments of the record and issues at any time, and even contains imperative words directing the Court to allow all amendments which may be necessary for determining the real question in controversy between the parties.

The meaning of these words is very important. They cannot mean that amendments may be made so as to enable the parties to obtain judgment on any question. Some particular question must be meant, and that is the question which is raised by the summons or other original pleading. Therefore, if an attempt is made to raise a different question, it is not only not imperative on us to allow it, but it is plainly beyond the scope of the statute. That is well illustrated by the case of Forbes v. Watt, decided in the Second Division, in which the question which the party endeavoured to raise at the end of the case was a separate dispute, not originally intended to be raised at all.

Here also the proposed amendment comes at the end of the case on a closed record and a concluded proof, after judgment has been given against the pursuers and only when they come to reclaim. No doubt the statute says that amendments may be allowed at any time. But the stage at which they are proposed is a material element in determining whether they ought to be allowed.

But the important point is whether the summons as proposed to be amended raises the same question as the summons when brought into Court. Now, with all inclination to deal leniently in matters of this kind, I am quite unable to affirm that it does. The question raised by the amendment is different. The summons must be judged of, not by the conclusions merely, but also by the condescendence and pleas.

Now, in the condescendence the pursuers set forth in articles 3 and 4 various details of arrangements between them and the defender regarding the removal of the one and the commencement of the possession of the other. Then follow the 5th article relative to the draft agreement. It is plain that the contract alleged to have been concluded consisted of a variety of items which formed the subject of verbal negotiation and adjustment at different times, beginning some time before the expiry of the pursuers' tenancy, and going on on different days embracing 16th August and coming down to 22d August, the day when the draft was made the subject of negotiation. Thus the condescendence shows that a part of the agreement which the pursuers now insist in was not even made the subject of negotiation till 22d August. The pursuers' plea in law is—"The defender having entered into the agreement labelled with the pursuers, and having refused to implement the same, the pursuers are entitled to decree as concluded for." The pursuers' statements and their plea amount to an averment that an agreement was made in terms of the draft produced, and that the pursuers are entitled to have it enforced; and what do we find in the conclusions? The whole of the draft is engrossed in it, and it is craved that the defender should be ordained to implement it in its whole tenor and conditions.

On the other hand, what is intended by the proposed amendment? To amend a verbal agreement in terms of one of the eight heads of the draft, and not

else,—that is, to enforce against the defender, as if it were a separate agreement, No. 159.
 one item of the agreement which the summons was brought to enforce. That is
 a startling proposal, and I am satisfied that it falls within the category to which
 the 29th section does not apply, namely, a proposal made at the end of a cause
 to raise a question not raised and not intended to be raised by the summons.

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LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT adhered.

JOHN HENRY, S.S.C.—D. & W. SHIRESS, S.S.C.—Agents.

ANDREW AITKEN AND OTHERS (Robert Baird's Trustees), Pursuers.—

No. 160.

Asher—M'Kechnie.

ROBERT BAIRD AND COMPANY, Defenders.—*Kinnear.*

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Interest—Sale—Price payable by instalments—Payments in Error—Repetition.—In a mineral lease it was stipulated that the lessees should take over the machinery and plant as valued by a named valuator, “the amount of such valuation to be payable . . . by ten equal instalments extending over a period of ten years, each of which instalments shall be payable at the term of Whitsunday yearly, and shall bear interest in case of failure in the punctual payment hereof at the rate of five per centum per annum on the amount which may remain due until payment, but the lessees shall have power to pay up the whole sum at any earlier period when it may be convenient for them to do so;” it was declared also that though they might be in possession of the plant, &c., and have the use of it, it was to remain the property of the lessor “until the whole price and interest thereof shall be paid.” For three years the lessees paid the instalments, and each year they also paid a sum of interest at the rate of five per cent upon the unpaid balance of the whole price.

In an action at the instance of the lessor for an unpaid instalment and interest on the unpaid balance of the whole price, *held (diss. Lord Justice-Clerk)* that the lessees were only liable for interest on instalments in arrear, and that the previous payments of interest having been made in error the lessees were entitled to credit for the overpayments in accounting with the lessor.

By lease dated 1st July 1871 Robert Baird, coalmaster, Airdrie, proprietor of the lands of Limerigg and Wester Drumclair in the county of Airdrie, let to his brother William Baird, architect, Airdrie, and John Wotherspoon, colliery manager, the coal, shale, and ironstone under these lands, with certain reservations, for a period of nineteen years from Whitsunday 1871. After providing for payment of fixed rent or lordships, in the option of the lessor, the lease proceeded,—“And it is hereby stipulated and agreed that the said William Baird and John Wotherspoon shall take over all the pits, engines, and machinery, workmen's houses, and other buildings connected with the colliery, railways, locomotives, waggons, and other plant, both fixed and moveable, . . . belonging to the said Robert Baird, situated at or connected with said coal-workings, at a valuation to be put thereon by Alexander Simpson, mining engineer, Glasgow, or, failing, by a skilled person to be mutually chosen for that purpose; the amount of such valuation to be payable by the second parties by ten equal instalments, extending over a period of ten years, each of which instalments shall be payable at the term of Whitsunday yearly, and shall bear interest, in case of failure in the punctual payment thereof, at the rate of five per centum per annum on the amount which may remain due, until payment, but the lessees shall have power to pay up the whole sum at any earlier period when it may be convenient for them to do so; declaring that while the second parties shall be entitled to the use and

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No. 160. occupation of said pits, engines," &c., "the same shall not be transferred to them or become their property, but shall remain and continue to be the property of the first party, until the whole price and interest thereof shall be paid, when the same shall become the absolute property of the second parties, but no sooner."

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William Baird and John Wotherspoon entered into possession under the lease under the firm of Robert Baird and Company, and worked the minerals.

On 20th August 1871 the mining plant, &c., referred to in the lease, was duly valued by Alexander Simpson, the valuator named, at £19,682, 16s. 3½d.

Robert Baird died on 26th November 1871, leaving a trust-disposition and settlement under which Andrew Aitken and others were appointed trustees.

Robert Baird and Company, upon an account prepared by the factor for Robert Baird's trustees being sent them in May 1872, paid a first instalment of the valued price of the mineral plant, amounting to £1982, 1s. 3½d., and also, as charged in that account, a sum of £862, 16s. 1d., being interest at the rate of five per cent from 1st June 1871 to 15th May 1872 upon the full amount of the valued price. Separate and detailed receipts for these two payments were granted upon 24th May 1872 by the factor for the trustees.

On 10th June 1873 Robert Baird and Company paid a second instalment of the valued price of the plant, and also a sum of £885 as interest on the balance of the whole price, after deduction of the first instalment, both as set forth in an account sent by the factor to them and him duly discharged.

On 20th July 1874 a similar account for a third instalment, and a sum of £756, 13s. 4d. as interest upon the balance after deduction of two instalments, prepared by the factor, was paid by Robert Baird and Company, and duly discharged.

On 1st June 1875 an account prepared in the same way as the three preceding ones was rendered to the tenants, but they delayed to pay it, and, on 2d March 1876, the trustees of Robert Baird raised an action against Robert Baird and Company, in which, *inter alia*, they concluded for payment of lordships, &c., which they alleged to be due, and for the fourth instalment of the price of the plant and machinery, and for interest upon the balance of the whole price after deduction of three instalments.

Separate answers were lodged for William Baird and John Wotherspoon, the only partners of Robert Baird and Company. In these defences no question was raised as to the interest due.

A record was made up, and while the cause was in the procedure and the trustees, on 4th July 1876, raised a second and supplementary action against Robert Baird and Company, in which, after giving credit for certain payments made by the tenants since the raising of the former action, they concluded for the alleged balance remaining due under the first summons, and also for a fifth instalment of the price of the plant and machinery, and interest upon the balance of the whole price, after deducting four instalments. The other conclusions were the same as in the former action. In the defences to this action William Baird in his answer to the article of the condescendence, which set forth in detail the items of the account sued for, "denied that any interest is due on the amount of the instalments of the value of the said plant which have not become payable;" and Wotherspoon pleaded,—"The defenders are not liable in the sums of interest concluded for; and in particular for the interest claimed on the balance of the amount of the valuations."

On 15th November 1876 the actions were conjoined, and on 22d No. 160. November the Lord Ordinary pronounced this interlocutor:—" Finds that the defenders are not liable to the pursuers in the interest charged on the amount unpaid of the value of the pit, engines, machinery, &c. (so far as not in arrear), amounting, the said interest, as set forth in article 8 of the condescendence appended to the summons in the second action, to £1278, 6s. 8d. sterling: Assolizies the defenders to that extent from the conclusions of the conjoined actions, and decerns: Finds the defenders liable in the sum of £3738, 13s. 7d., as brought out in the state No. 28 of process, with interest thereon from the 7th day of July 1876 till payment, and decerns accordingly: Allows interim extract; and *quoad ultra* supersedes consideration of the case *in hoc statu*, reserving all questions of expenses: Upon the pursuers' motion grants leave to reclaim against this interlocutor."

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The trustees reclaimed, and, on 10th March 1877, the record was opened up and additional statements by both parties were added. The pursuers' amendments, so far as material, were as follows:—" With respect to the payment of the instalments and interest on capital, the course of dealing always was that an account of the instalment due, with a detailed statement of the interest on the capital sum unpaid, was rendered to the defenders at the same time as the account for lordship was rendered in each year. The payments for the first three years of the lease, of which detailed accounts were rendered to the defenders as aforesaid, were as follows." (Here came statement of accounts, &c., as narrated *supra*.) "It was the agreement of parties, and the said houses, pits, engines, &c., were valued at the foresaid sum on the footing that interest on the unpaid capital was to be payable as alleged by the pursuers. The valuation was made on the footing that the subjects let by the lease were being used as going concern. Mr Simpson was not informed by either party, and, in point of fact, did not know, the terms of the lease, or the fact that the amount of the valuation was to be paid by instalments. In point of fact, Mr Simpson believed, when making the said valuation, that the price was to be paid immediately, in one cash payment, and he made the valuation on that footing."

The defenders' answer to this statement was,—“The payments credited were made to account of lordships. Denied that any interest is due on the amount of the instalments of the value of the said plant which have not become payable. It is denied that there was any agreement in reference to the pits, engines, and other plant and subjects specified in the lease, as to the valuation thereof, except what is contained in the lease itself. But it is explained that Robert Baird, the granter of the lease, was brother of the defender, William Baird, and that John Wotherspoon, the other tenant, had been the manager of his, Robert Baird's, collieries; and it is averred that the said Robert Baird intended that the lease should be very advantageous bargain for the tenants. Admitted that the valuation as made by the said Alexander Simpson, and that he valued the subjects as for a going colliery. . . . Admitted that at or about the term Whitsunday in 1872, 1873, and 1874 accounts were rendered on behalf of Robert Baird's trustees to the defenders, Robert Baird and Company. These accounts were rendered by Mr Rodger, who was commissioner or factor for Robert Baird's trustees, under a commission or factory granted by him, and by whom the affairs of the trust were managed. Admitted that in each of these accounts the said defenders were charged with interest on the unpaid amount of the valuation of the said pits, engines, and other plant and subjects; and explained that the said accounts formed representations by the factor for the trustees that these

No. 160. sums of interest were due. The defender, William Baird, relied on these representations, and paid the sums demanded, in the belief that they would not have been demanded unless they were due. The sums so charged as interest on the unpaid amount of the valuation, and paid by the defender, were as follows :—(In all £2390, 2s. 6d.) “ But the defender is advised and avers that no interest was or is due on the amount of the said valuation, except on overdue instalments thereof, from the dates at which the said instalments fell due, and that the pursuers and their factor had no right to represent that such sums of interest were due, or to demand payment thereof. The said sums were paid by the defender in error, and they formed in truth prepayments to account of the amount of the said valuation ; and the defender is now entitled to credit for the sums as paid to account of the total amount of the said valuation, with interest thereon from the respective dates of the said payments until 7th July 1876, as follows, viz. :—(In all £2766, 18s. 5d.)

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The defenders added a plea to the effect that no interest was payable except on overdue instalments, and that the defenders having in reliance on the representations of the pursuers or their factor made overpayments of interest they were entitled to credit therefor.

By the same interlocutor by which the above amendments were added to the record the Court allowed a proof before answer to both parties “ of their respective averments in regard to the alleged payments of interest by the defender on the amount of the valuation of the plant and machinery after the date of the agreement libelled.”

The proof was taken by Lord Gifford on 11th June 1877, when the pursuers examined their factor as to the mode in which he kept the accounts. They also examined Mr Simpson, the valuator, who stated that when he made his valuation it was as a going concern ; that he knew nothing about the arrangement as to payment of the price, and could not therefore have had it in view. The defenders adduced no evidence, and the proof was reported.

Argued for the pursuers ;—Apart from the ordinary rule that interest was *ex lege* due upon sums of money until paid, unless the reverse was expressly stipulated, or the nature of the credit usually given suspended for some time, the actings of the parties under this contract clearly shewed what had been intended by them when the contract was entered into. Unless interest was payable upon the unpaid balance the lessee would not get the full value of his plant and machinery. He would suffer a loss of about £4500. The right given to the lessees to pay the full sum at any time pointed to this, that they might wish to do so to get rid of the payments of interest at the rate of five per cent. The lessees having themselves interpreted the contract as being one which involved payment of interest, were bound by that course of dealing, and were barred from now repudiating it.¹ But even assuming that interest was not due upon the balance of unpaid instalments the lessees were not now entitled to repetition of the sums which they alleged they had paid in error. There was no error in point of fact ; it was at least in point of law, and the maxim held good *ignorantia juris non excusat*.²

¹ Garthland's Trustees v. McDowall, May 26, 1820, F. C. ; Brown's Trustees v. Brown, March 3, 1830, 4 W. and S. App. Ca. 28 ; Darling v. Adamson, March 16, 1834, 12 Sh. 598 ; Edinburgh and Glasgow Union Canal Co. v. Carmichael, May 27, 1842, 1 Bell's App. Ca. 316, 15 Scot. Jur. 193 ; Ersk. Inst. iii. 79, 82 ; Bell's Com. i. 692-3.

² Sinclair v. Wilson, Dec. 7, 1830, 4 W. and S. App. Ca. 398.

Argued for the lessees ;—Interest was due *ex lege* upon a principal sum whenever it became due, but not upon sums which were not due. The instalments upon which interest was now claimed had not yet fallen due. The object of the provision allowing the lessees to pay up the full price at any time was to enable them to acquire the absolute property of the machinery and plant whenever they liked. In a question as to a contract of such a recent date as this the Court were not entitled to look at the actings of the parties under it. They were bound to construe the written contract, however ambiguous it might be. It ceased to be ambiguous the moment the Court construed it. The exception under which written contracts might be construed by light thrown on them by the actings of parties under them applied only to ancient documents.¹ This was a peculiarly favourable case for the lessees getting credit for the sums which they had overpaid. The overpayments had been made in error induced by the lessor—although presumably innocently—and the transaction was not a concluded one. Credit could be given for these sums in the course of the subsequent accounting between the parties.²

At advising,—

LORD ORMDALE.—No question has been raised in regard to any of the findings of the Lord Ordinary in his interlocutor reclaimed against, except the first, by which the defenders are found not liable in payment of certain interest in the value of the pits, engines, machinery, and others referred to in the record ; and the question of interest which has been so raised by the reclaimers, and is now to be determined, appears to me to be one of nicety and difficulty.

The present conjoined actions have arisen in consequence of disputes having occurred between the parties in reference to implement of the following stipulation in the lease, and the payments due by the defenders under that stipulation (His Lordship read the clause of the lease quoted above). It appears that the yearly instalments of the value of the plant have been paid by the defenders the pursuers, and that interest was charged and paid on the other instalments at the rate of five per cent, not from the stipulated date of their becoming due, but from the date when possession of the colliery and plant was taken. But the defenders decline to proceed with payment of the other instalments on this footing, and now maintain that they are liable only in interest on the yearly instalments from the respective dates at which they are payable, in terms of the stipulation in the lease. In order that the statements of the parties in relation to this matter of interest might appear distinctly they were allowed to amend the record, which they have accordingly done. At the debate it was, on the one hand, contended on the part of the defenders that the interest as paid by them on the first instalments was calculated and paid from the date of their taking possession of the plant, in place of from the respective dates at which they were payable according to the stipulation in the lease, through ignorance and mistake ; while, on the other hand, it was contended for the pursuers that there was no ignorance or mistake in the matter, and that according to the true construction of the stipulation in the lease the defenders were and are liable in payment of interest exactly as it was made by them.

Two questions are thus raised for the determination of the Court,—1st, What is to be held to be the precise nature and extent of the defenders' liability in

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¹ Greenleaf on Evidence, vol. i. 352 ; Taylor on Evidence, vol. ii. 1044.
² Dickson v. Halbert, Feb. 17, 1854, 16 D. 586, 26 Scot. Jur. 266 ; Cooper v. Phibba, May 31, 1867, L. R. 2 E. and L. App. 149 ; Stair i. 1, 7.

No. 160. regard to interest on the instalments, or, in other words, what is the true construction of the stipulation in the lease in regard to that matter? and, 2d, Supposing it to be held that the defenders' view of their liability according to the true construction of the lease is the sound one, are they, or are they not, entitled, on the ground of ignorance or mistake, or of the mutual mistake of both parties, to be restored against the erroneous payments which have been already made by them?

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Now, in regard to the first of these questions I can, after full consideration, entertain no serious doubt. As a general rule it may be true, as was argued by the pursuers, that a party is, in the absence of any agreement to the contrary, liable in interest, or recompense in some form, for the use he has had of money or money's worth; and that, in accordance with this rule, he might have been liable in interest on the value of the plant in question from the date he received possession and has had the use of it; but, in the circumstances of the present case, and having regard to the terms of the agreement between the parties on the subject, I am unable to come to any other conclusion than that the general rule is inapplicable, and that the defenders neither were nor are liable in interest on the instalments referred to except from the respective dates at which they became due and payable in terms of the stipulation to that effect in the lease. It must, I think, be assumed that the very object of the parties in expressly stipulating, as they did, that the instalments should be payable at the term of Whitsunday yearly, and that they should "bear interest in case of failure in the punctual payment thereof at the rate of five per cent per annum," was to make it understood that no other interest was to be payable. I cannot think it admits of doubt that if the first instalment had been paid at Whitsunday 1872, being the first term of Whitsunday after the defenders obtained possession of the plant, the second instalment at the next Whitsunday, and so on till all the instalments were paid, that this would be punctual payment at the stipulated terms, and that no further or additional interest would be due. The only, or at any rate the only plausible ground, as it appears to me, on which the pursuers seemed to rest an argument in support of their contention that interest was due on the full value of the plant from the date when possession thereof was taken, besides additional interest on each instalment as it fell due, was the declaration at the end of the stipulations in the lease "that the lessees shall have power to pay up the whole sum at any earlier period when it may be convenient for them to do so." Although this does certainly appear at first sight to be a very singular declaration, and it may be doubtful what was its precise object, I find it impossible to hold that it was thereby intended to make the defenders liable in interest not from the dates at which the instalments became payable, but from the date when the plant was taken possession of. I cannot hold that the previous perfectly clear and distinct stipulation to the contrary, as I must hold it to be, should be rendered unmeaning and unintelligible for no other reason than that it subsequently contains an ambiguous, and, in some views that may be taken of it, inconsistent, declaration. I would rather be disposed to think the true meaning and effect of the declaration to be, not to alter in any respect what I hold to be the plain and obvious meaning of the express stipulation as to interest, but to enable the defenders, if they pleased, to pay up at once the whole value of the plant, under deduction or discount of what would otherwise in that way be paid by the pursuers in consequence of such prepayment. But it is unnecessary to go that length, or to suggest a reason which is not expressed by another declaration.

tion which immediately follows the power conferred on the tenants to pay up the whole value of the plant earlier than they would require if payment were made by yearly instalments, in these terms—"Declaring that while the second parties (the defenders) shall be entitled to the use and occupation of said pits, engines, machinery, houses, buildings, locomotives, waggons, and other plant, fixed and moveable, as before specified, the same shall not be transferred to them or become their property, but shall remain and continue to be the property of the first party (the pursuers) until the whole price and interest shall be paid, when the same shall become the absolute property of the second parties, but no sooner." The reason and object of what appears, at first sight, a strange and unaccountable power or privilege conferred on the tenants is thus explained. Till the whole price or value of the plant should be paid the property, so far at least as title to the subjects was concerned, remained with the landlord, exposed to his debts and the diligence of his creditors. It was therefore a matter of importance to the tenants to have the power of paying up the whole price at once, in place of by instalments extending over ten years, and thereby relieving themselves and their property from the risk to which they were exposed so long as such payment was not made.

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Then, as to the second question, whether, assuming that interest has, to an extent beyond what was legally due, been erroneously paid by the defenders to the pursuers on the first three instalments, are they entitled to repetition of such payments so far as they have been in excess, or to be otherwise restored against such excess?

It is certainly not in all circumstances that a claim for repetition of or restoration against an erroneous payment can be entertained; and it is all the more difficult to obtain such redress where the error into which the parties fell was more of the nature of one in law than of fact. It is certainly very difficult to hold that the defenders here were in ignorance of all the facts bearing on the matter. They could not have been ignorant of the stipulation in the lease to which they were parties, and by which their obligations regarding the plant, and especially their obligation as to payment of its value, principal and interest, was regulated. They may, however, have been under a mistake as to the true construction of the stipulation on the subject, and of their rights and duties under it; and the pursuers may also have been under a similar error. Are the defenders, then, entitled, in law or equity, to the redress they now ask?

The decisions on the subject of *condictio indebiti* are not, I think, of a uniform character; but it is not necessary to examine them all, or to endeavour to reconcile them, for I am disposed to think that the principles laid down in the cases of *Cooper v. Phibbs*, L. R. 2 Eng. and Irish App. 149, and *Earl Beauchamp v. Vinn*, L. R. 6 Eng. and Irish App. 223, as both were decided in the House of Lords, are sufficient to enable us satisfactorily to dispose of the present question. In the former of these cases it was stated by the Lord Chancellor (Westbury) that in the maxim *ignorantia juris haud excusat*, "*jus* is used in the sense of denoting general law—the ordinary law of the country. But when the word *us* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is matter of fact; it may be the result also of matter of law; but if the parties contract under a mutual mistake and misapprehension of their relative and respective rights the result is that the agreement is able to be set aside as having proceeded upon a common mistake." And in the other case, of *Earl Beauchamp*, it was held (1) that when making an agreement

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 ing an injury to one of them, the rule of equity is in favour of interposing to grant
 relief ; (2) that the Court of equity will not, if such a ground for relief is clearly
 established, decline to grant relief merely because, on account of the circumstances
 which have intervened since the agreement was made, it may be difficult to
 restore the parties exactly to their original condition ; and (3) that the rule
ignorantia juris neminem excusat applies where the alleged ignorance is that of
 a well-known rule of law, but not where it is of a matter of law arising upon the
 doubtful construction of a grant.

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These principles are, I think, in accordance with the doctrine stated by Professor Bell in his Principles (section 531) under the head "*Condictio indebiti*," and supported by the authorities to which he there refers.

Applying these principles to the present case, I am disposed to think that the defenders are entitled to the relief they ask for. There can be no question that both parties here—the pursuers as well as the defenders—acted under mutual mistake, for it was conceded in argument that there had been no intention by either party to deceive the other. The pursuers in asking payment of the interest in the manner and to the extent they did, and the defenders in paying the interest as so asked, were under a mistaken impression as to their respective rights and duties. And it is also undoubted that injury has resulted to the defenders. So far, therefore, the present case is within the principles which have been referred to. And there is just as little doubt that the defenders are also within these principles as they relate to the true meaning and effect of the maxim *ignorantia juris neminem excusat*. It was not ignorance of any general or well-known rule of law which had misled them. It was a mistaken view of the legal construction of the somewhat ambiguous stipulation in the contract of lease—a matter which is only now cleared up by the Court. And, as remarked by Lord Chelmsford in Earl Beauchamp's case, "although when a certain construction has been put by a Court of law upon a deed it must be taken that the legal construction was clear, yet the ignorance before the decision of what was the true construction cannot be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the grant" (obligation) "must be construed." The ignorance or mistake is, indeed, all the more excusable on the part of the defenders in the present case, and their right to be restored against it is all the more equitable, in respect that it was in some degree induced by the conduct of the pursuers in sending them a state of debt made up on what must now be held, so far as the interest in question is concerned, an erroneous footing.

In these circumstances I am of opinion that the defenders are entitled to relief from the consequences of the error they fell into in regard to the interest on the three first instalments of the price of the plant in question. And, fortunately, there need be no difficulty in giving this relief as the over-payments can be allowed for in the payments yet to be made.

LORD GIFFORD.—In common with Lord Ormidale I have found this case one of serious difficulty, but I have arrived at the same opinion as that now expressed by his Lordship, and substantially given effect to by the Lord Ordinary.

Previous to the year 1871 the late Robert Baird was proprietor of the lands of Limerigg and Wester Drumclair, and of the coal and minerals thereon. Up to Whitsunday 1871 Mr Robert Baird was himself in the personal occupation of

the minerals, and worked them for his own behoof. On 1st July 1871, however, Mr Baird entered into a contract of lease in favour of his brother William Baird, and John Wotherspoon, who had been his manager in the working of his mines, whereby he let to them, as tenants thereof, the whole coal and minerals for nineteen years from the term of Whitsunday 1871—the 1st of July 1871 being the date of the lease. The mineral lease, as is usual in such circumstances, embraces a great variety of stipulations regarding the working of the minerals, the plant and machinery, and other matters connected therewith, and, *inter alia*, it contains stipulations whereby the tenants became bound to take over the implements and machinery, workmen's houses, and other buildings and plant, at a valuation to be fixed by Mr Alexander Simpson, mining engineer, Glasgow. These stipulations are really subsidiary contracts between the first and second parties; they form part of the mineral lease, and the whole must therefore be taken into consideration for the purpose of determining its true construction and meaning. The provisions relating to the machinery, fixtures, plant, &c., form really a contract of sale of that machinery and plant by the lessor to the lessees, whereby they were sold to the tenants at a price to be fixed by the valuator, which price should be payable at the terms and in the manner stipulated and agreed upon in the lease; and the important question is, does this price as fixed bear interest, and if so, from what terms and to what extent? Now, the first observation I wish to make is that the mineral lease, dated 1st July 1871, is the sole and only contract between the lessor and lessees, neither of whom have proposed to reduce it or set it aside in whole or in part, or as not setting forth truly the agreement of the contracting parties. We are not asked to reform the deed to use an English expression), to alter any of its clauses or provisions, or to vary its words in any way. We are only to read and consider the contract as it stands as embodying the sole contract between the parties, and we have merely to construe these terms and enforce them according to their present and true meaning and intent. I think it important to keep this strictly in view, but specially in reference to the proof which was led before answer, and with reference to certain receipts and documents which were founded on. To me it appears that a great part of the proof and documents have really no bearing at all upon the principal question at issue—I mean the question of the construction of the lease, and how far, according to the terms of the lease, interest is due on the amount of the valuation of the plant. I think this question can only be determined by construing the words of this lease, and by finding what is the true meaning of the contract which forms the written and sole agreement between the parties. I take, then, the words of the lease in reference to the sale of the plant and the payment of the price or amount of the valuation thereof, and I find that the contracting parties specially stipulate and agree that the price of the plant as ascertained by the valuation of a man of skill shall be paid to the lessor, not instantly or when the lessees get possession thereof, but that payment of the price shall be postponed, and shall be accepted of by the lessor in ten equal instalments extending over a period of ten years. The lease says so, and I do not think the words are capable of more than one construction. The words are—“The amount of said valuation to be payable by the second parties by ten equal instalments extending over a period of ten years.” Now, if the deed had stopped there I think these words by themselves would be conclusive against the claim which the landlord's representatives have presented for interest on the whole amount of the valuation from the date of the tenants' entry and of the lease. When a

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No. 160. purchaser of goods or of any article or subject whatever at a specified or ascertained price is, by the express written terms of the bargain, allowed a certain credit or a certain time to pay the price, I think it follows that no interest is due, and that the purchaser shall have the advantage of retaining the price till the period of credit expires. It would be no advantage to a purchaser to get this credit if he had to pay interest; it might even be a disadvantage to pay five per cent interest, because he might be able to borrow or obtain money at a lower percentage. The rule that no interest is payable during the currency of the agreed-on credit unless expressly stipulated for holds good most certainly in ordinary sales of goods and in the ordinary dealings between a merchant and his customer. Thus, in ordinary sales of merchandise, where twelve months' credit is sometimes given, or where the price is made payable, as often happens, by bill or bills at three or six months, or at other currency, no interest is due or can be charged till the credit expires, or until the bills for the price fall due, and if the bills are punctually paid when due no interest can be demanded from the purchaser, who has had the use of the article purchased from the very first. No doubt it may be said that credit for ten years or repayment by ten yearly instalments is a very unusual credit, and we must therefore look very narrowly into the contract to see whether that was really intended by the parties. This is quite a just observation, and accordingly I do look very narrowly into the deed, but I find that this unusual credit is really stipulated for in the very words of the contract. I make no difference, and can apply no different rule of interpretation between a credit for ten years or payment of the price by ten yearly instalments, and a credit for ten months where the price is made payable by ten monthly instalments. The principle is the same whatever be the duration or extent of the agreed-on credit. If nothing is said about interest, then no interest runs till the agreed-on period of credit expires. But the contract of lease is not silent on the matter of interest. It goes on expressly to deal with the question of interest on the price of the plant, that is, on the amount of the valuation thereof, and fixes what interest shall be due. The words are—"Each of which instalments" (that is, each of which ten equal instalments of the amount of the valuation), "shall be payable at the term of Whitsunday, and shall bear interest" (that is, each instalment shall bear interest), "in case of failure of the payment thereof, at the rate of five per cent per annum." Now, when I find that it is provided that interest shall be paid on these instalments only in the event of their not being punctually paid at the stipulated annual terms, and nothing further is said about interest, the conclusion is irresistible that no further interest is due in case of their non-payment. Had the contracting parties intended that interest was to be due on the full price from the first, and apart altogether from the non-due payment of instalments, I think it would have been distinctly stated in the lease. I cannot insert a provision for payment of interest and make a bargain for the parties which they have not chosen to make for themselves.

The only answer to this was (and it was a very ingenious one, suggested first, I think, by your Lordship in the chair), that the ten instalments were themselves to embrace, each one of them, a proportion of the interest, or a proportion of the price and of the interest, as to make the ten instalments equal in amount. Now, I think it is a sufficient answer to this view that the lease itself fixes what the ten equal instalments are to be. Each instalment is one-tenth of the "amount of the valuation," not of the amount of the valuation

with anything added ; and to add interest to each instalment is to do something not warranted by the deed. It is the "amount" of the valuation, and that amount alone, which is to be paid by ten equal instalments. Then it is a somewhat difficult conclusion to combine interest and principal so as to make ten equal instalments of both. No doubt such a calculation might be made, but can we infer that such a calculation is to be made from the lease itself? I am quite unable to do so, even giving effect to considerations of equity. Ten equal instalments on the whole amount of the valuation are easily fixed. The valuation we have before us amounts to £19,000 and some odd hundreds of pounds, and each instalment is equivalent to a tenth of that sum. If these instalments were to be increased by past-due interest that would make the instalments unequal, and that would be contrary to the deed. And, really, if it was intended that the amount of valuation should bear interest from the beginning it was easy to say so, and there was no reason whatever for an intricate calculation to make the instalments equal in amount. I do not think, nor does it appear, that the colliery proprietors ever made a calculation to bring out the ten equal instalments, each compounded partly of capital and partly of interest. Suppose the bargain had been that bills should be granted for the amount of the valuation, as in the case of a debt payable by instalments at one, two, three, or ten years' currency, or suppose a bond had been granted for the ten instalments binding the tenants, and by a cautioner binding himself, for payment of the amount of the valuation by ten equal instalments payable in ten years, could it have been held that, besides the amount in the bond or in the bills, interest was running all that ten years on the capital sum? That might have been—I am not sure that it was not—the original idea of the lessor. It seems it was the idea of his agent, for he acted on it, but it is not expressed in the lease, and I do not think we can give it effect. For I think this lease virtually embraces stipulations which are equivalent to a bond or bills for the ten equal instalments of the amount of the valuation of the plant, without any cautioner, which amount of valuation was payable at Whitsunday yearly, and extended over ten years. I cannot add anything to that. I cannot make a bargain for the parties which they have not chosen to make for themselves, and therefore I think that the fair interpretation of the deed is, that the ten equal instalments of the amount of the valuation are to be paid without interest. Still further, if the instalments were to include interest, as suggested in argument, then the stipulation for interest upon overdue instalments must mean interest upon interest, and I do not think that is the case. A stipulation for compound interest, though it may be lawful, is never to be presumed, and must be very explicit indeed, and where there is only one stipulation for interest, and nothing said about compound interest, I cannot hold compound interest to be due. It was said that the actual payment of interest for three years might enable us to construe the meaning of the contract so as to read in the deed a different meaning from that which the deed taken by itself bears. I cannot possibly give such effect to the payment of interest for three years. No doubt, I must look to the position in which the parties stood when they entered into the contract. I must take into consideration the circumstances in which the parties stood at the date of the contract, which was 1st July 1871, and I think the actings of the parties after that date, even if they had been much stronger than they were, could not give a different meaning to the contract from that which it had at its date. But I do not think the payment of interest for three years alters the construction which I think should

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No. 160. be put upon the lease itself, and therefore I hold that, according to the terms of the mineral lease itself, read in the light of the whole surrounding circumstances, the lessor is not entitled to any interest on the yearly instalments of the valuation of plant, &c., unless and until these yearly instalments fall into arrear, and then the interest clause of the deed will come into effect.

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It was strongly urged that this interpretation of the contract of lease is inequitable and unjust, as it gives the tenants the use of the plant from their term of entry downwards without paying anything for the use thereof, at least until the instalments fall due. But the first answer is, that if parties make a clear written agreement in certain terms, or in terms which have a certain legal effect, the Court cannot inquire into the equity of the bargain, and cannot estimate the relative value of the stipulations *hinc inde*. The written bargain must be carried out. But, apart from this, it appears to me that no want of equity is apparent. I cannot tell what compensatory effects the other clauses of the lease may produce. The rent or lordship may have been made higher just because the use of the plant was to be given without interest till the instalments fell due, or the other obligations on the lessees may have been made more onerous just because they got some advantage in a gratuitous or partially gratuitous use of the plant. Again, it appears that the plant in question was valued, not as upon a sale for removal, but as plant to be used in a going colliery, so that the amount of valuation was much greater, perhaps twice as great, as would have been realised at a breaking-up sale. It may very well be that in consideration of this enhanced price the payment of the instalments were deferred, and so to subject the lessees in payment of interest before the instalments fell due would or might very probably deprive the lessees of a benefit for which they may very probably have expressly stipulated. In every point of view, therefore, I find myself bound to follow strictly the very words of the contract, without adding or inserting anything whatever.

The only remaining point is, whether the landlord's representatives are bound to repay or to give credit for the three sums of interest which the lessees (if my interpretation of the deed is correct) have erroneously paid? Now, on this point I agree entirely with Lord Ormisdale. The moment the true meaning and effect of the contract of lease is fixed and ascertained then everything erroneously paid in excess of what is truly and legally due must either be repaid or must be allowed credit for in the current accounting for rents and lordships. Everything is open; the instalments are only in course of being paid. The rents and lordships are accruing termly, and nothing has occurred to bar either of the parties from insisting that the accounting between them shall be adjusted, and that their rights shall be fixed and given effect to in terms of the contract of lease, as these terms shall now be judicially interpreted.

LORD JUSTICE-CLERK.—If I could come to the conclusion that the true meaning of this contract was that the defenders were not bound to pay to the pursuer the value of the machinery, but only a part of it, and that the agreement to take the amount by instalments imported not only delay in payment but an abatement from the price, I should concur in the proposed judgment. But I think the contract bound the defenders to pay the whole price, and that the stipulation that payment should be taken by instalments was only an ease to the defenders (and it was a great one) in point of time.

It is unnecessary to say anything about rules of interpretation, for none are

involved here excepting two of the most elementary—First, that the Court are No. 160.
 entitled, in reading this contract, to be placed in the position of the parties to it,
 by ascertaining the surrounding circumstances; and, secondly, that the best ex-
 position of doubtful expressions in a mercantile contract is the manner in which July 10, 1877.
 the persons who used them carried them into effect. But as I read the contract ^{Baird's}
 it contains no ambiguous words, nor any uncertain provisions requiring ex-
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The real nature and substance of the contract may be very shortly stated. In this lease Robert Baird let the coal-field to the defenders for nineteen years, the tenants being bound to pay to the lessor a fixed rent or a lordship, and being bound to purchase the machinery and plant at a valuation to be fixed by a man of skill. But in order to enable the tenants to provide so large a sum the lessor agreed to postpone the payment of the present value, and to spread the amount, by annual instalments, over ten years. The amount of the instalments is not fixed, but materials are to be furnished by the valuation to be made by the arbiter. As possession of the machinery was given immediately, and the tenant was to have the profit of it from the first, it followed that the price bore interest from the same date, unless there were a stipulation to the contrary, and, as a necessary consequence, that each of the ten annual instalments included interest as well as principal, the object being that the ten instalments should, when all paid, be equivalent to the present payment of the stipulated price. This could not be accomplished on any other footing. If I lend £1000, or sell a house for £1000, making payment or giving possession immediately, but stipulating that the price shall be paid by ten yearly instalments, that contract will not be fulfilled by the borrower or purchaser paying ten instalments of £100 each, for that would leave the creditor with little more than two-thirds of his debt. I do not go into calculations, but it is one of the most simple problems in a very simple and ordinary transaction. When a debt, certain in amount and instantly due, is stipulated to be paid by instalments, such and must be the meaning of the contract.

It needs little arithmetic to shew that the same numerical amount paid by annual instalments is of less value to the creditor than a present payment, and therefore that the sum which represents the value of the machinery when paid once will not represent it when spread over ten yearly instalments. The simplest illustration of this, which seems to be self-evident, may be gathered from the familiar practice under Government loans for drainage and other improvements. The Government advance a capital sum, to be repaid by instalments in twenty-two years. That means, that at the end of twenty-two years the Government will have received an amount equivalent to the value of the sum advanced as at the date of the loan. Now, this will not and can not be done by splitting up the capital sum into twenty-two instalments, but, assuming that the loan is at three per cent, a sum equal to six and a-half per cent on the capital is paid for twenty-two years, and these instalments, compounded of principal and interest, will, when paid, leave the Government as they would have been had the loan not been made.

Now, if that were the substance of the contract, let us examine the written instrument and see if it be susceptible of any other construction, and if it be in all its parts entirely consistent with it.

First, there is the obligation to pay the value of the property sold. What is the nominal expression of the price may be, it is to represent the present

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The sum so fixed is to be paid by ten annual instalments of equal amount. Therefore the instalments must be of such an amount as will, together, be equivalent to the present payment of the price. The contract does not specify the amount, and it could not, as the present value had not been ascertained; but it does say explicitly that the whole value of the machinery is to be paid in that way, and the value could only be made good to the creditor by including in the instalments the interest which a present payment would have given him.

But it would not follow as matter of necessity that interest would run on unpaid instalments compounded of capital and interest, because that would be to accumulate interest on interest. Therefore the contract quite consistently provides the "amount of such valuation to be payable by the second parties by ten equal instalments, extending over a period of ten years, each of which instalments shall be payable at the term of Whitsunday yearly, and shall bear interest, in the case of failure in the punctual payment thereof, at the rate of five per centum per annum on the amount which may remain due until payment." The provision is not only consistent with what precedes it, but shows that the writer of the deed had fully in view the rule that interest on interest will not be presumed unless made the subject of express stipulation. Then follows a clause which well illustrates the construction I have suggested. It provides—"But the lessees shall have power to pay up the whole sum at any earlier period," &c. Now, if the lessees had volunteered to pay up the price before the first instalment became due what would they have had to pay? Clearly the whole amount of the valuation. They are to pay "the whole sum," and nothing less. But the "whole sum" was to be the sum found due by the arbiter; and this could never have been inserted as a privilege to the tenant except on the footing that the landlord was to draw at least as much, if the instalments ran on to the end of the ten years. The clause seems to be quite conclusive against the notion that the tenant was to retain the whole accruing interest if he did not elect to pay up, and was only to be allowed as a privilege to pay the whole amount. But this is made still clearer by the succeeding words of the agreement—"Declaring that while the second parties shall be entitled to the use and occupation of said pits, engines, machinery, houses, buildings, locomotive-waggons, and other plant, fixed and moveable, as before specified, the same shall not be transferred to them or become their property, but shall remain and continue to be the property of the first party until the whole price and interest thereof shall be paid, when the same shall become the absolute property of the second parties, but no sooner." Nothing can be more explicit. The object of this clause was plainly to create in the landlord a certain security over the plant, although delivered, while the instalments were current and unpaid. The effect of it may be doubtful. It may be questioned whether the landlord could in any way have asserted this right while the instalments were current, or maintained his security against the creditors of the tenant. But, be this as it may, the concluding words seem to leave no doubt remaining. The property is not to pass when the whole price—that is, the value of the plant—"and interest thereon, shall be paid." That was the condition on which alone the tenant was to become absolute owner, and the condition also on which the delay was given.

In all this there is really nothing which requires construction. Granted that the present value was to be made good to the seller, the words of the contract seem to admit of no other signification.

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But let us see what followed on the contract, for, as I have said, the manner in which the provisions of it were carried out is the best interpreter of what the parties meant by it. The first thing which was done was that the arbiter valued the machinery, as for a present payment, at £19,000. This would have been resumed, but the matter is put beyond doubt by his own evidence. He swears he knew nothing about the period of payment, but simply fixed its present value as for a going concern. It was quite competent, indeed essential, to clear this up by evidence, and the fact admits of no doubt. It follows that a present payment of £19,000 was the capital on which interest was to be calculated, and the data were thus furnished for determining the amount of the annual instalments.

This being so, the contract was acted on for three years entirely on the footing we have described. The accounts were rendered annually for the instalments as they fell due, including the interest, and they were duly paid. Whether the mode of charging the instalments was altogether artistic is another matter, but the question has been raised on that head. Then the payments fell in arrear, and an action was raised to recover them, and even in the defences to that action no plea was taken that the interest had been surrendered. It was not till the supplementary action was raised that at last it was suggested by the defenders' advisers, what never had occurred to the man who made the contract, that by the terms of the written instrument the interest had been foregone. That is the plea which your Lordships propose to sustain. I am of opinion that it is unfounded, for the following reasons :—

First, There are no words in the instrument which admit of such a construction, unless the provision that the price was to be paid by instalments necessarily implies it. I have endeavoured to shew that it means the reverse.

Secondly, The view that the purchaser was not to pay the price, but only a proportion on it, is wholly inconsistent with the distinct obligation to pay the price of the machinery.

Third, The provisions in regard to the option by the purchaser to pay up the price, and the condition on which he was to acquire the property, exclude absolutely the plea contended for. The words are quite precise, and can mean nothing else but a payment of the full price and the whole interest due. To interpolate into this provision words which are not true, and which were, as I think, never intended to be true, I should hold to be entirely inadmissible.

Fourth, It is clear that the tenant, who knew what his contract was, never supposed that it gave him a gift of the interest, because he paid it without objection for three years.

Fifthly, The defender did not venture to appear as a witness in the proof, and that he was under any error in making these payments; from which I infer that he was conscious he was not. The only error he could have committed was an erroneous reading of the agreement, and if he had alleged that he had proved conclusively that he read the contract as his brother did.

As to the question of repetition, if the considerations I have mentioned do not avail, as they will not avail, to establish the nature of the contract, I am of opinion that there is here no proper case of *condictio indebiti*—a payment in

If the interest is not due there is only an overpayment to account, which

No. 160. may be adjusted on the subsequent instalments. If, indeed, the instalments had been paid up with or without interest, I should have held it incompetent for either party to have reopened the accounting on any such ground, seeing that both must have been aware of the true nature of their contract. But while they are current it is a matter of accounting merely, and although overpayments might not have been recovered back had the account been concluded, it is not, I think, incompetent to hold them as payments in account while there are future payments still to become due. The true effect to be given to these payments is to hold them as conclusive, as I think they are, of what the contract truly was. But if they have not this effect I cannot see that the pursuers can refuse to give credit for them.

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THE COURT pronounced this interlocutor:—"Adhere to the interlocutor complained of, so far as it finds that the defenders are liable to the pursuers in the interest charged on the amount unpaid of the valuation of the pit, engines, machinery, and plant. As far as the instalments stipulated for in the lease were not in arrear and past due, and to this extent refuse the reclaiming note. *Quoad ultra* recall the said interlocutor: Further, find that in fixing the amount of rents and lordships now due by the defenders to the pursuers the defenders are entitled to credit for the three sums of interest paid by them on the unpaid amount of said valuation, the instalments of which were not in arrear, but where sums of interest were erroneously paid in 1872, 1873, and 1874 and that as at the dates at which the said three sums of interest were paid respectively; and with this finding remit the cause to the Lord Ordinary to proceed therein as may be just, reserving all questions of expenses, and decern: Grant power to the Lord Ordinary to deal with the whole questions of expenses, both in the Outer and Inner House, and to decern therefor."

D. & W. SHIRESS, S.S.C.—GEORGE BURN, W.S.—Agents.

No. 161. HUGH HENRY ROBERTSON AIKMAN (G. R. Aikman's Curator), Pursuer—*Kinnear—Pearson.*

July 10, 1877. THE CALEDONIAN RAILWAY COMPANY, Defenders.—*R. Johnston—Mackintosh.*

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Railway—Compensation for Lands and Injuries thereto.—A paid way-leave access to a railway over ground belonging to B. The railway company, in the exercise of compulsory powers, took a portion of B's ground to form a branch railway, to which A formed an access without using B's ground, and ceased to pay way-leave. *Held* that the loss of way-leave was not to be taken into account in fixing the compensation to be paid by the railway company for the land taken.

2D DIVISION. THIS action was raised by H. H. Robertson Aikman, curator to G. R. Robertson Aikman, heir of entail in possession of the estate of Ross, in the parish of Hamilton and county of Lanark, against the Caledonian Railway Company, and arose out of the following circumstances, which were admitted:—

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The estate of Ross was bounded on the west by the estate of Haughhead, belonging to Mr Gardner. The Lesmahagow Junction Railway, belonging to the defenders, intersected part of the estate of Ross, but not at any point touch or pass through Haughhead. Access, therefore, from Haughhead to that railway could not be had except by passing over the lands of Ross. In 1861 Mr Gardner let the mine...

in Haughhead to Messrs Merry and Cunninghame, and in order to obtain access to the railway he and his mineral tenants entered into a contract of lease with the pursuer, as curator, whereby the latter let to them for nineteen years from Whitsunday 1861 (with breaks in the option of the tenants at the end of the fifth, tenth, and fifteenth years) whichever of two specified pieces of ground they might select on the estate of Ross, each extending to about an acre, for the purpose of forming thereon and using a private railway and lye from the said railway to the lands of Haughhead. By the lease it was agreed that the tenants should pay £150 per annum of fixed rent for the privilege of making and using such railway, or, in the option of the proprietor, certain lordships specified in the lease. Thereafter Mr Gardner and his mineral tenants constructed a line of railway from their pits at Haughhead to the defenders' railway, partly upon the piece of ground selected by them on the lands of Ross, and partly on the lands of Haughhead. The line so formed was used by Mr Gardner and his tenants for the transport of the Haughhead minerals, and for the way-leave over Ross they duly paid the stipulated lordships. The defenders, by the "Caledonian Railway (Lanarkshire and Mid-Lothian Branches) Act, 1866," acquired power to make a line of railway to connect their line at Hamilton with their Lesmahagow line, the junction to be formed at a point on the lands of Ross; and for the purposes of the said Act, and of a later Act, entitled the "Caledonian Railway (Additional Powers) Act, 1872," they, by virtue of their statutory powers, took several portions of the lands of Ross, contiguous to Haughhead, extending in all to upwards of eleven acres. They also took sundry portions of the contiguous parts of Haughhead, and upon the ground so taken from the estates of Haughhead and Ross they constructed their new main line railway and certain other works. Mr Gardner was thus enabled to connect his own branch railway from his pits at Haughhead directly with the defenders' new railway, which passed through the ground taken from himself, without the necessity of passing through any part of the lands of Ross, or of using the private railway and lye which he and his mineral tenants had formed on the lands of Ross in virtue of their lease from the pursuer. And in 1876 they formed the connection by constructing, at their own expense, a line of railway from a point on their own original private line, within the lands of Haughhead, to the defenders' new line of railway, at a point within the ground taken by the defenders from the pursuer.

The amount of compensation due to the pursuer, as curator of the proprietor of Ross, having been referred to arbitration, in terms of the Lands Clauses Consolidation (Scotland) Act, 1845, the pursuer expected that Mr Gardner and Messrs Merry and Cunninghame would no longer require to make use of their way-leave over the estate of Ross, they would construct a new private railway on the lands of Haughhead, and would take advantage of the break which would occur at Whitsunday 1876, and terminate the lease as from that date. The pursuer accordingly maintained before the arbiters that he was entitled to compensation from the defenders for the loss of profit under the lease, occasioned by the defenders having constructed, partly upon the lands taken from him and partly upon Haughhead, a line of railway which would enable his tenants to reach Lesmahagow Railway without passing over the ground let to them by lease. The arbiters held that it was not within their competence to decide whether the pursuer was entitled to compensation on this account. It was thereupon agreed that the arbiters should be requested to fix the amount of compensation which would be payable to the pursuer in the event of its being found that the loss of profit which he derived from the

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No. 161. way-leave ought to be taken into computation in fixing the amount of compensation due to him for the ground taken by the defenders. The arbiters accordingly pronounced a decree-arbital, dated 3d and 10th July 10, 1877. Aikman v. Caledonian Railway Co. November 1875, the material part of which was as follows:—“(1) We do hereby find, fix, and determine the amount of purchase-money and compensation to be paid to the said Hugh Henry Robertson Aikman, as curator foresaid, in full of all his claims as aforesaid, with the exception of that for deprivation of way-leave after referred to, at the sum of £3600; and (2) with regard to the claim for deprivation of way-leave, we find that it is a legal question, and one which it is not competent for us to decide, whether, under the said ‘Lands Clauses Act,’ the claimant is entitled to compensation in respect thereof at all; but at the request of, and in terms of the arrangement made by the parties, we find that, in the event of the claim being held good by the Court, the sum to be paid should be £2370.”

On 11th November 1875, the day after the date of the decree-arbital, Mr Gardner and Messrs Merry and Cunninghame gave notice to the pursuer that they would take advantage of the break in their lease at Whitsunday 1876, and declared the lease at an end as from that date.

In October 1876 the pursuer raised the present action for the purpose of having the claim for the sum of £2370 declared good and enforced.

He pleaded;—(1) The loss of profit derivable from the aforesaid way-leave ought to be taken into computation in fixing the compensation due to the pursuer for the land taken by the defenders, in respect that part of the value to the pursuer of the ground so taken by the defenders consisted in the circumstance that a way-leave through the pursuer's estate was necessary to the proprietor and mineral tenants of Haughhead, and that the pursuer has been deprived of the said profit by reason of the defenders having taken the said ground. (2) The amount of compensation due to the pursuer, as curator foresaid, in respect of the said loss of profit, having been fixed by the arbiters at £2370, the pursuer is entitled to decree the payment thereof, in terms of the conclusions of the summons.

The defenders denied liability, and, *inter alia*, pleaded;—(2) The prospective and contingent loss to the pursuer through Mr Gardner and Messrs Merry and Cunninghame's renunciation of their lease does not constitute damage for which the defenders are liable to make compensation either under the “Lands Clauses Consolidation (Scotland) Act, 1845,” or any other Act, or at common law.

The Lord Ordinary, on 29th December 1876, pronounced this interlocutor:—“Assolizes the defenders from the whole conclusions of the summons, and decerns: Finds the pursuer liable in expenses,” &c.*

* “NOTE.—(After a narrative of the facts, the substance of which has been given above)—The legal ground on which the pursuer bases his claim for compensation for deprivation of the foresaid way-leave is ‘that part of the value to the pursuer of the ground so taken by the defenders consisted in the circumstance that a way-leave through the pursuer's estate was necessary to the proprietor and mineral tenants of Haughhead, and that the pursuer has been deprived of the said profit by reason of the defenders having taken the said ground. Now, it is not pretended that any part of the ground leased by the pursuer Mr Gardner and Messrs Merry and Cunninghame has been taken or used by the defenders under their statutory powers, or that any direct damage by occupation, obstruction, injury to access, or in any other way, has been done to the said ground by the execution of the works authorised by the Acts of 1866 and 1875, and executed by them upon the ground acquired by them in virtue of the Acts; and it is not disputed that the new railway by which the Haughhead minerals are brought into connection with the defenders' system of railway has

The pursuer reclaimed.

Argued for the pursuer ;—Throughout the decisions a clear distinction

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been constructed by Mr Gardner and his mineral tenants, and not by the defenders, and that it had not been constructed at the date of the decree-arbital. And it is only in consequence of the recent construction by Mr Gardner and Messrs Merry and Cunninghame of that new private railway that the use of the way-leave over the pursuer's lands of Ross has become unnecessary, and that the lease thereof has been given up by them in terms of the absolute and unconditional power to do so conferred on them by the lease. And the question now to be solved is, whether, in these circumstances, the loss of the way-leave, which at the date of the decree-arbital was only prospective and contingent, constituted damage to the pursuer's lands, for which he is entitled to compensation from the defenders. I am of opinion that this question must be answered in the negative.

"It appears to me that the connection between the compulsory purchase of the portion of Ross in question, and the construction and execution of the authorised works thereon by the defenders on the one hand, and the cessation of the pursuer's income from a way-leave over another part of this estate, is too remote to entitle the pursuer to compensation for such loss. In the first place, it is not the execution of any works by the defenders, either on the land taken from the pursuer or on adjacent land, which has brought the use of the way-leave to an end; it is the construction by Mr Gardner and Messrs Merry and Cunninghame of a private railway on their own lands, and the voluntary exercise by these parties of their absolute right to declare the lease at an end at Whitsunday 1876 which have directly brought about this result. And, in the second place, the formation by the defenders of works on the land taken by them from the pursuer has not injured the pursuer's lands of Ross in any other sense than this, that the tenants of a portion of the estate of Ross, who got access to the defenders' railway by paying a way-leave to the pursuer, can now get access directly from their own land to the defenders' line. This, I think, is not loss for which the pursuer is entitled to compensation under the Lands Clauses Act. It is not loss or damage for which compensation could have been claimed at common law; and it cannot be regarded as anything more than loss or damage arising from the legitimate use of the defenders' railway after it has been made, and for such loss no compensation can be given under the statutes. The law on this matter appears to have been settled by judgments of the House of Lords in two cases involving the construction of the English 'Lands Clauses Consolidation Act,' which, as regards compensation, is expressed in language similar to that of the Scottish Act—See *Ricket v. The Metropolitan Railway Company*, Feb. 1867, L. R. 2 E. and I. App. 175, and *Hammersmith and City Railway Company v. Brand*, July 1869, L. R. 4 E. and I. App. 171. And these cases were referred to by the Lord Chancellor (Hatherley) and Lord Helmshurst as settling the law in deciding a case from Scotland, viz., *The City of Glasgow Union Railway Company v. Hunter*, 30th June 1870, 8 Macph. R. L. 156. Their Lordships held that the injury to be done to lands in the exercise of their statutory powers by a railway company, and referred to in the 4th and 61st sections of the 'Lands Clauses Consolidation Act,' means injury

to be done by the execution of the works referred to in sec. 17, and not injury caused by the use of the railway when made. And although Lord Westbury expressed his dissent from the general view of the statute taken by their Lordships, and his disapproval of the judgment in the cases of *Ricket* and of *Brand*, he said, 'with these limitations I concur in this, that what is the result of the legitimate uses of the railway cannot be made the subject of a claim of compensation after the railway has been made. Whatever is done by the company in pursuance of their powers, and done without neglect and without an excess of their authority, is a legitimate consequence of the statutory enactments, and cannot be considered as doing an injury to any one.' Now, what the railway company has here done is to construct a railway on the land taken from the pursuer, and to permit—what, indeed, they could not have refused—a connection

No. 161. had been recognised between cases in which a person claimed damages, no part of whose land had been taken, and cases relating to the mode in

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to be made between their railway and a private line made by an adjoining proprietor on his own land; and if by the use of such connection the way-leave over the pursuer's land is no longer necessary to that adjoining proprietor, I do not see what 'injury,' in the sense of the statute, has been done to the pursuer.

"But farther, it is, in my opinion, not necessary to take such a narrow view of the case, as to decide it upon the somewhat strict view of the statutes on which the judgments in the cases referred to were pronounced. The simple and natural construction of the 'Lands Clauses Consolidation (Scotland) Act, 1845,' upon which the pursuer's claim rests, leads to the same result. That Act provides (sec. 19) in the case of the purchase of lands otherwise than by agreement, that compensation is to be given for the lands taken, and 'for any damage that may be sustained by reason of the execution of the works.' And by sec. 61 it is enacted that 'in estimating the purchase money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid regard should be had not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severance of land taken from the other land of the owner, or otherwise injuriously affecting such land by the exercise of the powers of this or the special Act, or any other Act incorporated therewith.' Now, even assuming that the injury for which compensation is to be awarded is not limited, as the recent judgments of the House of Lords would seem to imply, to loss or injury caused by the execution of the works, but includes injury arising from the use of the works after they have been made, it appears to me that the lands of the pursuer cannot be said to have been injuriously affected, or, as Lord Westbury calls it, 'damnously affected,' by the exercise of the defenders' statutory powers, so as to entitle the pursuer to compensation. If any loss has accrued, or is likely to accrue, to the pursuer through the construction of the defenders' new line of railway, that loss is much too indirectly consequential to entitle the pursuer to compensation. No loss had accrued at the date of the decree-arbital fixing the compensation. The alleged damage was then entirely prospective and contingent; it depended upon two things, (1) upon the pursuer's tenants availing themselves of the option given to them in the lease of the way-leave, and declaring the lease at an end as at Whitsunday 1876; and (2) upon Mr Gardner constructing the private line of railway on his own land between his pit at Haughhead and the defenders' new line of railway. I think it is impossible to say that the necessary and inevitable result of the exercise of the defenders' statutory powers was either to lead to the abandonment of the way-leave, or to the construction of the private line over Haughhead by other persons with whom the defenders were in no way connected, and over whom they had no control.

"All that the defenders, up to the date of the decree-arbital, had done in the exercise of their statutory powers upon the lands taken from the pursuer was to construct a line of railway so convenient for the district that it was possible, if not probable, that Mr Gardner, the proprietor of the adjacent lands of Haughhead, and his mineral tenants, might find it more profitable to construct a private line of their own than to continue to use the way-leave over the lands of the pursuer. But even if the arbiters had been satisfied that Mr Gardner and his tenants intended to avail themselves of their statutory right to construct such a railway, and of their right to declare the lease at an end as at Whitsunday 1876, without assigning any reasons, which right had been stipulated for by them, and agreed to by the pursuer at the commencement of the lease, the loss of the way-leave occasioned could not, in my opinion, have been competently dealt with by the arbiters as an injury to the pursuer's lands occasioned by the defenders' exercise of their statutory powers. The arbiters would therefore, in my opinion, have exceeded their powers if they had found the pursuer entitled to compensation for such loss, in anticipation of the tenants of the way-leave availing themselves of the break in the lease. The exercise of their statutory powers by the defenders has in no way injured the *solum* of the ground over which the way-leave extended;

which compensation was to be estimated to a person whose land had been taken. The question in the latter class of cases was not properly one of damage; it was one of value. The statute contemplated that when land was taken compulsorily the owner should get not merely the separate value of the land taken but what the land was worth to him. It was important, therefore, to see what use he was making or was likely to make of the land—whether he was likely to use it for feuing, building, or other purposes. That let in the consideration of indirect advantages, and most reasonably, because these were just the things which would be taken into consideration in making a private sale. It was a fair criterion to take into account what a willing seller would reasonably take into account. The Legislature did not intend to put a seller who was obliged to sell in worse position than a willing seller. The land in question was a source of income to the pursuer, because, being interjected between the railway and the coalpits of Messrs Merry and Cunninghame, the latter were obliged to take a way-leave. As soon as a part of the land was taken by the defenders it was clear from the position of the properties that the pursuer's income would cease. The loss of the way-leave rent was the direct and immediate consequence of the construction of the railway, and herein the case differed from that of the City of Glasgow Union Railway Company v. Hunter,¹ in which the injury did not arise from anything done on the ground taken by the railway from the claimant, and might equally well have been made the subject of a claim by any other person in the neighbourhood. True, the pursuer's income might cease from other causes; but in a question like the present one must judge upon reasonable probabilities. If the defenders had left the land alone it was to be expected that the way-leave would continue to be taken. It was beside the point to argue that the advantage was a precarious one, and might have been lost in other ways. That was a mere question of amount. All pecuniary interests were liable to various risks, and these were proper considerations for the arbiters to take into account. But when the arbiters had taken these contingencies into account, and fixed the value, it was unreasonable to say that the pursuer was not to recover what the arbiters had fixed because of these contingencies. The principles contended for by the defenders, that no claim for damage could arise, unless that damage could have been made the subject of an action if the company had proceeded without statutory powers, and that no compensation was due unless the injury arose from the construction of the railway, and not out of subsequent use, were both inapplicable to the case where the injury was done on ground taken from the claimant. If, without having obtained an Act, the defenders had come to the pursuer and asked him voluntarily to sell the piece of ground in question, it may fairly be supposed, even if he were a willing vendor, that he would have fixed a price which would represent the actual loss and damage to him, including the loss of the way-leave. The possession of the land would have enabled the pursuer to make his bargain with the defenders. It was in accord-

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as not damaged it by severance, or in respect of amenity, or obstructed the access to it, or prevented it in any way from being used, either as a private railway, or for any other lawful purpose. If affected by the exercise of the defenders' statutory powers at all, it is merely in consequence of a third party having been enabled to construct a competing private line of railway; and I can find neither principle nor authority for holding that, for any loss so occasioned, the pursuer is entitled to compensation from the defenders."

City of Glasgow Union Railway Co. v. Hunter, June 30, 1870, 8 Macph. 156, L. R. 2 Scot. App. 78.

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ance with reason and equity, that as the statute took away from the proprietor the option of refusing to part with his land, it should place him as far as possible in the same position, to the extent at least of giving him reasonable indemnification for the loss actually sustained by the taking of the land. These principles were clearly laid down by Mr Justice Crompton in the case of the Stockport Railway Company, 33 L. J. Q. B. 251, and although in some subsequent English cases some doubts as to their soundness had been thrown out, they had received the sanction of the House of Lords in the recent case of the Duke of Buccleuch v. Metropolitan Board of Works. Any dicta in the previous cases of Rickett and Brand, which might be founded on in a contrary sense, must be held as overruled by the decision in the Duke of Buccleuch's case. In the case of Reg. v. Cambrian Railway Company, May, 3, 1871, L. R. 6 Q. B. 422, where a railway had been empowered to construct across a river a railway bridge and footway for passengers in the neighbourhood of a ferry, the owner of the ferry was held entitled to compensation, although the railway in no way obstructed the ferry or approaches to it. It was not, therefore, necessary that there should be physical interference with the right injuriously affected.¹

Argued for the defenders;—The sum claimed was really in respect of land which had not been taken, viz. the land over which the way-leave extended. Compensation was excluded by two well settled rules—first, that compensation could only be recovered where the injury was such that but for its being legalised by statute it would have grounded an action at law; and second, that to entitle a person to compensation the injury complained of must be one arising out of the original construction and not out of the subsequent use of the railway. In the present case the loss sustained by the pursuer was not even occasioned by the defenders, but by other parties, viz. the lessees of the Haughhead minerals taking the legitimate use of the railway after it was made. Although a part of the pursuer's lands had been taken, there was no connection of cause and effect between the taking of that part of the lands and the loss of the way-leave; at least the connection was too remote and indirect to found a claim against the defenders. The way-leave would equally have been lost if another railway had passed on the other side of the Haughhead estate without touching the lands of Ross, and in many other contingencies which might be figured, and which could not possibly give rise to any claim by the pursuer against the defenders. The case was therefore ruled by that of City of Glasgow Union Railway Company v. Hunter. The case of Reg. v. Cambrian Railway Company founded on by the pursuer was not in point. Compensation was there given in respect that the ferry was a hereditament within the definition of the Lands Clauses Act, which had been injuriously affected by the building of the bridge. A crown-granted ferry was a right of an essentially different character from a mere accidental monopoly created by the situation of a property relative to an existing railway. The pursuer was in much the same position as the owner of a posting inn, a corner of whose garden had been taken by a railway. It could not be contended that this would entitle the owner to compensation for loss of profits on posting caused by the diversion of traffic by the railway.²

¹ Duke of Buccleuch v. Metropolitan Board of Works, April 30, 1872, L. R. 5 E. and I. App. 418; *in re* Stockport, &c. Railway Co., May 1864, 33 L. J. Q. B. 251; Jubb v. Hull Dock Co., 1846, 9 Q. B. 443; Bourne v. Mayor of Liverpool, June 24, 1863, 33 L. J. Q. B. 15; Metropolitan Board of Works v. McCarthy, June 1874, L. R. 7 E. and I. App. 243.

² Rickett v. Metropolitan Railway Co., Feb. 1867, L. R. 2 E. and I. App. 155.

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LORD JUSTICE-CLERK.—(After stating the facts)—This is no doubt a hard case on the pursuer, for if the branch line had not been made he would probably have been the richer by £150 a-year. But I have come to a very clear conclusion that this claim has no ground whatever on which to rest. July 10, 1877.
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I have gone carefully through the authorities quoted to us. They are not as consistent or satisfactory as might be desired, and even in the last of them in the Court of last resort, that of M'Carthy,¹ jurists of the highest authority do not seem altogether agreed as to the principle on which such cases should rest. I forbear, however, any analysis of them, because I am very decidedly of opinion that the present claim stands outside of any principle of compensation which has ever been recognised.

It is not said by the claimant that the lands themselves have been injuriously affected in any way whatever. He does not complain of severance, or loss of access, or even of general deterioration in the market. None of these things have been done by the defenders, or if they have been done they have been allowed for. What he says is that one man, or firm, who before found it convenient to go through his land, and to pay him for the privilege, no longer finds it for his interest to do so, and has taken advantage of his legal right to put an end to his obligation.

It will be observed that this act which caused the damage was not the act of the railway company, but of the lessees of the way-leave, over whom the defenders had no control whatever. They had no power to compel the lessees to take advantage of the break in their lease, or to make the connecting line, nor could they have prevented their doing so. The whole matter is this, that the condition of the neighbourhood being altered, by no act of theirs, the lessees of the Haughhead Colliery, as members of the public, choose to use this new railway line, instead of going through the pursuer's ground. But with their determination the defenders have no concern. All the public may use their line, and they cannot object, and for the consequences of that use they cannot be responsible.

What the pursuer really complains of is that the defenders, by affording increased facilities for traffic, have furnished a motive to the lessees to break their lease and make the new connecting line. But that is what all railway facilities have done, and are intended to do. To affect property injuriously is one thing; to divert traffic from one district and take it to another is quite a different thing. The gain of the many is every day the indirect cause of the loss of one or of several. But this is the true end for which these increased powers are given, and it is in vain to attempt to place on the shoulders of those who afford these facilities the remote effects of the alterations in life which they produce.

Let us suppose that instead of the present case the pursuer had entered into lease with a grazier to pasture his cattle on their journey to a market. A railway comes through the pursuer's ground, and the grazier finds it more for his

[*Lammersmith and City Railway Co. v. Brand*, July 13, 1869, L. R. 4 E. and I. pp. 171; *City of Glasgow Union Railway Co. v. Hunter*, June 30, 1870, 8 Macph. H. L. 156, L. R. 2 Scot. App. 78; *Deas on Railways*, pp. 282, &c., and cases there cited.

¹ *Metropolitan Board of Works v. M'Carthy*, June 1874, L. R. 7 E. and I. pp. 243.

No. 161. advantage to send his cattle to a more distant station. Is the railway company to be liable to each landowner through whose ground the railway passes in every instance in which such things happen? These things are the voluntary acts of third parties, and all the part which the railway company has in them is that they have supplied a motive for the change.

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But the present is a feeble case, even of the feeble class to which it belongs. It is not one in which the pursuer can allege any general loss of custom or depreciation in the land market. He only can say,—There is now one customer who will not employ me as he formerly did, and you have no right to take my land with that result without paying me the value of that custom. I have never heard of such a case. If loss of the good-will of a business, or general reputation in the feuing market, or elements of that kind, are admissible as objects for which compensation can be demanded—on which opinions differ—the interest involved must be a general one,—one affecting the community, or at least a district or neighbourhood. The present case is much the same as if a shopkeeper were to complain that a line of railway which cut off a corner of his ground enabled one customer to go to the county town instead of dealing with him. In short, the relation of cause and effect is entirely wanting here. The Caledonian Railway did not break this lease. It was the doing of the lessees themselves in the exercise of their legal right, and there are no grounds on which the defenders can be made responsible for the result.

LORD ORMIDALE.—(After a statement of the facts)—From the statement now given it will be observed that the defenders, the Caledonian Railway Company, who maintain that the pursuer's claim is not a good one, did not take any part of the ground over which the way-leave in question passed, or interfere directly with it in any way. And, it will also be observed, that the pursuer has been awarded to him by the arbiters the purchase-money and compensation to which he is entitled for the land actually taken from him. I think it must likewise be assumed, there being nothing said to the contrary, that the purchase-money and compensation so awarded comprehended all proper severance damages, if any, sustained by the pursuer. He does not, indeed, aver that his communications were interfered with, or that any severance damage was sustained by him in consequence of the defenders taking some ground from him, or in any other way. His claim now in dispute is for what is called "depreciation of way-leave" exclusively. And this claim is maintained by the pursuer on the ground not that the land over or through which the way-leave passes has been taken or interfered with by the defenders, but in consequence of his tenants, Mr Garner and Messrs Merry and Cunninghame, having brought their lease to an end as they were entitled to do, by taking advantage of a break in it. This is obviously a very indirect cause of damage in any view that can be taken of it as against the defenders, who were not parties to the lease, and neither broke it nor had the power of breaking it. They had no more to do with the breaking of the lease, and thereby depriving the pursuer of his way-leave rent, than any proprietor of lands in the neighbourhood could be supposed to have who merely allowed the pursuer's tenants to pass through his lands, and in that way enabled them to dispense with the way-leave they had from the pursuer.

But, then, no doubt, the defenders have taken, compulsorily taken, from the pursuer a portion of his lands, although not that portion over which the way-leave in question passes, and in this respect the case differs from that supposed.

of a neighbouring proprietor giving the necessary access over his lands to the tenants of the way-leave. But, does that circumstance render the defenders liable in compensation to the pursuer? It could not do so directly, because the lands over which the way-leave passes have not been taken or interfered with. It may be said, however, and it is here the only plausibility which the pursuer's claim has lies, that, independently of statutory compulsion enforced by the defenders, the pursuer, had he been applied to by a private individual to sell the portion of land which has been actually taken by the defenders, would have had it in his power either to have stipulated that no competing way-leave should be allowed through it, or, failing such stipulation, to have insisted for a price all the higher. This is true, but it does not follow that every claim for enhanced price that might be available in a private voluntary sale is competent or admissible in a statutory compulsory sale, any more than it is in the power of a proprietor to refuse in the latter case to part with any portion of his estate at all, although he could do so if he pleased in the former.

But while a party is not entitled, in respect of a compulsory sale to a railway company, to insist on every claim of damage (however induced), or compensation, however fanciful and extravagant, every fair and legitimate claim is secured to him. Accordingly, the arbiters in the present instance awarded to the pursuer the purchase-money or value of the lands actually taken from him; and it must also be borne in mind that in estimating the purchase-money or value so awarded to the pursuer the arbiters were entitled, and must be presumed, in the absence of any statement to the contrary, to have taken into their consideration all the capabilities of the ground taken,—for example, its building or feuing value, if it had any such. And they were, besides, entitled to add, and must be presumed to have added, in conformity with the universal practice in such cases, a considerable sum more in respect of the compulsory purchase.

In these circumstances, I am unable to see on what ground or principle the pursuer can be held to have right to the sum he now claims, or any claim at all, or deprivation of way-leave, as against the defenders. Such a claim as against them appears to me, in any fair view that can be taken of it, too remote and indirectly consequential to be sustained; and on this ground, were there no other, think the Lord Ordinary has rightly assoilzied the defenders.

But the same result must follow if the validity of the pursuer's claim is tried by the principle which has been recognised by the highest authorities, that a railway company is not answerable for consequences resulting to a party, not from the original formation of their line, but merely from its subsequent use, supposing that use to be legitimate in itself, and within the statutory powers of the company. That this is a sound principle appears to me to have been ruled by the House of Lords in, among other cases, the case of the City of Glasgow Union Railway Company v. Hunter.¹ Now, the pursuer does not say that the mere formation of the defenders' railway or the erection of the works caused any damage to him which entitles him to the sum in dispute by way of compensation. On the contrary, it is clear from the pursuer's own statements, that the injury for which his present claim is made has arisen from the use, perfectly legitimate in itself, which has been taken of the defenders' railway after its completion. But that cannot be made the foundation of a claim for compensation by the pursuer any more than the de-

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¹ June 30, 1870, L. R., 2 Sc. App. 78, and 8 Macph., H. L. 156.

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fenders could have been allowed to set off the advantages which their railway when made would be to the pursuer in extinction, *pro tanto* or wholly, of the compensation due to him for the purchase-money of land compulsorily taken from him. And to apply another test which has also been recognised by the House of Lords, viz., that the defenders, as a railway company, can only be made liable for doing what, but for their statutes, would have been actionable at law. This principle was given effect to by the House of Lords in the case of the Hammersmith and City Railway Company v. Brand,¹ and distinctly recognised as a sound one in the case of the City of Glasgow Union Railway Company v. Hunter already noticed. Accordingly, if the defenders had taken any land from the pursuer, or otherwise entered upon, or injuriously affected any property of his outwith or in excess of their statutory powers, they would be liable in an action at law just as any ordinary party; but nothing of the kind has in the present instance been done, or is said to have been done, by them. They have, on the shewing of the pursuer himself, acted in every respect within their powers, and accordingly they cannot be made responsible to the pursuer as maintained by him.

It was said, however, in the course of the argument for the pursuer, that the authority of the decisions to which I have referred has been displaced by the more recent judgment in the case of the Duke of Buccleuch v. the Metropolitan Board of Works, L. R., 5 E. and L. App. 418, but after a careful examination of the report of that case I have been unable to find that this is so.

The result is, therefore, that, in my opinion, the interlocutor of the Lord Ordinary reclaimed against is well founded, and ought to be adhered to.

LORD GIFFORD.—I think that the question in the present case, when divested of its specialties, really comes to be this: Is a landowner, a part of whose estate is taken under compulsory powers by a railway company, entitled to claim and receive from the company, not only the full value of the land taken, with damages for severance and for direct injury done to the adjoining land, but also to claim and receive compensation for the loss, injury, or destruction which may be occasioned to the traffic on a private road belonging to the landowner and situated on another part of his estate, by the facilities which the railway will afford when constructed? Perhaps the question may be put even more generally: Is a railway company ever bound to pay to the proprietors of roads, either public or private, in the district which it traverses, compensation for the loss of traffic which is working, when finished, may occasion on the pre-existing roads?

A right of way-leave, such as that belonging to the pursuer, however valuable, is simply a right to levy a rent or toll for the use of or for passage over a private road. The rent or way-leave may be exacted from one or more persons or companies, or it may, like a pontage, be payable by such of the general public who choose to avail themselves of the bridge or way, but it is always, and essentially, simply a toll or payment for the use of a road or bridge payable to the proprietors or proprietors thereof. Now, it is a very important and a very general question, whether a railway, which, when made and in operation, will probably or certainly injure, lessen, or destroy the traffic on pre-existing roads or bridges, is bound to pay compensation therefor—when, as in the present case, no part of the road

¹ July 13, 1869, L. R. 4 E. and L. App. 171.

or bridge itself is cut or physically interfered with or touched by the railway No. 161.
itself?

I am disposed to answer this question in the negative, at least in the general case,—for probably exceptional cases may occur, and with these I do not deal. In general, I think I may say that a railway company is not bound to pay for the loss of traffic which its ultimate working, after being constructed, may occasion either to other railways, to canals, to public turnpike or other roads, or to private roads or bridges, the property of individuals or companies. The reason why the Legislature authorise the construction of a new line of railway is, that additional accommodation and means of carriage and communication is required by and will be beneficial to the neighbourhood, the public, or the nation, and therefore it is that compulsory powers are granted to the railway company to acquire the land needed for its undertaking. It is, of course, a condition of each acquisition that private and individual proprietors shall be compensated and paid for the land which the railway takes from them for a public purpose, and in reality the public through the railway company pay such compensation, but it was never contemplated that the railway company and through it the public or in one shape or other, in railway fares or otherwise, the public must pay for it—should make good as a condition of getting its new and improved road by railway all the traffic which formerly passed over the old and inconvenient ways, public or private, which were in use in the district. It was the very inconvenience, circuitousness, or expense of these old roads which made the new way necessary and expedient, and which induced the Legislature to authorise its construction and it would really deprive the public of all the advantages contemplated if it had not only to make and pay for in railway dues the new road or railway, but also to keep up the traffic on the old roads, or to pay for the old and superseded traffic as if it were still kept up.

Now, I think this principle is sufficient for the decision of the present case. The *solum* of the right of way or private road or railway belonging to the pursuer and situated on his estate has not been touched or taken or physically affected in any way by the railway company. The new railway does not touch it, but leaves it precisely as it was before. It may be used now and henceforth just as it was used before the new railway was made. All that the pursuer can say is that the new railway gives such facilities of traffic to the coalowners in the mineral field of Haughhead that instead of using the pursuer's private way, as they did before, they will now use the new railway to which they have direct access, without the pursuer's leave, and will accordingly terminate, as they have power to do, the use of way-leave which they formerly had from the pursuer. But this is just what may be said of every old road superseded by a new one. The old road will be deserted for the new and improved communication, and this is just what is intended. But it certainly does not follow that the public—for the public ultimately must pay through the railway company—is bound to pay the old tolls on the old roads, just as it did before, although it no longer uses these old roads.

The loss of traffic of which the pursuer complains is not the direct act of the railway company. It is not the railway company who have made the new siding on the Haughhead Colliery joining the new railway. This has been done by the coal company themselves in virtue of a statutory right conferred on the coal company or the mineral owner, and which they are entitled to exercise without

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the consent and against the will of the railway company. It would seem rather hard that the railway company should be compelled to pay the pursuer for the consequences of what is not the act of the railway company, but the sole act of the pursuer's own tenants, over whom the railway company have no control. It can make no difference to the railway company whether the coal from Haughhead Colliery came upon the railway by the old way-leave railway or by the new siding. That is solely a matter of choice depending on the will of the coalowner and with which the railway cannot interfere, and yet it is because the coalowner chooses to get to the railway in his own way that the railway company is asked to pay the pursuer for the way-leave which the coalowner has chosen to abandon, and the right to abandon which the coalowner specially reserved to himself; for it is one of the conditions of the lease or contract of way-leave that it shall be terminable by the Haughhead coalowners at certain terms. It is difficult to see how the pursuer can claim from the railway company compensation for the coalowners doing the thing—that is, terminating the lease—which the pursuer himself expressly contracted might be done.

The loss or disadvantage to the pursuer by the cessation of traffic on the private road or way-leave would have been precisely the same if, instead of the Caledonian Railway making the new branch in question, some other railway company had crossed the district and touched the Haughhead coalfield without taking any of the pursuer's lands at all. If an independent railway had been formed, say at the other side of the coalfield, and not near the pursuer's property and if it would have given a convenient market access for the coal, the way-leave from the pursuer would have become useless, and would have been discontinued. It can hardly be maintained that in such a case the pursuer could have exacted compensation from the railway company, who had simply given a new and advantageous outlet for the mineral products of the district. I do not think it makes any difference that the branch railway now in question happens to pass through the pursuer's property and in close proximity to the *locus* of the private railway or way-leave on the pursuer's grounds.

With these additional observations I concur in the result at which both your Lordships have arrived.

THE COURT adhered.

HAMILTON, KINNEAR, & BEATSON, W.S.—HOPE, MACKAY, & MANN, W.S.—Agents

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EDINBURGH ROPERIE AND SAILCLOTH COMPANY AND JAMES HAY,
Pursuers.—*Kinnear—Mackintosh.*

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THE MAGISTRATES OF EDINBURGH, Defenders.—*M'Laren—Mackay.*

Superior and Vassal—37 and 38 Vict. c. 44, Conveyancing Act, 1874, sec. 15—Redemption of Casualties.—Held that a proprietor of part of a feu who had entered with the superior by the operation of sec. 4 of the Conveyancing Act, 1874, was entitled under sec. 15 of the Act to redeem the casualties in so far as applicable to his part of the feu, negativing the superior's plea that the vassal could only redeem the casualties of the entire feu as set forth in the last charter.

1ST DIVISION.
Lord Young.
B.

Two pieces of ground were feued by the Magistrates of Edinburgh by charters dated 1750 and 1765. The entry of singular successors was not taxed in either of the charters. These pieces of ground were acquired in 1851 by William Waddell, William Wood, George Ritchie, and others, as trustees for the Leith Roperie Company. The disposition and instrument

of sasine in their favour contained an exception of nine different portions of ground which had been previously sold. No. 162.

On 21st August 1862 the magistrates, as superiors, granted a writ of confirmation in favour of William Wood and George Ritchie as surviving trustees for the Leith Roperie Company, in which it was declared that upon the death of George Ritchie the superiors should be entitled to a year's rent of the subjects as a composition, and in the event of the subjects being sold the purchaser was to be bound to take out an entry on the death of George Ritchie.

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In May 1867 the Leith Roperie trustees conveyed to the Leith Police Commissioners a small part of the ground embraced in the writ of confirmation of 1862, but no part of the feu-duty payable to the city was allocated on this piece of ground. The Leith Police Commissioners were not infeft.

By disposition dated 5th and 6th May 1876 the Leith Roperie trustees conveyed the whole of the ground embraced in the writ of confirmation of 1862, with the exception of the part conveyed to the Leith Police Commissioners, to the Edinburgh Roperie and Sailcloth Company, and James Hay as their manager, and they were taken bound to pay the whole of the feu-duty for the two portions of ground including the portion sold to the Leith Police Commissioners.

This disposition was recorded by the disponees on 15th May 1876.

The Edinburgh Roperie Company, and James Hay as their manager, brought this action against the Lord Provost and Magistrates of Edinburgh, concluding for decree that they were entitled under the 15th section of the Conveyancing and Land Transfer Act, 1874,¹ to redeem the whole casualties of superiority, and that the defenders were bound to grant a discharge of all casualties on their paying £214, 13s. 3d., being one year's rent of the subjects which belonged to the pursuers, and fifty per cent additional. The vassal, George Ritchie, who was entered by the magistrates under the writ of confirmation of 1862, was still alive at the date of the action.

The defenders maintained that they were not bound to accept a redemption and grant a discharge on payment of a year's rent and fifty per cent additional of only a part of the subjects, but that the pursuers must pay the casualties applicable to the whole of the subjects in the original feu, including the part which belonged to the Leith Police Commissioners.

The defenders pleaded ;—(1) Under the original charters granted by the defenders to the authors of the pursuers in the subjects whereof the entry of singular successors was untaxed it was the right of the defenders to declare the subjects to be in non-entry on the death of the last entered vassal, and to continue to draw the rents thereof until a composition was paid or tendered, being a year's rent of the subjects disposed in feu by such charters. (2) The right of the superiors was not diminished or altered in character by their having granted charters or writs by progress to disponees of parts of such original feus ; and the successors of such disponees could not, prior to the statute of 1874, obtain an entry except upon payment of a casualty applicable to the entire original feu. (3) At all events, such successor could not obtain an entry except on payment of a year's rent of the entire subject included in the last writ by progress. (4) The provisions of the statute relating to the redemption of casualties are, in sound construction, referable to the rights and obligations of the superior and vassal at common law, and the vassal is not entitled to redeem

¹ Quoted in the Lord President's opinion, *infra*, p. 1035.

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The Lord Ordinary pronounced this interlocutor :—" Finds and declares that in terms of, and in accordance with, the provisions contained in the 15th section of 'The Conveyancing (Scotland) Act, 1874,' the pursuers, the Edinburgh Roperie and Sail Cloth Company, and James Hay as manager and for behoof of the said company, as proprietors of the subjects described in the summons, are entitled, upon payment to the defenders, as superiors of the said subjects, of the amount of the highest casualty estimated as at the date of redemption, with an addition thereto of fifty per cent, to redeem the whole casualties of superiority incident to the said whole lands, subjects, and others described in the summons, and payable to the defenders as superiors of the same, and that the pursuers are entitled, as at the date of signeting the said summons, being 21st November 1876, to insist upon the defenders granting and delivering to them, and are entitled to receive from the defenders, but always at the pursuers' expense, a discharge, in terms of the said statute, of all such casualties incident to the whole of the said lands, subjects, and others, and payable to the defenders from the same, subsequently to the date of signeting the said summons, and that upon making payment to the defenders of the sum of £214, 13s. 3d., being the amount of the highest casualty owing and exigible therefrom, as fixed by the defenders, including the said addition of fifty per cent, with interest thereof at the rate of four per centum per annum from the said 21st November till payment or consignment in bank of said sum of £214, 13s. 3d.: And decerns and ordains the defenders to execute and deliver to the pursuers, at the pursuers' expense, such a discharge, upon the pursuers making payment to the defenders of the said sum of £214, 13s. 3d., with interest as above set forth; but reserving always to the defenders, notwithstanding such redemption of the casualties and superiority, full right and title to levy the future feu-duties payable from the said subjects, in the same manner and to the same effect as they have heretofore been, and are at present entitled to do; and also reserving to them the right and option to insist, if so advised, that the said redemption-money, or price so to be paid by the pursuers, shall be converted into an annual sum or feu-duty equal to four per cent upon the capital: Finds the defenders liable in expenses, and remits," &c.

The defenders reclaimed.¹

At advising,—

LORD PRESIDENT.—This is an action brought under the authority of the 15th section of the Conveyancing Act of 1874, for the purpose of redeeming casualties of superiority. The 15th section of the statute provides, that "the casualties incident to any feu created prior to the commencement of this Act shall be redeemable on such terms as may be agreed on between the superior and the proprietor of the feu in respect of which they are payable; and failing agreement, all such

¹ *Defenders' authorities*.—Wemyss v. Thomson, Jan. 19, 1836, 14 S. 233, 9 Scot. Jur. 181; Gilmour v. Balfour, Jan. 22, 1839, 1 D. 403, 11 Scot. Jur. 261; Montgomerie Bell's Lectures (1st ed.), vol. i. p. 590.

Pursuers' authorities.—Stirling v. Ewart, Feb. 14, 1842, 4 D. 684, 14 Scot. Jur. 468; Cockburn Ross v. Heriot's Hospital, June 6, 1815, F. C.; Paterson v. Murray, March 30, 1637, M. 15,055.

casualties, except those which consist of a fixed amount stipulated and agreed to be paid in money or in fungibles at fixed periods or intervals may be redeemed by the proprietor of the feu in respect of which the same are payable on the following terms, viz., in cases where casualties are exigible only on the death of the vassal, such casualties may be redeemed on payment to the superior of the amount of the highest casualty, estimated as at the date of redemption, with an addition of fifty per cent." That is the class of cases to which the present belongs, and the question between the parties is what is demandable by the superior under the words "the amount of the highest casualty estimated as at the date of redemption, with an addition of fifty per cent."

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The feus as originally given out by the town of Edinburgh consisted of a larger estate than that which is now vested in the pursuers of this action, and it may be necessary to observe somewhat in detail what is the precise history of these feus. But the ground maintained by the defenders in the present case as superiors is that the vassals, the pursuers of this action, are not entitled to redeem the casualty except upon payment of a whole year's rent of the subject,—meaning by the subject the original feu as given out by them. The pursuers, on the other hand, maintain that the casualty is to be estimated as a year's rent of the subjects held by them in feu.

The feus, portions of which belong to the pursuers, were originally given out by the magistrates in the last century—one of them by a charter dated the 31st of January 1750, and the other by a charter dated the 11th of September 1765. Now, it is averred, and not disputed, that prior to the year 1851 these feus had come to be separated into parts. Parts and portions of both these original feus had been sold off, and in that year, 1851, the whole remainder of the two feus were conveyed to William Waddell and others, as trustees for the Leith Roperie Company; and in that conveyance there were excepted nine different parts or portions of the original feus as having been already disposed to other people; so that in the year 1851 the feus had been separated into parts, and were from that date held by different vassals. We are concerned with the portion which remained vested in the Leith Roperie Company. Now, the Leith Roperie Company's trustees were entered by writ of confirmation dated the 21st of August 1862, and in that writ of confirmation it was expressly provided and declared, that if the subjects hereby confirmed shall pertain and belong to the said trustees at the death of the said George Ritchie, then and in that event we, the said Lord Provost, Magistrates, and Council, shall be entitled to demand a composition of a year's rent or value (over and above the feu-duty for the current year) in lieu of an entry, and the same is hereby declared to be then due and payable; and in case of the said trustees selling or disposing the said subjects prior to the death of the said George Ritchie, then and in that event the purchaser or purchasers shall be bound and obliged to take out an entry from us, the said Lord Provost, Magistrates, and Council, immediately upon the death of the said George Ritchie, whensoever that event shall happen after the date of the purchase; and the said subjects are accordingly hereby declared to be in non-entry upon the said death taking place, under which express condition and declaration these presents are granted and to be accepted of by the said trustees, and not otherwise." Now, the defenders originally pleaded in their second plea in law,—"The right of the superiors was not diminished or altered in character by their having granted charters or writs by progress to disponees of parts of such original feus; and the successors of such disponees could not, prior to the statute

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of 1874, obtain an entry except upon payment of a casualty applicable to the entire original feu." That plea was not maintained in argument, and indeed it was quite untenable, because, as applied to that very writ of confirmation to which I have just referred, it is plainly inconsistent with what is agreed between the parties as superior and vassal on the occasion of granting that writ. It is the subject which is vested in the trustees—that is, the portion of the original feus then belonging to them—with reference to which the arrangement is made that George Ritchie is to be held to be the last entered vassal. His death is to have the effect of putting these lands in non-entry, and on that occasion a composition of a year's rent of these subjects is to be payable to the superior. Now, that which is expressed in this writ of confirmation would really have been the legal effect of such a proceeding if there had been a single individual vassal, in which case there would have been no occasion for that particular agreement to which I have adverted. But it appears to me that if this plea, which is rested on the law as it stood before the statute of 1874, is bad, it follows of necessity, when we take into consideration what are the enactments of the statute of 1874, that the plea founded upon that statute is bad also. That plea, the fourth, is this,—“The provisions of the statute relating to the redemption of casualties are, in sound construction, referable to the rights and obligations of the superior and vassal at common law, and the vassal is not entitled to redeem merely on payment of the redemption-money applicable to his part of the feu, but only on redemption of the whole casualties stipulated in the deed constituting the relation of superior and vassal.” It seems to me that the 15th section of the statute, upon which this action depends, applies only to the case of an entered vassal, and if that be so it is in vain to consider whether, if a person has obtained a mere personal right by disposition to a feu or portion of a feu, he is entitled to go to the superior and say—I shall have the casualties of this portion of the feu redeemed by payment of a year's rent and fifty per cent additional. The answer of the superior to such a party would be,—I know nothing of you; you are not my vassal, and I cannot be asked to deal with you. And I think that answer would be conclusive.

But how do the facts stand as regards the pursuers? They have acquired from the trustees of the Leith Roperie Company the greater part of what that company had acquired under the two original feus, and in which they were entered by writ of confirmation in 1862, but there is a portion—apparently not a very large portion, but still a portion—of that which belonged to the Leith Roperie Company's trustees that is still vested in their persons in so far as the superior is concerned. It is said, no doubt, that the Leith Roperie Company's trustees have sold that remaining portion of the feus to the Police Commissioners of Leith, but then their right stands upon a bare disposition, and the superior has nothing to do with them, and they have no claim against the superiors. Therefore, as in a question between superior and vassal the matter stands thus,—The Edinburgh Roperie Company, represented by Mr Hay, are now the disponees of the greater part of that which belonged to the Leith Roperie Company, and formed the subject of the writ of confirmation in 1862; the remainder of it still stands in the persons of the trustees of the Leith Roperie Company.

Now, it is in these circumstances that the defenders maintain that the pursuers to entitle them to a redemption of the casualty, must pay a year's rent, not only of that which they have acquired and now possess, but of that portion also of

the subject which remains in the trustees of the Leith Roperie Company. I think that contention proceeds on a total misunderstanding of the Conveyancing Act of 1874. It is conceded by the defenders that if Mr Hay had been entered by them in the same way as they entered the Leith Roperie Company's trustees in 1862 they could not have made this demand. But they seemed to forget that that which they might have been called upon to do prior to the statute of 1874 has been done for them by the statute, because the 4th section of the statute, in the second sub-section, provides that infeftment shall imply entry with the superior, and therefore when Mr Hay, on behalf of the Edinburgh Roperie Company, took infeftment in that part of the subject which he had bought from the Leith Roperie Company's trustees, he became thereby the entered vassal of the defenders. No doubt the effect of that entry was somewhat different from what would have been the effect of his taking an entry before the statute. He did not require to take an entry according to the old law when he bought this subject from the trustees of the Leith Roperie Company, because there was an entered vassal, viz., Mr Ritchie. But the statute implies the entry at once, and it provides also for what is to be the effect of that implied entry as regards the rights and obligations of superior and vassal. The third sub-section of the same section (fourth) provides that it is not to affect the rights of the superior as regards duties or casualties. In short, it provides that, as regards the casualties of superiority, they shall not be payable at any other time or on any other conditions than they would have been if this Act had not been passed. So that the effect is, that while Mr Hay was made the entered vassal as soon as he took infeftment by force of the statute, he did not require to pay a composition on that entry, his liability to pay the composition being postponed until the death of the last entered vassal, and the right of the superior to demand a casualty being in like manner postponed. The pursuers being the entered vassals of the defenders, and seeking to have the casualty redeemed under the terms of the 15th section of the statute, it appears to me quite unreasonable and beyond all intelligible construction of this statute to say that this party, who is entered with the superior and is now the superior's vassal in this particular part of the original feu as distinguished from the other, is to pay anything more by way of composition than one year's rent of that subject in which he is the vassal of the superior. I am therefore of opinion that the Lord Ordinary's interlocutor is well-founded. There is no dispute as to the figures.

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LORD DEAR, LORD MURE, and LORD SHAND concurred.

THE COURT adhered.

MORTON, NEILSON, & SMART, W.S.—WILLIAM WHITE MILLAR, S.S.C.—Agents.

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ance has been executed, is not provided for at all. That is nothing more than overlooking an unlikely contingency, as testators often do, and cannot entitle us to refuse effect to the will so far as expressed. If such a contingency should occur, the truster's heirs would be the daughter's heirs, and what her right, in that event, would be is far from clear, and I do not speculate upon it.

As to the argument that the fee was to go to the daughter, whom failing, to her children, it will be observed that the words "whom failing" are not in the clause in question from beginning to end; and these are words not readily to be supplied.

But the conclusive answer to the inference attempted to be drawn from the first portion of the 8th clause is, that you cannot know the meaning of that portion of the clause till you have read the clause to the end. What the truster means in the introductory part of the clause he immediately proceeds himself to explain by saying—"And I hereby declare and direct and appoint that neither the said annual proceeds and income of my estates, nor the fee thereof, shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds, or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with this direction."

Now, this is not a deed subject to any strict or technical construction. It is not like a special disposition of a heritable subject, the precise words of which must go into the record of sasines and be construed by technical rules. It is a mere general *mortis causa* deed, and the clause we are dealing with is simply intended to let his trustees understand what sort of deed (technical in so far as technicality may be necessary) they ought to execute, under professional guidance, in order to carry his intentions into effect,—just as where a testator directs his trustees to execute a strict entail without (it may be) saying more about it, the directions to execute the entail do not require to be in technical language, and are to be construed with reference to intention merely, although the entail itself must be in technical language, and will be subject, when executed, to a technical and strict construction. Now, there is not a word, from beginning to end of this clause, to the effect that the daughter is to have the beneficial fee. The only inference that she is to have a fee at all rests on the words "that neither the said annual proceeds and income of my estates, nor the fee thereof, shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds, or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life." Now, I grant that there is here an inference that the daughter is to have a fee of some kind; but it must be a fee which shall answer the description given of it, and what that can be, except a fiduciary fee, I am unable to conceive. The framer of this deed was obviously a young and untrained conveyancer. We are all, I believe, under that impression. Probably the experienced law agents, in whose employment he was, thought their superintendence unnecessary, as the more important and technical conveyance was to follow. But the framer obviously knew that what the truster wanted was that both fee and liferent should be independent of the husband and of the husband's creditors and of the daughter's creditors; and so, in place of attempting to describe the kind of fee or the form of destination, he contented himself with a detail of the consequences the deed was intended to

have, and a direction to the trustees to "make full provision to the above effect in the conveyance or conveyances to be executed by them," so as effectually to secure these consequences. No. 163.

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I understand your Lordships now to be agreed that the daughter is to have only a qualified or limited and not an absolute fee, and the question therefore is reduced to this—What is the qualification or limitation to be? Your Lordships propose that the daughter shall be *fiar*, subject to the qualification that there shall be a *pes successionis* in the children, not defeasible by her gratuitous deeds. That is the whole qualification or limitation proposed to be put upon her right of fee in the conveyance to be executed. But the truster has declared, directed, and appointed that his estate shall not be subject to the debts or deeds of his daughter, whether gratuitous or onerous, or to the diligence of her creditors. The truster directed a conveyance that should exclude liability for the daughter's debts and onerous deeds, but your Lordships propose to direct a conveyance which will admit that liability, and even liability for her husband's debts, if they are, as in some circumstances they may be, undistinguishable from hers. That appears to me to be the very opposite of the declared will of the truster. Then we have the intensifying declaration that the estates and annual income thereof "shall be an alimentary and inalienable provision for my said daughter during her life." Your Lordship in the chair has said that the only income thus referred to is the annual income before the birth of a child and the execution of a conveyance; but how the annual income, prior to the birth and conveyance, can form an alimentary and inalienable provision for the daughter during her life, if she lives after the execution of the conveyance, has not been explained.

The Lord Justice-Clerk, on the other hand, seems to acknowledge rather than to ignore the inconsistency between the latter portions of the clause and the kind of fee which he spells out of the first portion of it; but his Lordship thinks he solves all difficulty on that score by saying the concluding declarations and directions are subsidiary and auxiliary merely to what goes before, and, being of a conflicting nature, can receive no effect. But nothing that goes before is half so clear and distinct as these concluding declarations and directions themselves. They are subsidiary and auxiliary in no other sense than an interpretation clause may be said to be subsidiary and auxiliary. They are really the sting of the whole matter, and their inconsistency with the kind of conveyance now proposed to be sanctioned affords, I think, the most legitimate and convincing argument against that being the kind of conveyance the truster contemplated, especially as he concludes by directing his trustees to make full provision for carrying out these declarations and directions in the conveyance or conveyances to be executed by them.

For my own part, I could understand the deed being construed as contemplating a conveyance to the daughter in *lifereit* alimentary or *allenary*, and to the child *nominatim* and other children to be born, so as at once to vest an absolute fee in the children. But I cannot read this eighth clause of the deed and conceive it to have been the intention of the truster that there should be, in the daughter, a fee of a kind which shall render the estates liable for her debts and onerous deeds, and expose them to the diligence of her creditors.

Any question as to the nature and efficacy of the daughter's alimentary *lifereit* is quite a different matter from the more important question of the fee, and the one ought not to be mixed up with the other. I see no difficulty, however, in excluding the creditors, both of the husband and wife, from affecting the

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The marriage-contract trustees of Mr and Mrs Ross also claimed the whole residue, but they did not press their claim until the question between the testamentary trustees and Mrs Ross should be disposed of.

The Lord Ordinary pronounced this interlocutor:—"Finds that, at the death of the truster, the deceased William Walker Gibson, his only child, Ellen Percival Gibson or Ross, was a married woman, and that a child had been born of the marriage and is still in life, and that another child has since been born of said marriage: Find that in respect of the birth and existence of said children, and in accordance with the sound construction of the trust-disposition and settlement of the said William Walker Gibson, the nominal raisers and pursuers, as trustees under said trust-disposition and settlement, are bound, after providing for the annuity of £400 per annum, payable to the truster's brother, John Gibson, to convey and dispose the residue of the trust-estate to the said Ellen Percival Gibson or Ross, and to the child or children of her present marriage or of any subsequent marriage into which she may enter, in such terms and in such manner as will restrict the right and interest of the said Mrs Ellen Percival Gibson or Ross to the same to a *liferent* right *allenary*, and will exclude the *jus mariti* and right of administration of her present husband or any future husband she may marry, and liability for his or her debts or deeds, and the diligence of the creditors of such husband, and her own creditors, and will secure the same as an alimentary and inalienable provision for the said Mrs Ellen Percival Gibson or Ross, and also in such manner and in such terms as will settle and secure the fee of the said residue to the pupil children already born of the said Mrs Ellen Percival Gibson or Ross' present marriage, and any other children of the said present or any subsequent marriage into which she may enter, equally among them, if she shall not otherwise appoint, but subject always to a power of division by her among her said children, and, failing a child or children of the said Ellen Percival Gibson, then to the truster's own nearest heirs and assignees whomsoever: Therefore sustains the claims for the pursuers and nominal raisers, as trustees foresaid, and for David Ogg, S.S.C., curator *ad litem* to William Walker Gibson Ross and Reginald Carew Ross, the pupil children of the said Mrs Ellen Percival Gibson or Ross, in so far as the same are consistent with the foregoing findings: *Quoad ultra* repels said claims: Repels the claims of the whole other claimants; and before further answer appoints the cause to be enrolled in order that the parties may be heard as to the amount of the fund *in medio*, and as to the precise terms in which the conveyance or conveyances of the said residue are to be expressed, and reserves all questions of expenses: Grants leave to all concerned to reclaim, if so advised."

* NOTE.— . . . "The primary and principal questions, therefore, to be answered are—Who are the heirs of the residue? And to whom, and in what terms, are the trustees now bound to convey the residue of the trust-estate?"

"On the one hand, Mr and Mrs Ross maintain that as a child has been born of the existing marriage they are entitled to call upon the trustees to convey the fee of the residue of the trust-estate, both heritable and moveable, under burden of John Gibson's annuity, to Mrs Ross absolutely, with a bare destination in favour of her children *nati et nascituri*, and with a declaration that the provision is to be alimentary and inalienable and not liable for the debts or deeds of either Mr or Mrs Ross, or attachable by the diligence of the creditors of either. On the other hand, the infant children of Mr and Mrs Ross (whose interests in the action are protected by Mr David Ogg, S.S.C., as their curator *ad litem*) claim that according to the sound construction of the settlement, the truster intended to restrict, and has restricted his daughter Mrs Ross' interest in the residue to an alimentary and inalienable *liferent allenary*, and that he

Mr and Mrs Ross reclaimed. The First Division appointed the case to be heard before themselves and three Judges of the Second Division.

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intended to confer, and has conferred, a right of fee upon Mrs Ross' first born child, for behoof of himself and of all the other children which might be born of Mrs Ross' present or any subsequent marriage, and they desire a conveyance to be executed in favour of Mrs Ross in liferent allenary and her children in fee accordingly. They also maintain that there should be no ulterior destination of the fee to the truster's nearest heirs and assignees whomsoever. In the claim which has been lodged for the trustees they maintain the same views as to the liferent and fee which are stated on behalf of Mrs Ross' children, but they further maintain that they are bound to insert in the conveyance the ulterior destination in favour of the truster's nearest heirs and assignees.

"Having been favoured with an exceedingly able argument for all the parties, have, after the best consideration I have been able to give to the case, come to form a clear opinion in favour of the general construction of the settlement commanded for by the children of Mrs Ross, and by the trustees, and against that intended for by Mr and Mrs Ross. It is no doubt true that in the present use after the birth of a child of Mrs Ross' marriage the trustees are to cease to hold the estate for behoof of Mrs Ross, and are thereupon actually to convey the estate to her or her child or children; and it is also true that in the direction so to convey the estate the words 'liferent,' or 'liferent allenary,' or any equivalent words, are not expressly used in immediate conjunction with the name of Mrs Ross. But I think that it is impossible to read the eighth purpose of the trust-deed as a connected whole without being satisfied not only that the truster meant his daughter's interest to be limited to a bare liferent, but that the directions which he has given to his trustees as to the execution of the conveyance are sufficient to enable them to give effect to his intentions. The truster begins by directing the trustees to retain in their own hands the whole residue until his only child, Ellen Percival Gibson, who then resided with him, should be married, and until a child should be born of the marriage. Now, though both of these events actually occurred before the truster died, it is necessary, in order to understand the deed, to see what the truster intended the trustees to do with the residue in the event of his daughter not being married, or being married and not having a child born of the marriage. In the first place, he directed that until his daughter should attain majority, or be married, his trustees should either pay to her, or for her behoof, only so much of the annual proceeds or income of the estate as they should think necessary for her suitable maintenance and education. In the next place, upon his daughter being married, the trustees were to pay over to her, for her alimentary use, the whole annual proceeds or income of the residue. The truster does not appear to have expressly provided for the case of his daughter attaining majority, but being unmarried, though I think it is probable that in that case she would have been held entitled to the annual income of the estate until her marriage. And, in the third place, it is not until a child is born of the marriage that the trustees are to nude of the trust-estate. They are, however, directed to do so upon that event taking place. The duty of retention of the residue which was imposed on them by the introductory part of the eighth purpose was then to cease, and the duty of conveying and disposing the residue was to emerge. And on that event occurring the trustees are directed to convey or dispose the estate to the truster's daughter and the child or children of her marriage, or of any subsequent marriage—that is to say, to the child or children so born, and to Mrs Ross's other children *nascituri*.

"Now, although nothing is here expressly said as to the conveyance being to Mrs Ross in liferent, and to her children in fee, it would certainly, looking to the previous context, be natural to expect some such limitation of her right. Why did the truster so anxiously limit his daughter after her marriage, but before the birth of a child, to a bare right, to call upon the trustees for payment of the annual income of the trust-estate for her alimentary use if it was not to protect the estate of her possible children? And, if so, could anything be more

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wife's liferent to the extent, at all events, of a suitable alimentary provision, and in excluding the *jus mariti* not only as regards the heritable estate, but likewise as regards the personal estate to be specifically conveyed, all in accordance with the will of the truster. It may not, perhaps, be practicable, without the intervention of a trust, effectually to prevent the daughter from despoiling herself of her liferent of the personal estate by her own express voluntary deeds, because there might, in that case, be no one to come forward and prevent or challenge the illegal transaction; but it is quite practicable, without a trust, to protect her liferent of that estate against the husband's *jus mariti*, and the acts and deeds of his and her hostile creditors. We have an instance of this as regards the exclusion of the *jus mariti* and of the husband's creditors, in the case of Macdonald or Young v. Loudon and Company, June 26, 1855, 17 D. 998, and the same principle would exclude the wife's creditors where her liferent is declared alimentary. The late case of White's Trustees v. White, June 1, 1877, is not inconsistent with this doctrine. The truster there, by his *mortis causu* settlement, conveyed his whole heritable and moveable estate to trustees for certain purposes, and *inter alia*, for the purpose of paying to his sister, half-yearly in advance, an annuity of £60, declaring it to be purely an alimentary provision, not arrestable for her debts or deeds, and not assignable by her, either onerously or gratuitously, in any manner of way. The *jus mariti* of any husband she might marry was also excluded. All the other purposes of the trust-deed being satisfied, the heir-at-law, who became entitled to the residue, called upon the trustees, with consent of the annuitant, to denude in his favour on his discharging the trust and securing the annuity to the lady over the heritable estate, which was ample in value. But it was obvious there that the truster's purpose was to secure the annuity to his sister, not only against the hostile interference of third parties, but against the voluntary deeds of the lady herself; and what the Court decided was, that it had not been shewn that this latter purpose could be absolutely secured against collusive evasion and defeat otherwise than by a trust, and, at all events, the truster had chosen that his purpose should be guarded in that way, and therefore, on considering a special case for the trustees, the heir, and the lady, we refused to sanction the proposed arrangement. That judgment does not imply that an alimentary liferent cannot be secured against the *jus mariti* and against hostile creditors both of the husband and wife, without a trust, so as to afford a practical protection, although a trust may be necessary, as I have said, effectually to protect the liferentrix against herself.

My opinion in the present case is, that the judgment of the Lord Ordinary ought to be adhered to, and a conveyance or conveyances directed to be prepared to carry that judgment into effect.

LORD ORMDALE.—It cannot be questioned that the duty of the Court in this case is to give effect, so far as practicable, to what may be legitimately held to have been the intention of the truster. But that intention must be collected from the language he has used in his trust-deed of settlement, and not from any loose or vague speculations as to what he ought to have done.

Now, by the eighth purpose of the trust-deed of settlement, upon the terms of which the disputed question entirely depends, the deceased Mr Gibson directed his trustees to pay to his only daughter and child, Elsie Percival Gibson, now Mrs Ross, till her majority or marriage, the whole, or such part as might be required for her maintenance, education, and upbringing in a manner suited to

The true meaning of the clause was merely that Mrs Ross was not gratuitously to defeat the interests of her children. They had a protected right of succession, but the fee was in Mrs Ross.¹ A power of apportionment did not exclude the idea of a fee, although it was an indication of intention that the fiar was not to dispose by testament to the disappointment of her children.² The word "alimentary" might have been important if a liferent had been given, but it was not so as applied to a fee. It would be impossible to secure the interest of the funds without the intervention of a trust, and there was no warrant for creating a trust.³

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Mr Gibson's trustees argued ;—The plain intention of the testator was that his daughter should only have the liferent. The case was similar to that of Gerran, which was anterior to Newlands, and first established the rule as against the case of Frog's Creditors that the intention of the testator must govern.⁴ The trustees were bound to make a conveyance in

ance to Mrs Ross by the use of the taxative word 'allienarly,' they would, in my opinion, be bound, while conveying the fee to her in liferent for her alimentary use, and as an inalienable provision not affectable by the debts and deeds of herself or her husband, or by the diligence of creditors, to insert, as the fiars of the property, the children born of Mrs Ross' present marriage *nominatim* and her future children *nascituri*. A conveyance in such terms would, according to a well settled rule of law, restrict the right of the parent to a bare liferent, and not the fee in the children.

"If I am right in the views above expressed it follows that the trustees are not entitled longer to retain any part of the trust-funds except so much as may be necessary to meet John Gibson's annuity, and that they are bound to convey the whole to Mrs Ross and her children for their respective rights of liferent and fee. I also think that the ulterior destination to the truster's own nearest heirs and assignees should be inserted in the conveyance. In so far as the estate consists of heritable there can be little or no difficulty in framing the conveyance and conveyances. There may be more difficulty as to those parts of the estate which are moveable; and the cause is appointed to be enrolled in order that the form and terms of the conveyances thereof may be adjusted.

"As I have come to be of opinion that the interest of Mrs Ross in the residue is not amount to a right of fee, but is a liferent to her for her own exclusive alimentary use, it follows that her marriage-contract trustees can have no claim on the fund *in medio* in virtue of the conveyance by Mrs Ross in their favour contained in her antenuptial marriage-contract. She has expressly excepted in that contract 'all such estate and effects as the said Ellen Percival Gibson may succeed to under any destination or provision which may settle the same on herself or her heirs exclusively.'

Farther, if the right of Mrs Ross is a bare liferent, and in no sense a right of fee, no question can arise similar to that which occurred in the case of Lady Massy, December 5, 1872, 11 Macph. 173. But I think it right, for the information of the parties, to say, that if I had regarded Mrs Ross' right to the residue as a right of fee I should have held that it was a qualified right, that her children had more than a bare *spes successionis*, and that they had a right of succession which the Court would have been bound to protect by some expedient similar to that adopted in the case of Lady Massy.

The case will now be enrolled for the purpose already indicated, and to enable the parties, if necessary, to ascertain the amount of the fund *in medio*."

Arthur and Seymour v. Lamb, June 30, 1870, 8 Macph. 928, 42 Scot. Jur.

Massy v. Scott's Trustees, Dec. 5, 1872, 11 Macph. 173, 45 Scot. Jur.

White v. White, June 1, 1877, *supra*, p. 786.

Mackintosh v. Gordon, April 17, 1845, 4 Bell's App. 105; Macdonald v. Maclean, Jan. 14, 1831, 9 S. 269, 3 Scot. Jur. 164.

Allan's Trustees v. Allan, Dec. 12, 1872, 11 Macph. 216, 45 Scot. Jur. 144.

Gerran v. Alexander, June 14, 1781, M. 4402; Dykes v. Boyd, June 3,

F. C.; McGowan v. Robb, Dec. 14, 1862, 1 Macph. 141, 35 Scot. Jur.

Martin's Trustees v. Milliken, Dec. 24, 1864, 3 Macph. 326, 37 Scot. Jur.

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At advising,—

LORD PRESIDENT.—The question which we have to determine regards the nature and extent of the interest which the claimant and reclamer, Mrs Eller Ross, is entitled to under the trust-disposition and settlement of her deceased father, William Walker Gibson, and that depends upon a construction of the clauses of that settlement, but particularly of the clause disposing of the residue. When Mr Gibson made his settlement in the year 1866 Mrs Ross was his only child, and she was then unmarried and in minority ; but at the time of his death, on the 1st of April 1875, Mrs Ross was married, and there was one child born of the marriage.

In these circumstances, the question comes to be, what is the duty of the trustees under the directions given by the testator in the eighth purpose of his settlement? He begins by directing them to retain in their own hands the whole residue of his estate "until my only child, Ellen Percival Gibson, at present residing with me, shall be married, and until a child shall be born of her marriage." He thus very distinctly assigns the term for which the trust is to subsist ; and then he proceeds to declare what the trustees are to do during this period—"Until my said daughter shall attain majority or be married my trustees shall pay to her or apply for her behoof and benefit the whole, or such part as may be required for her maintenance, education, and upbringing in a manner suited to her station, of the annual proceeds or income of my estate and effects, and upon my said daughter being married my trustees shall pay over to her for her alimentary use the whole annual proceeds or income thereof." Then he proceeds to direct and appoint what is to be done upon the further event of a child being born of the marriage. Upon that event the trust is undoubtedly to come to an end, and a conveyance is to be made. But while the trust subsists it is important to observe that there are two periods provided for by the trust—First, during the time that his daughter continues minor and unmarried she is to be maintained and brought up in a manner suited to her station, and for that purpose the trustees are to use so much as may be necessary of the annual proceeds or income of the estate. Then, after she is married and before a child is born of the marriage, they are directed to pay over to her for her alimentary use the whole of the annual proceeds or income thereof. It is only necessary to observe at present that in neither of these portions of the deed is there anything like a liferent right created in favour of the wife. Now we come to the direction as to what is to be done when a child is born, and

155 ; *Newlands v. Newlands' Creditors*, Feb. 7, 1794, aff. April 26, 1798, 4294, Ross, L. C., 3 L. R. 634, Bell's Fo. Ca. 54 ; *Frog's Creditors v. Children*, Nov. 25, 1735, M. 4262, Ross, L. C., 3 L. R. 602.

¹ *Cuming's Trustees v. Cuming*, July 10, 1832, 10 S. 804 ; *Seton v. Seton*, March 1, 1854, 16 D. 658, 26 Scot. Jur. 364.

² *Ramsay v. Beveridge*, March 3, 1854, 16 D. 764, 26 Scot. Jur. 329.

³ *Douglas v. Sharpe*, March 9, 1811, Hume's Dec. 173 ; 1 Bell's Com. 355 ; Bell's Prin. 1956 ; *West-Nisbet v. Moriston*, 1627, M. 10,368 ; *Tennant v. Futhie*, 1637, M. 10,372 ; *Dick and Dunbar v. Pinkhill*, 1709, M. 10,373 ; *Dawson, &c.*, Nov. 10, 1876, *supra*, p. 597.

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direction is "that upon a child being born of her marriage my trustees shall convey and dispoise to her and to the child or children of her marriage, or of any subsequent marriage into which she may enter, equally among them if she shall not otherwise appoint, but subject always to a power of division by her among the said children, and failing a child or children of my said daughter, then to my nearest heirs and assignees whomsoever, the whole residue and remainder of my estate." Now, the first question is, what is the legal meaning and construction of these words taken by themselves, because these are the leading and most important words in that clause. It may be that their natural legal meaning may be overruled by other declarations in the deed, but it is very desirable, in the first place, to ascertain what is the meaning of the words of his direction to convey. Now, I think the conveyance which the trustees are hereby directed to make is, according to the true legal construction of the words used, a conveyance to his daughter of the fee of the residue. The words are—"Convey and dispoise to her and to the child or children." There is no mention either of life or of fee in this clause, and I think therefore that the true legal construction of the words is a conveyance to his daughter in fee, whom failing to the child or children of her marriage, or of any subsequent marriage, equally among them; also in fee, unless she shall otherwise appoint—that is to say, it is to be equally unless she shall otherwise appoint, but a power of appointment or division is reserved. Now, that being, according to my view, the natural meaning of these words, the question comes to be next, whether there is anything that follows a sufficient indication of an opposite intention on the part of the truster to derogate from the proper construction of the words used? My opinion is that everything that follows goes strongly to support and confirm the proper legal meaning of the words so used. He expresses himself thus—"I hereby declare and direct and appoint that neither the said annual proceeds of income of my estates, nor the fee thereof, shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds or to the diligence of his or her creditors." Now, be it observed, there can be no mistake here of what is the subject he is speaking of, for he expresses himself in words that cannot be misunderstood. It is both the annual proceeds and income of his estates above mentioned, or, as it is expressed, "the said annual proceeds and income of my estate, and also the fee thereof;" and what is said of them is that they are not to be subject to the *jus mariti* or right of administration of any husband, nor subject to his or her debts or deeds, or the diligence of his or her creditors. The "said annual proceeds" plainly applies to the income of the estate, which is directed to be paid to her while the trust subsists. There is no provision of the annual income or proceeds at all except during the continuance of the trust. And therefore it is plain to me that, in so far as that part of the estate is concerned, it is declared here that no part of anything that is paid over to her during the subsistence of the trust shall be subject to the *jus mariti* or right of administration, or to the diligence either of her own or her husband's creditors. And that seemed a very reasonable provision, because the annual proceeds and income of the estate are to be paid to her after she is married, but before she has a child. But then it is also quite plain that the truster is anxious to prevent the fee of the estate from being subject to the *jus mariti* or right of administration of the husband, or to his or her debts or deeds; but how could the fee of the estate possibly fall under the *jus mariti* or be subject or liable to the husband's

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husband of my said daughter, nor shall the same be subject to his or her debts or deeds, or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with these directions." Now, this, as I read it, is a distinct declaration and direction that the daughter's interest is to be a *lifereit* interest. It is to be an alimentary provision during her lifetime, and the provision, such as it is, is to be inalienable; and there is also a positive declaration that the fee of the estate shall not be subject to her own or her husband's debts, but shall be free from both. But as I understand the judgment proposed by the Lord President, the fee of this estate will be subject to the debts of those parties. The daughter will be prevented from making a gratuitous disposition of the estate, but it will be subject to her onerous debts and deeds, as it was in the case of Lady Massy, which was referred to in the course of the discussion. Now, the words that appear to me most distinctly to indicate the intention of the truster are the words "alimentary and inalienable provision for my said daughter during her life;" and what is that? It is nothing more or less, as I read it, than a *lifereit* provision to his daughter. It is not to be available for her debts; and construing the conveyance of the residue in consistency with the directions given, and with the positive declaration that her provision is to be a *lifereit* provision—an alimentary and inalienable provision for her during her life—I think it would be a violation of the intention of this truster to oblige the trustees to execute any conveyance which would have the effect of exposing the estate to the diligence of this lady's creditors or to her own onerous deeds.

The views of the Lord Ordinary, as indicated by him, appear to me to carry out what I think was the intention of the truster, by giving the *lifereit* alienably to the mother and the fee to the children. I have the less hesitation in adopting this course, because on studying the case of Lady Massy I find the opinions of several of the Judges were very materially influenced by the fact that there was nothing in the wording of the provision in favour of Lady Massy which could be held to import that anything in the shape of a mere *lifereit* was to be conferred upon her, while in other parts of the deed there were *lifereit* provisions given to others of her relatives, shewing that the man of business who prepared the deed knew how to word the settlement so as to give a *lifereit*. But here, instead of there being an absence of any declaration as to a *lifereit*, there is a most express declaration, as I read it, of an alimentary provision for the daughter during her lifetime; and this, coupled with the further declaration that it is not to be subject to her debts, leads me to think that this gentleman never intended that the fee of the estate should be settled upon his daughter.

I think, therefore, that the construction which has been adopted by the Lord Ordinary should prevail. Reference was made in the discussion to a case where instructions given to trustees to make an entail were coupled with a direction to adopt a particular entail, and yet the trustees were held to be entitled to disregard that direction—and why? because it was coupled with words which showed that the intention of the testator was that his estates should be dealt with and settled as an entailed estate, and if the direction as to the mode in which the entail should be made had been carried out that declaration of intention on the part of the testator would have been frustrated and defeated. I allude to the case of *Graham v. Lord Lynedoch's Trustees*, March 15, 1853, 15 D, 568, after

wards affirmed in the House of Lords, 2 M'Q. 295, where the instruction was that the trustees should purchase land to be entailed in terms of a particular entail which was mentioned, but the words were added—"so as to make it a valid and effectual entail according to the law of Scotland." Now, if the direction to make the entail in terms of that particular entail had been adopted it would have been a bad entail according to the law of Scotland, and this Court held, notwithstanding the specific direction to make the deed in terms of the particular entail, that the trustees were bound to disregard that entail and make what was a good entail by the law of Scotland, so as to carry out the intention of the truster. The opinions of Lord Colonsay, Lord Fullerton, and Lord Ivory with regard to that case appear to me to be directly applicable to the question we have here to decide.

On these grounds I concur with Lord Deas in thinking that the interlocutor should in substance be adhered to.

LORD GIFFORD.—I think that the first question in this case is—What was the real wish, purpose, and intention of the testator, the late William Walker Gibson, in regard to the disposal of the free residue of his estate, heritable and moveable; what did he really mean should be done with that residue; and what was the precise measure and extent of the rights and powers in and over that residue which he truly intended should be conferred upon his daughter and her children respectively? I think this is the first question, and in putting it I purposely avoid the use of technical language, seeking only to get at the mind and will of a non-professional testator.

It is also of importance that this first question—What did Mr Gibson really wish to be done with the residue of his estate?—should be kept perfectly separate and distinct from the other questions in the case, which are—How far can the trustees or the Court give effect to Mr Gibson's intention consistently with the deeds which he has appointed to be executed? or, how far and to what extent ought the Court to give effect to the intention disregarding or superseding the special machinery which the testator contemplated employing? and still further, What ought to be the precise form and terms of the deeds of conveyance of other deeds which the trustees are now to be ordained to execute? All these questions are important, and some of them may be difficult, but none of them arise until the primary question be answered—What was the will and mind of the testator in reference to the disposal of the residue of his estate?

Now, in determining what was the will and mind of the testator—the *voluntas testatoris*—I am of course confined to the words of his trust-deed and settlement. I must gather his meaning and intention from the words which he has employed, reading his deed as a whole, and reading and comparing together all its parts. I must not leave out of view, also, that as the deed bears to be prepared by professional conveyancers, and as it contains technical words in many of its clauses, the canon of interpretation may apply, that where technical words are used they are to have their technical meaning, unless it appears from the context or from the deed otherwise that a different signification or a meaning more or less non-technical was intended. At the same time, I must say that in this case I feel that the rule that technical words must be read technically has very slight application, for it is impossible to read the deed without feeling that the conveyancer has not used legal and technical words with appreciation of their exact legal force and meaning, or with any accurate consistency, so as give them their

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should be to the mother in *liferent* for her *liferent* use *allenary* (or, what would be equivalent, *alimentary*), "and to the child or children born and to be born in fee," which would have conferred a *liferent* on herself and a fiduciary fee for her children. This last form of destination would give the mother a title of the nature of a trust for behoof of the children, and I prefer it therefore, as, of the only two legitimate alternatives, the most in accordance with the probable will of the truster, who does not say expressly that the child who is to be born shall be named in the conveyance. If that had been said expressly there could have been no doubt at all that the mother was to be a bare *liferenter*. But that not being said, it is open, I think, for the trustees to accomplish the same purpose by the other and, with a view to management, the more convenient form of destination; and if a conveyance were executed in favour of the mother in *liferent* for her *liferent* use *alimentary*, "and the child or children born and to be born in fee," nobody will doubt that that would be a *habile* title to confer a fiduciary fee upon the mother and a beneficial fee on the children. That stands decided as regards heritable estate by the very authoritative case of *Watherstone v. Rentons*, Nov. 25, 1801 (M. 4297), where Mr Watherstone granted a disposition in favour of his daughter and her husband in conjunct fee and *liferent*, and to the longest liver, for their *liferent* use *allenary*, and to the children procreated or to be procreated of the marriage equally in fee. That case was reported to the Inner-House by the first Lord Meadowbank, and the Court were all clear that the point had been fixed by previous cases, and that there was there only a fiduciary fee in the parents. It has been explained that in the present case the heritable and moveable estate are together of the value of £40,000, and that about one-half of this sum may be taken roughly as the value of each. The case of *Watherstone* has ruled the practice ever since its date, and it is beyond all question therefore that a conveyance of the heritable estate, in the present case, to the mother for her *liferent* use *alimentary*, and the child or children born or to be born in fee, would be valid and effectual to make the mother *liferentrix* and the children beneficial *fiars*, without the necessity of any nomination of trustees.

That the same would be the consequence of a conveyance in similar terms of the moveable estate was decided in the case of *Rollo v. Shaw or Ramsay*, Nov. 28, 1832, 11 S. and D. 132. In that case the wife, by antenuptial marriage-contract, destined a sum of £5000, which had been bequeathed to her by her uncle, to herself and her husband for the *liferent* use *allenary* of the longest liver, and to the children of the marriage in fee. The husband uplifted upwards of £2000 of the money, and died insolvent in 1828. The widow claimed and obtained for herself and the children a ranking on his estate for the money he had so uplifted. About £3000, principal and interest, remained in the hands of his uncle's executors, and was claimed by the husband's creditors, for whose behoof Mr Rollo, W.S., expedite a confirmation as executor-creditor of the husband, whereupon the uncle's executors raised a *multiplepoinding*, in which a claim was lodged for the widow and children, who pleaded that "nothing was given to the husband than a *liferent* interest with a fiduciary fee for behoof of the children." On the other hand, a claim was lodged for the executor-creditor on the footing that the fee was in the husband. (The first) Lord Mackenzie, Ordinary, (adding an instructive note), sustained the claim of Mr Ramsay and the children, and repelled the claim for the creditors. To this judgment the Court unanimously adhered, Lord Glenlee expressly observing—"This appears to me to be no difference here from the case of *Watherstone*." The

or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds, or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with this direction." The Lord Ordinary holds that, notwithstanding the direction to convey the residue to the daughter, and notwithstanding the words, which are quite clearly expressed, that these restrictions are to be applicable to the fee which he has already conferred—that these words must be read as converting the fee which has been, in words at all events, given, into a *liferent* *allenary*. I cannot read the provision in that way. I think, on the contrary, that no such provision was intended by the testator. How far these particular restrictions can be validly and effectually carried out in conformity with a conveyance of the fee as directed in the prior part of the deed is another question, and I do not understand that our opinion upon that matter has been desired by your Lordships of the First Division. It does not in the least follow, although there may be restrictions and qualifications which the testator attempted to attach to the direct conveyance, which cannot be carried out in their integrity, that he did not intend the conveyance to be made. That is too violent a conclusion from the words, and although it is said that these qualifications are to create an alimentary and inalienable provision during his daughter's life, that to my mind means no more than this, that the fee so qualified and so restricted is only to be qualified and restricted during her life, and that the qualifications and restrictions do not apply to those who are to succeed through the after destination. I do not know that I have anything further to say. I do not see that there is here the creation of any fiduciary fee in the mother. She is given a power of division, and that rightly; because if your Lordship's intention is carried out, as I think it should be, of inserting in the conveyance what will render this a destination protected against the mother's gratuitous deeds, it is perfectly right that she should have the power also of apportioning among the children the amount of the estate. On the whole matter I agree with the opinion which your Lordship has expressed.

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LORD DEAS.—The Lord Ordinary has put a certain construction upon this deed, and directed the trustees to frame a conveyance in accordance with that construction. Assuming his Lordship's construction of the deed to be right I do not suppose any experienced conveyancer could have the slightest difficulty in framing a conveyance which would carry out that construction. I am of opinion that the Lord Ordinary's interlocutor is perfectly right, although, as the case has been taken out of his hands before the draft conveyance was lodged, we do not know in what precise words he would have approved of the conveyance being expressed. The views which I entertain on that subject are not in the least inconsistent with anything in his interlocutor and note.

The conveyance was directed to be executed when a child should be born. There must have been an object in the mind of the testator in directing the execution of the conveyance to be delayed till then, and I think that must be held to have been either in order that the conveyance might be to the mother in *liferent* and the child *nominatim* and her subsequent issue in fee (which would have limited her to a bare *liferent* without the necessity of using any restrictive words such as "*allenary*" or "*alimentary*"), or it must have been that the conveyance

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ance has been executed, is not provided for at all. That is nothing more than overlooking an unlikely contingency, as testators often do, and cannot entitle us to refuse effect to the will so far as expressed. If such a contingency should occur, the truster's heirs would be the daughter's heirs, and what her right, in that event, would be is far from clear, and I do not speculate upon it.

As to the argument that the fee was to go to the daughter, whom failing, to her children, it will be observed that the words "whom failing" are not in the clause in question from beginning to end; and these are words not readily to be supplied.

But the conclusive answer to the inference attempted to be drawn from the first portion of the 8th clause is, that you cannot know the meaning of that portion of the clause till you have read the clause to the end. What the truster means in the introductory part of the clause he immediately proceeds himself to explain by saying—"And I hereby declare and direct and appoint that neither the said annual proceeds and income of my estates, nor the fee thereof, shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds, or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with this direction."

Now, this is not a deed subject to any strict or technical construction. It is not like a special disposition of a heritable subject, the precise words of which must go into the record of sasines and be construed by technical rules. It is a mere general *mortis causa* deed, and the clause we are dealing with is simply intended to let his trustees understand what sort of deed (technical in so far as technicality may be necessary) they ought to execute, under professional guidance, in order to carry his intentions into effect,—just as where a testator directs his trustees to execute a strict entail without (it may be) saying more about it, the directions to execute the entail do not require to be in technical language, and are to be construed with reference to intention merely, although the entail itself must be in technical language, and will be subject, when executed, to a technical and strict construction. Now, there is not a word, from beginning to end of this clause, to the effect that the daughter is to have the beneficial fee. The only inference that she is to have a fee at all rests on the words "that neither the said annual proceeds and income of my estates, nor the fee thereof, shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds, or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life." Now, I grant that there is here an inference that the daughter is to have a fee of some kind; but it must be a fee which shall answer the description given of it, and what that can be, except a fiduciary fee, I am unable to conceive. The framer of this deed was obviously a young and untrained conveyancer. We are all, I believe, under that impression. Probably the experienced law agents, in whose employment he was, thought their superintendence unnecessary, as the more important and technical conveyance was to follow. But the framer obviously knew that what the truster wanted was that both fee and liferent should be independent of the husband and of the husband's creditors and of the daughter's creditors; and, in place of attempting to describe the kind of fee or the form of destination, he contented himself with a detail of the consequences the deed was intended to

have, and a direction to the trustees to "make full provision to the above effect in the conveyance or conveyances to be executed by them," so as effectually to secure these consequences. No. 163.

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I understand your Lordships now to be agreed that the daughter is to have only a qualified or limited and not an absolute fee, and the question therefore is reduced to this—What is the qualification or limitation to be? Your Lordships propose that the daughter shall be *fiar*, subject to the qualification that there shall be a *pes successionis* in the children, not defeasible by her gratuitous deeds. That is the whole qualification or limitation proposed to be put upon her right of fee in the conveyance to be executed. But the truster has declared, directed, and appointed that his estate shall not be subject to the debts or deeds of his daughter, whether gratuitous or onerous, or to the diligence of her creditors. The truster directed a conveyance that should exclude liability for the daughter's debts and onerous deeds, but your Lordships propose to direct a conveyance which will admit that liability, and even liability for her husband's debts, if they are, as in some circumstances they may be, undistinguishable from hers. That appears to me to be the very opposite of the declared will of the truster. Then we have the intensifying declaration that the estates and annual income thereof "shall be an alimentary and inalienable provision for my said daughter during her life." Your Lordship in the chair has said that the only income thus referred to is the annual income before the birth of a child and the execution of a conveyance; but how the annual income, prior to the birth and conveyance, can form an alimentary and inalienable provision for the daughter during her life, if she lives after the execution of the conveyance, has not been explained.

The Lord Justice-Clerk, on the other hand, seems to acknowledge rather than to ignore the inconsistency between the latter portions of the clause and the kind of fee which he spells out of the first portion of it; but his Lordship thinks he solves all difficulty on that score by saying the concluding declarations and directions are subsidiary and auxiliary merely to what goes before, and, being of a conflicting nature, can receive no effect. But nothing that goes before is half so clear and distinct as these concluding declarations and directions themselves. They are subsidiary and auxiliary in no other sense than an interpretation clause may be said to be subsidiary and auxiliary. They are really the sting of the whole matter, and their inconsistency with the kind of conveyance now proposed to be sanctioned affords, I think, the most legitimate and convincing argument against that being the kind of conveyance the truster contemplated, especially as he concludes by directing his trustees to make full provision for carrying out these declarations and directions in the conveyance or conveyances to be executed by them.

For my own part, I could understand the deed being construed as contemplating a conveyance to the daughter in *liferent* alimentary or *allenary*, and to the child *nominatim* and other children to be born, so as at once to vest an absolute fee in the children. But I cannot read this eighth clause of the deed and conceive it to have been the intention of the truster that there should be, in the daughter, a fee of a kind which shall render the estates liable for her debts and onerous deeds, and expose them to the diligence of her creditors.

Any question as to the nature and efficacy of the daughter's alimentary *liferent* is quite a different matter from the more important question of the fee, and the one ought not to be mixed up with the other. I see no difficulty, however, in excluding the creditors, both of the husband and wife, from affecting the

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wife's liferent to the extent, at all events, of a suitable alimentary provision, and in excluding the *jus mariti* not only as regards the heritable estate, but likewise as regards the personal estate to be specifically conveyed, all in accordance with the will of the truster. It may not, perhaps, be practicable, without the intervention of a trust, effectually to prevent the daughter from despoiling herself of her liferent of the personal estate by her own express voluntary deeds, because there might, in that case, be no one to come forward and prevent or challenge the illegal transaction; but it is quite practicable, without a trust, to protect her liferent of that estate against the husband's *jus mariti*, and the acts and deeds of his and her hostile creditors. We have an instance of this as regards the exclusion of the *jus mariti* and of the husband's creditors, in the case of Macdonald or Young v. Loudon and Company, June 26, 1855, 17 D. 998, and the same principle would exclude the wife's creditors where her liferent is declared alimentary. The late case of White's Trustees v. White, June 1, 1877, is not inconsistent with this doctrine. The truster there, by his *mortis causus* settlement, conveyed his whole heritable and moveable estate to trustees for certain purposes, and *inter alia*, for the purpose of paying to his sister, half-yearly in advance, an annuity of £60, declaring it to be purely an alimentary provision, not arrestable for her debts or deeds, and not assignable by her, either onerously or gratuitously, in any manner of way. The *jus mariti* of any husband she might marry was also excluded. All the other purposes of the trust-deed being satisfied, the heir-at-law, who became entitled to the residue, called upon the trustees, with consent of the annuitant, to denude in his favour on his discharging the trust and securing the annuity to the lady over the heritable estate, which was ample in value. But it was obvious there that the truster's purpose was to secure the annuity to his sister, not only against the hostile interference of third parties, but against the voluntary deeds of the lady herself; and what the Court decided was, that it had not been shewn that this latter purpose could be absolutely secured against collusive evasion and defeat otherwise than by a trust, and, at all events, the truster had chosen that his purpose should be guarded in that way, and therefore, on considering a special case for the trustees, the heir and the lady, we refused to sanction the proposed arrangement. That judgment does not imply that an alimentary liferent cannot be secured against the *jus mariti* and against hostile creditors both of the husband and wife, without a trust, so as to afford a practical protection, although a trust may be necessary, as I have said, effectually to protect the liferentrix against herself.

My opinion in the present case is, that the judgment of the Lord Ordinary ought to be adhered to, and a conveyance or conveyances directed to be prepared to carry that judgment into effect.

LORD ORMDALE.—It cannot be questioned that the duty of the Court in this case is to give effect, so far as practicable, to what may be legitimately held to have been the intention of the truster. But that intention must be collected from the language he has used in his trust-deed of settlement, and not from any loose or vague speculations as to what he ought to have done.

Now, by the eighth purpose of the trust-deed of settlement, upon the terms of which the disputed question entirely depends, the deceased Mr Gibson directed his trustees to pay to his only daughter and child, Ellen Percival Gibson, now Mrs Ross, till her majority or marriage, the whole, or such part as might be required for her maintenance, education, and upbringing in a manner suited to

her station, of the annual proceeds or income of his estates, and "upon my said daughter being married, my said trustees shall pay over to her for her alimentary use the whole annual proceeds or income thereof." No. 163.

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So far, there neither is, nor could well be, any dispute as to the intention of the truster, or as to the legal effect of the language he employs in expressing his intention. The dispute arises in regard to the meaning of what follows in the same eighth purpose of his trust-deed.

After expressing his intention as to the disposal, in the manner which has been stated, of the income or annual proceeds of his estate during the minority of his daughter, and while she is unmarried, the truster goes on to provide for the contingency of his daughter being married and having a child or children, in which event he directs his trustees to convey and dispoise to her and her child or children, whom failing, his own nearest heirs and assignees whomsoever, "the whole residue and remainder of my estate which may be then vested in them." Neither did I understand that any difficulty or dispute was raised in regard to the meaning and effect of this direction considered by itself. I am not, however, to overlook what follows; but it is important to bear in mind that according to the truster's directions as to the disposal of his estate on or after the marriage of his daughter and her having a child or children, so far as I have yet gone, it is clear and indisputable—(1) That his trustees were to divest themselves of his whole estate, capital or fee as well as the income, in favour of his daughter and her child or children; and (2) That supposing this to be done, the full fee would be in his daughter, and her child or children would have a mere *spes successionis*.

Accordingly, the truster goes on to declare, direct, and appoint "that neither the said annual income and proceeds of my estates, nor the fee thereof, shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds, or to the diligence of his or her creditors." Here it will be observed that the truster deals with the income of his estates, and the capital or fee, as two different things; and it must be assumed that he understood the difference between these two things. Clear it is, therefore, that, so far as I have yet gone, the truster intended that his daughter's right to the income, and to the capital or fee of his estate, should be equally full and complete, although with regard to both he excluded the *jus mariti* of his daughter's husband and the debts, deeds, and diligence of her creditors. How far, if at all, he could by the mere use of these words exclude the debts, deeds, and diligence of creditors is a different matter, but it is at anyrate clear, I think, that such an exclusion, so attempted to be imposed, could not change a fee, assuming one to be vested in the truster's daughter, as he expressly says it was intended by him to be, into a mere life interest. And just as little do I think it can be maintained that the fee so expressly spoken of by the truster was a mere fiduciary fee in his daughter on behalf of her children, for in that view it would have been absurd to protect it, as he does, from the *jus mariti* of his daughter's husband, or the debts, deeds, and diligence of her creditors. Neither her husband's *jus mariti* nor her creditors by any mode of diligence could possibly affect a fiduciary fee which, indeed, could be wholly valueless to them. It was a full beneficial fee, as distinguished from a fiduciary one, that it could in any view be necessary to protect by an exclusion of the husband's *jus mariti*, or the debts, deeds, and diligence of creditors.

But it is true that the directions of the truster in regard to the protection of

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his estates as vested in his daughter do not stop there, for he goes on to say that the same, that is, both the income and capital or fee, "shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with this direction." It is out of this part of the truster's deed that the difficulty—and I do not say that it is not one of importance—of the case arises. It is said that the object of the truster is here distinctly expressed, to the effect that his estates when they devolved to his daughter were to be an alimentary and inalienable provision for her during her life, and that his trustees were to make full provision to that effect in the conveyance or conveyances to be executed by them. This is quite true, but not more so than the truster had previously in the most unequivocal manner, as it appears to me, directed his trustees, on his daughter having a child born to her, to divest themselves by conveying to her and her children his whole estate, capital or fee, as well as income or annual proceeds. Surely this is not to be gone back upon and disregarded in order to carry into effect the subsequent declaration of the truster, that he intended his estates to remain an alimentary and inalienable provision for his daughter during her life. And to adopt such a course appears all the more inadmissible when the difficulty, or rather the impossibility without making a new settlement for him, of carrying the truster's supposed object into effect is considered. To convey his estates to Mrs Ross in life or for her alimentary use, and to her children in fee, would, according to my apprehension, be virtually making a new or different settlement for the truster than that which he has made for himself; and, after all, it would not, so far as I can see, indefeasibly secure an alimentary and inalienable provision for his daughter during her life, in regard, at least, to the moveable portion of the estates in question. Then, in regard to the creation of a trust, which was the only other mode suggested by which such an object could be carried into effect, that would be, still more obviously, making a new settlement for the truster. To create a trust in the face of the testator's express direction that the trust he had himself created should in a certain event, which has happened, be brought to an end, would not only be a violation of his settlement, and without precedent, but in the face of the judgment of the Court in the recent case of *Allan's Trustees v. Allan*, 11 Macph. 216.

The truster may perhaps have intended nothing more by the declaration in question than that it should appear for what it is worth in the conveyance or conveyances to be executed by his trustees in favour of his daughter; but if he intended something more I do not see how his intention can be carried into effect.

In these circumstances, I have found it impossible to adopt the conclusion to which the Lord Ordinary has come. The only course, I think, that can be followed is that which has been suggested by your Lordship in the chair.

LORD MURE.—I do not understand that there is any difference of opinion among your Lordships as to the rules of construction upon which this case must be decided. We are called upon to deal with a *mortis causa* settlement, and according to the ordinary rule, the intention of the testator as disclosed in the provisions of his settlement must be our guide in dealing with such a question as that which is here raised. The portion of this deed which we have more particularly to consider is the eighth purpose of the trust. It is of some length.

and, construing it according to the above rules, the question we have to consider is this—What has the truster here indicated to have been his intention relative to the bequest contained in this part of his settlement? Now, this intention must be gathered from the clause as a whole, and not from any isolated passage, however clear and distinct that passage may be. Because, if any particular passage is inconsistent with what appears to be the general purpose and object of the truster, or if the provisions of particular parts of a clause of this sort are inconsistent or even contradictory, they must, I apprehend, be construed and reconciled to the best of the ability of the Court when called upon to deal with them, in conformity with the general purpose and object of the truster as indicated in the whole of the clause. But where one part of a clause of this sort is inconsistent with the other another rule of construction comes into operation, which is this, that the latter part of the clause, if inconsistent with the earlier part, is generally held to prevail; and more especially is that the case if in the latter part of the clause there is a plain and distinct summing-up, as it were, of the general object the truster had in view, and a plain and distinct injunction to the trustees to carry out what he has told them to do in a manner consistent with, and so as to give effect to, his directions. If, therefore, the latter part of a clause contains a positive direction as to what the general purpose and object of the truster was, and appoints his trustees to carry that out, those instructions must, I conceive, be obeyed; and, applying this general rule to the construction of the eighth purpose of this trust-deed, I have come to the conclusion that the Lord Ordinary has taken substantially a sound view of that eighth purpose.

I do not intend to trouble your Lordship by going over again the terms of this clause in detail. I have read it over frequently and carefully, and after having done so I have not been able to come to any other conclusion than this, *z.*, that the truster never intended to give the fee of his estate to his daughter. On the contrary, he has, I think, indicated a distinct intention that her interest in the estate should be exclusively a *liferent* interest. In the earlier part of the clause he makes special provision of the *liferent* to her up to the period of the birth of her first child, and then, on the birth of the child—and this is the part of the clause which has given rise to the present question—he directs his trustees to convey and dispone to his daughter and her children the whole residue and remainder of the estate. It is unfortunate that the clause does not contain any express mention either of the *liferent* or of the fee. The insertion of a very few words here, such as to his “daughter in *liferent* only and to her children in fee,” would have tended to prevent all dispute; but those words are not there, and as it stands the clause is open to the construction that under the general word “residue” the fee of the estate may have been intended to be conveyed to the daughter. The question at issue, however, cannot, I conceive, be decided by the provision of this part of the clause alone. We cannot stop here, I say—“There is a conveyance of the fee, and we must therefore so construe the clause;” because, when we come to the latter part of the clause—which contains the instruction the party gives to his trustees, we find that the truster makes use of declarations which appear to me to be inconsistent with the existence of any fee in the daughter, or of any intention on his part that the fee should be given to the daughter. For he appoints and declares that “neither the said annual proceeds and income of the estate, nor the fee thereof, shall be subject to the *jus mariti* or right of administration of any

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husband of my said daughter, nor shall the same be subject to his or her debts or deeds, or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with these directions." Now, this, as I read it, is a distinct declaration and direction that the daughter's interest is to be a *lifereit* interest. It is to be an alimentary provision during her lifetime, and the provision, such as it is, is to be inalienable; and there is also a positive declaration that the fee of the estate shall not be subject to her own or her husband's debts, but shall be free from both. But as I understand the judgment proposed by the Lord President, the fee of this estate will be subject to the debts of those parties. The daughter will be prevented from making a gratuitous disposition of the estate, but it will be subject to her onerous debts and deeds, as it was in the case of Lady Massy, which was referred to in the course of the discussion. Now, the words that appear to me most distinctly to indicate the intention of the truster are the words "alimentary and inalienable provision for my said daughter during her life;" and what is that? It is nothing more or less, as I read it, than a *lifereit* provision to the daughter. It is not to be available for her debts; and construing the conveyance of the residue in consistency with the directions given, and with the positive declaration that her provision is to be a *lifereit* provision—an alimentary and inalienable provision for her during her life—I think it would be a violation of the intention of this truster to oblige the trustees to execute any conveyance which would have the effect of exposing the estate to the diligence of this lady's creditors or to her own onerous deeds.

The views of the Lord Ordinary, as indicated by him, appear to me to carry out what I think was the intention of the truster, by giving the *lifereit* alienably to the mother and the fee to the children. I have the less hesitation in adopting this course, because on studying the case of Lady Massy I find the opinions of several of the Judges were very materially influenced by the fact that there was nothing in the wording of the provision in favour of Lady Massy which could be held to import that anything in the shape of a mere *lifereit* was to be conferred upon her, while in other parts of the deed there were *lifereit* provisions given to others of her relatives, shewing that the man of business who prepared the deed knew how to word the settlement so as to give a *lifereit*. But here, instead of there being an absence of any declaration as to a *lifereit*, there is a most express declaration, as I read it, of an alimentary provision to the daughter during her lifetime; and this, coupled with the further declaration that it is not to be subject to her debts, leads me to think that this gentleman never intended that the fee of the estate should be settled upon his daughter.

I think, therefore, that the construction which has been adopted by the Lord Ordinary should prevail. Reference was made in the discussion to a case where instructions given to trustees to make an entail were coupled with a direction to adopt a particular entail, and yet the trustees were held to be entitled to disregard that direction—and why? because it was coupled with words which shewed that the intention of the testator was that his estates should be dealt with as settled as an entailed estate, and if the direction as to the mode in which an entail should be made had been carried out that declaration of intention as to part of the testator would have been frustrated and defeated. I allude to the case of *Graham v. Lord Lynedoch's Trustees*, March 15, 1853, 15 D. 538, after

wards affirmed in the House of Lords, 2 M'Q. 295, where the instruction was that the trustees should purchase land to be entailed in terms of a particular entail which was mentioned, but the words were added—"so as to make it a valid and effectual entail according to the law of Scotland." Now, if the direction to make the entail in terms of that particular entail had been adopted it would have been a bad entail according to the law of Scotland, and this Court held, notwithstanding the specific direction to make the deed in terms of the particular entail, that the trustees were bound to disregard that entail and make what was a good entail by the law of Scotland, so as to carry out the intention of the truster. The opinions of Lord Colonsay, Lord Fullerton, and Lord Ivory with regard to that case appear to me to be directly applicable to the question we have here to decide.

On these grounds I concur with Lord Deas in thinking that the interlocutor should in substance be adhered to.

LORD GIFFORD.—I think that the first question in this case is—What was the real wish, purpose, and intention of the testator, the late William Walker Gibson, in regard to the disposal of the free residue of his estate, heritable and moveable; what did he really mean should be done with that residue; and what was the precise measure and extent of the rights and powers in and over that residue which he truly intended should be conferred upon his daughter and her children respectively? I think this is the first question, and in putting it I purposely avoid the use of technical language, seeking only to get at the mind and will of a non-professional testator.

It is also of importance that this first question—What did Mr Gibson really wish to be done with the residue of his estate?—should be kept perfectly separate and distinct from the other questions in the case, which are—How far can the trustees or the Court give effect to Mr Gibson's intention consistently with the deeds which he has appointed to be executed? or, how far and to what extent ought the Court to give effect to the intention disregarding or superseding the special machinery which the testator contemplated employing? and still further, What ought to be the precise form and terms of the deeds of conveyance of other deeds which the trustees are now to be ordained to execute? All these questions are important, and some of them may be difficult, but none of them arise until the primary question be answered—What was the will and mind of the testator in reference to the disposal of the residue of his estate?

Now, in determining what was the will and mind of the testator—the *voluntarius testatoris*—I am of course confined to the words of his trust-deed and settlement. I must gather his meaning and intention from the words which he has employed, taking his deed as a whole, and reading and comparing together all its parts. I do not leave out of view, also, that as the deed bears to be prepared by professional conveyancers, and as it contains technical words in many of its clauses, the canon of interpretation may apply, that where technical words are used they are to have their technical meaning, unless it appears from the context or from the deed otherwise that a different signification or a meaning more or less non-technical was intended. At the same time, I must say that in this case I feel that the rule that technical words must be read technically has very slight application, for it is impossible to read the deed without feeling that the conveyancer has not used legal and technical words with appreciation of their exact legal force and meaning, or with any accurate consistency, so as give them their

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strict legal effect. The deed in the important clauses now under construction is framed in the most loose manner, and I feel at liberty to gather from the whole clauses what Mr Gibson's real purpose was, taking the whole expressions, technical and non-technical, together, as the words of the testator himself, and fortunately, as I think, the testator, by the common and non-technical words which he has used, I think, for the very purpose of explaining his desires, has made his meaning and intention perfectly clear.

It is also to be kept in view that in construing a testamentary deed—in reading the purposes of the trust for the purpose of finding the intention of the testator—we are not bound by the rules which give certain legal effects to certain words when they are used in a deed of grant, a deed of conveyance, or even a deed of obligation. The question is not, what would be the legal effect of a deed of conveyance granted to Mrs Ross and her children in such-and-such words? On the contrary, the question is, what did the testator mean? and it is for the Court to select the words which will give full legal effect to his intention, whatever it was. In short, to use the words of the Lord President in *Graham v. Lynedoch's Trustees*, 15th March 1853, 15 D. 564, the case belongs “to that class of cases which have been treated as instructions to trustees, and to be ruled by the intentions of the maker—not to that class which have been treated as operative deeds of conveyance, to be ruled by the technical structure of the clauses.” Even if there were a conflict between the prescribed as indicated terms of the deed to be granted, and the declared intention of the truster, I think the latter must prevail, as it did in Lord Lynedoch's case. In that case there was an express direction to settle certain fee-simple lands under all the conditions, provisions, and “clauses prohibitory, irritant, and resolute,” contained in an existing deed of entail specially referred to, so as to make a valid entail by the law of Scotland. It turned out that the entail referred to was defective in the irritant clause, and the Court held, and that judgment was affirmed in the House of Lords, that the direction to follow the terms of the bad entail must be disregarded, and that, notwithstanding such direction, a good and valid entail in different terms must be executed by the trustees. In the present case, however, I think no such conflict arises, and the directions of the testator are not inconsistent with his declared intentions.

Now, taking the trust-deed, let us see how Mr Gibson wished the residue of his estate to be disposed of. In the first place, and while the trustees themselves hold the residue in their own hands, there is and can be no difference of opinion. While Ellen Percival Gibson, the truster's only child, is in minority, the trustees are to apply the whole or such part of the annual proceeds as may be required “for her maintenance, education, and upbringing.” Next, when Ellen Percival Gibson is married, and apparently when she attains majority if that should happen first, the trustees are to pay over to her “for her alimentary use,” the whole annual proceeds or income of the residue of the trust-estate; and lastly, and it is here the difficulty begins, when a child is born of the marriage of the testator's daughter, the testator directs his trustees to convey the whole residue to his daughter, and to the child or children of her marriage, and of any subsequent marriage into which she may enter, equally among them, with a power of division to the daughter and a destination over to the testator's heirs whomsoever.

Now, if the deed had stopped here there might not probably have been much doubt as to the duty of the trustees. I think that they would have fallen to execute the conveyance in the very words or substan-

tially in the words used by the truster, whatever the effect of such conveyance would have been. There would have been hardly room for construction or for reaching this intention of the testator and imposing restrictions or using different words from those of the testator,—the direction could be carried out *in terminis*, and there would have been little doubt as to the legal effect of a conveyance in such terms.

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But the case is very different when the testator goes on to declare and provide, in what appears to me to be the most express and explicit terms, what his purpose is, and what he intends and wishes to effect and to be fully secured by the terms of the conveyance or conveyances in favour of his daughter and her children, and it is in this clause, I think, that we find the testator's true intention, for the clause is introduced for the very purpose of telling what that intention is, and for nothing else. The words are—"And I hereby declare and direct and appoint that neither the said annual proceeds and income of my estates, nor the fee thereof, shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with this direction." This formal declaration of intention is not expressed in technical language, but to my mind it is perfectly clear and absolutely unambiguous. How it is to be carried out is quite another question, to which I will come immediately, but what the testator intended to be done I really have never been able, after the first consideration of the clause, to entertain any doubt.

In the first place, he meant the residue to be secured "as an inalienable provision for my daughter during her life." Does not this mean that the daughter shall have no power to sell or alienate, or squander and dissipate the residue? Does not the testator say so? What other words could he have used to make clear his will? The residue is to be secured inalienably, not for a year or two, but "during my daughter's life." Whether this can be done effectually is not the present question, but I have not the shadow of a doubt that the testator meant this to be done. Again, the provision is to be alimentary, that is to say, the daughter herself is not to be allowed to have power to anticipate it, or to touch the capital, or to dissipate the fund, but is only to get it term by term, to be available for her termly maintenance. The testator expressly says so. What other words could he have used to give utterance to his wishes? Then the husband's *jus mariti* and right of administration are excluded. No one will deny that this is not aptly and appropriately expressed, legal and technical words being used in their legal and correct application; but the testator in his anxiety reduplicates his words, for he declares that neither the annual proceeds nor income of his estate nor the fee thereof (for so only can I read his words) shall be subject to the debts or deeds, either of his daughter herself, or of her husband, present or future, or to the diligence of "his" or "her" creditors. This anxiety may possibly be in vain,—I shall come to that presently,—but I can hardly think that there is much room for two opinions as to what this anxious father meant. Let the residue of my estate be dedicated, he says—yes, let it be conveyed to my daughter and her children, but, oh, take care that it be conveyed and secured that her husband or husbands shall not touch it, either through *jus mariti* or through right of administration; that my daughter herself

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shall not alienate it, or delapidate it, or put it away during her whole life; that her creditors shall not touch it; that her own debts and deeds shall not affect it; that the income of it shall not be anticipated and antedated, but shall always be termly forthcoming for the supply of her termly wants; that the capital shall be preserved intact—"inalienable"—during my daughter's life, and shall then be divided in the proportions that she may fix among the children or descendants that may be procreated of her body. I despair of ever estimating the force and the meaning of words if this is not the interpretation of what the testator has said—said, I mean, in the clause I am considering. Whether he contradicts himself in another clause, or says something inconsistent with his intention, under a delusive notion that he is carrying it out, may be another question. But it is a still further question how far the law will give effect to his wishes, but reading this declaratory clause as the expression of an unprofessional man's wishes, to me it is as clear as daylight what those wishes were.

I wish to remark, in the next place, that there is nothing either illegal or immoral in the testator's intentions, interpreted in the sense in which I read his will. There is nothing either illegal or improper or incompetent in a testator making his whole estate, or his whole residue, a fund for the alimentary use of his daughter, inalienable by her, and not affectable by her debts and deeds or by the diligence of her creditors, and exclusive of her husband and his creditors, the capital to be divisible at the daughter's pleasure among her issue. This is done every day, and the only questions, in my view, attending with any difficulty are, how is it to be done, and how far is it to be done in the present case?

But, before going to these questions, I must say that I am not moved in my interpretation of the trustor's will by any apparent contradictions or inconsistencies in the words he has used. No doubt he directs a conveyance or conveyances of the residue to be made to his daughter and her children. But he is not here prescribing the technical terms of the conveyance. He is merely stating who are to be the beneficiaries. A conveyance to the daughter in life for her life use alienably and alimentary and her children in fee, with a power of apportionment to the mother, would, I think, completely satisfy in every reasonable—indeed in every legal—sense the direction of the trustor, for such a conveyance would still be, in the strictest sense of the trustor's own words, a conveyance to the daughter and to the child or children of her marriage or of any subsequent marriage. They would be the dispositive in the deed. I can see here no contradiction—not even an inconsistency. And so, when it is said that neither the said income of my estates nor the fee thereof shall be subject to the *jus mariti* or right of administration of my daughter's husband nor be subject to his or her debts or deeds, this does not in the least mean that the absolute fee is to be in the daughter. The reverse is implied. Undoubtedly the daughter is not to have the power of affecting or alienating the fee by her debts or deeds. The words may be unnecessary, but it is as if the testator had said, wherever you put the fee take care that my daughter and her husbands shall not have the power of absolute fiars; the terms of the legal deeds the lawyers will adjust.

Suppose that the instruction to grant conveyances instead of preceding followed the declaration of intention, and had been introduced with such expression as this—"And in order to carry out my intention as above expressed I direct my trustees to convey to my daughter and her children

making in the conveyance or conveyances full provision, which shall be effectual for legally carrying out my intentions." In such case could it have been said that the direction to convey was inconsistent with the pre-expressed intention. But I think it does not matter which comes first—whether the testator first expresses his intention and then provides machinery which he supposes will carry it out, or whether he first provides the machinery and then declares and limits the purposes for which it shall be used. In either case the result is the same, and when the inquiry is, what did the testator mean? you are surely not to look so much to the machinery as to the express words which the testator has employed for the very purpose of declaring what his meaning was.

And so, even if there were an irreconcilable inconsistency between the expressed intention and the prescribed machinery, still if the question only is asked, what was intended? I discard unhesitatingly the unsuitable machinery, and look to the express will alone. A mistake as to the suitability of the machinery will never derogate from what the testator expressly says he meant to do. This was the principle of the decision of the House of Lords in Lord Lynedoch's case, a decision which seems to me to have a direct bearing on the present case.

This brings me to the only remaining questions in the case. Having ascertained what the testator's wishes really are, how and how far are these wishes to be carried into legal effect by the trustees under the direction of the Court?

The residue of the estate consists both of heritable and of moveable property, and I assume that the testamentary trustees are now to divest themselves thereof by conveyances in favour of Mrs Ross and her children. The truster has directed such conveyances to be granted. Whether the direction of a truster must always be carried out *in terminis* when the effect of so doing will necessarily defeat his carefully expressed intention, may well be doubted, and the opinions of the Judges, and indeed the decision in Lynedoch's case, rather lead to the conclusion that where a testator has clearly expressed his will and intention, and then professedly, with the object of carrying out that intention, has directed his trustees to do something which (although the testator did not know it) would really defeat the intention, the Court will vary the direction, so as to save and carry out the testator's purpose and intention. The details of the machinery must yield and be accommodated to the object in view. In the present case, however, I think there is no necessity for disregarding any detailed direction of the truster, for I think his purpose can be carried out by means of conveyances to his daughter and her children, provided such conveyances are expressed in appropriate terms.

The exact terms of the deeds to be granted are not before us, for no drafts have been prepared; but I may say, in general terms, that if these conveyances bear to be in favour of Mrs Ross in life only for her life interest alimentary use alienably, exclusive of the *jus mariti* and right of administration of her present or of any future husband, and to her children in fee, with a power of apportionment in her favour, and a declaration (and here I would take almost the words of the trust-deed) that neither the annual proceeds of the subjects conveyed nor the fee thereof shall be subject to the debts or deeds of Mrs Ross or her husband, present or future, or to the diligence of his or her creditors, and so on—then such conveyances will validly and sufficiently carry out the testator's inten-

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So far as relates to heritage, I do not think there is much, if indeed there is any, difficulty. Such conveyances will not give Mrs Ross the fee of the heritage, only a *liferent* alimentary and exclusion of her husband, and the fee will be to the children whether they are named or not. It will make no difference in the essential right even though a fiduciary fee be held by the mother for behoof of her children. Such fiduciary fee would not expose the rights of the children to any risk, and the express declarations and provisions added would secure the interests of all parties.

But even as to the moveable estate, I am of opinion that the conveyances thereto should be in precisely the same terms and with the same declarations and provisions. This is the will of the testator, and I see no legal objection or incompetency in its being fully and literally carried out. Suppose the testator to be now living, and to desire to divest himself by conveyances, *inter vivos*, in favour of his daughter Mrs Ross and his grandchildren, would there be any legal objection or incompetency to his expressing himself in such *inter vivos* conveyances in the terms proposed? I think not; and if so, may not Mr Gibson's trustees now do what Mr Gibson, if alive, might have done himself? I think they may.

It is true that such conveyances of moveable subjects or of moveable estate will not protect the ultimate rights and interests of Mrs Ross' children, or even the rights and interests of Mrs Ross herself, so well or so effectually as could be done in the case of the conveyances of the heritage. But this cannot be helped, as the testator has chosen to direct that stranger trustees shall not be interposed for the protection of the rights and interests of those concerned. It may be that after the conveyances are granted Mrs Ross may set herself to defeat her father's intentions. She may get the moveable subjects or the cash into her own hands, and by disposing of the subjects or by spending the cash she may disappoint her children, or she may, notwithstanding the exclusion of her husband's *jus mariti*, hand over to him money or funds, and if they become mixed with his separate estate, or if he deals with them as owner, they may become subject to his debts or deeds. But this is just a risk against which the testator has not chosen to provide, perhaps because he had confidence in his daughter that she at least would respect his wishes, and did not need to be fettered by being put permanently under trustees.

For rights of *liferent* and fee, even in moveables or in money, may be constituted quite legally and quite well without the interposition of a trust and without the nomination of trustees. The interposition of a trust is not required for the constitution of such rights, but only for their security—only to afford a safeguard against their being defeated, and against the rights of the respective parties being disappointed. A sum of money or a corporeal moveable may be handed to one person for his or her *liferent* use *alienarily*, and for another party in fee; or the sum or subject may be given or handed to the *fiar*, subject to the *liferent* of another. There is nothing illegal or incompetent in such an arrangement, and no trustees are required, only without trustees there will be the risk of the solvency of the person who has the custody and control of the money. But the fact that the right of the children, or part thereof relating to moveables, may possibly be defeated by the acts of Mrs Ross and her creditors, is surely no

reason why the Court itself should at once and for ever defeat the testator's intentions altogether, both as to heritage and as to moveables. No. 163.

I am of opinion, therefore, that Mr Gibson's trustees are now bound to grant conveyances of the whole residue of the estate, both heritable and moveable, in favour of Mrs Ross in liferent only, and not to her in fee at all, and in favour of her children in fee, in terms similar to those I have suggested, with all the declarations, powers, and restrictions which the testator directs; and I agree in this respect, and indeed in all respects, with the opinion expressed by Lord Deas.

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The cardinal difference, as I understand it, between the opposing views in this case is, that while Mrs Ross contends that the conveyance shall give her at once the absolute fee of the whole estate, her children contend that these dispositions or conveyances shall only give her a liferent *à l'enfant*, and shall give to them (the children), and to them alone, the fee of the whole. I agree with Lord Deas and Lord Mure in thinking that the contention of the children is well founded. I think that to give Mrs Ross the fee, and to the children only and merely a *spes successionis* (even if protected) will not be to carry out the intention of the truster, but directly to defeat it. If Mrs Ross gets a fee, she may alienate or sell the whole estate to-morrow, or at her own pleasure, while the testator says that it shall be inalienable "during my daughter's life." If she gets a fee the whole estate will be exposed to her debts and deeds, and perhaps, in certain circumstances, to the debts and deeds of her husband, while the testator expressly says it shall not be affected by such debts and deeds, and so on. I read these restrictions, which I have no doubt are the work of the testator, as pointing quite clearly to a liferent, and not to a fee, and I think the dispositions and conveyances should be limited accordingly. I am not careful to decide at present to what risks such conveyances may expose the beneficial rights of the parties; but I think that the trustees and the Court ought not to destroy rights altogether, simply because the testator has exposed them, or some of them, to risk and danger.

LORD SHAND.—I need scarcely say that the question of construction of this deed is attended with considerable difficulty. That is sufficiently attested by the fact that your Lordships are equally divided in opinion. After full consideration, however, of the terms of the deed, and having had the benefit of the argument and the views of your Lordships, I am of opinion that the effect of the deed was to give to the daughter of Mr Gibson the fee of the estate exclusive of the *jus mariti* and right of administration of her husband, with a right of protected succession in favour of her children—with this result practically, that while Mrs Ross will be vested as *fiar* with the right of dealing with the property as the absolute owner of it, this right will be subject to the condition that she cannot defeat or prejudice the children's right of succession by any merely gratuitous alienation, whether by deed *inter vivos* or *mortis causa*.

I concur with the observations of two of your Lordships, from whom I differ otherwise in opinion, that the Court must be guided by what they find to be the intention of the truster on the face of the deed, and also, that in ascertaining that intention you are not to take one part of this clause, and that alone, but to take the whole of the clause which has been the subject of so careful examination, and, indeed, to keep in view the whole provisions of the deed. But, adopting that principle, I think it leads to the result I have already stated.

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My Lords, I think the scheme of this settlement is not unimportant in enabling us to reach the true result. In the first place, the testator provides that until his daughter shall attain majority or marriage she is only to receive for her benefit either the whole or such part of the proceeds of the estate as might be required for her maintenance, education, and upbringing. In the next place, there is a direction that upon her marriage the trustees are to pay over to her not merely such part of the annual income of the estate as they may think necessary, but the whole income. And, in the third place, upon the birth of a child I think the truster intended to give her something more—an additional advantage—to put her in possession of his estate as her own, giving her children a right of succession to her, subject to her power of apportionment. It has been said there was no reason why the existence of a child should lead to that result, but I can very well understand how a father, looking at these three stages in the life of his daughter, may very properly and reasonably provide that the existence of a child shall lead to this result, that his estate shall then be parted with, and his daughter be put in possession of it.

Before dealing with the clause itself, I have one observation to make with reference to the view which weighs with the minority of your Lordships, and I think it is an observation of considerable weight. The result at which your Lordships have arrived is this, that it was intended by this deed to give the daughter simply a right of life-tenant, and to give the children a right of fee. If that ordinary result was what was to be effected by this deed, I can only say that it could have been attained by the employment of very familiar words—words in daily use, and the effect of which is known to every conveyancer—by merely stating that the estate was to be conveyed to the daughter for her life-tenant use only and to her children in fee. I cannot see any good answer to the view that this simple and well-known form of expression would have been used if life-tenant and fee had been intended. Taking the clause, however, as we have it, I can only read it as your Lordship in the chair has done, as giving a right of fee to the daughter. In the first place, the first portion of the clause directs the whole residue and remainder of the estate to be conveyed. It is said we have not the word “fee” there. I think the word “fee” would have been out of place in that clause. The proper way to convey an estate is to direct the estate itself to be conveyed, and the very use of the term “residue or remainder of the estate” necessarily implies a fee unless it is limited in some way. The first part of this clause directs that this estate is to be conveyed to the daughter and to the child or children of her marriage. Those words “to my daughter and to the child or children of her marriage” I think necessarily give to the daughter a fee; and the effect would be the same whether the conveyance were to her and to the child or children of the marriage generally or to children *nominatim*. I do not think the addition of children *nominatim* would make any difference, for, as I read the clause, the true import is that there is to be a disposition to the daughter, whom failing, to the child or children of the marriage, or of any subsequent marriage into which she may enter, subject to a power of apportionment. The only other way of reading the clause is to read the word “and” as copulative, in which case it would be to the mother and children of the marriage and of any future marriage, in equal shares and with equal rights, unless, as regards her children, Mrs Ross should otherwise appoint as to their shares. That is plainly out of the question, and therefore I take it

that this part of the clause, concluding with the words "residue or remainder of my estate," plainly gives the daughter a fee. No. 163.

The next part of the clause contains a declaration that this fee shall not be subject to the *jus mariti* or right of administration of her husband, nor to his or her debts or deeds, or to the diligence of his or her creditors. There, again, is the strongest corroboration of what has gone before—that the fee has been given to the daughter. The declaration is that the fee shall not be subject to the *jus mariti* of her husband, but unless the father had previously given the fee, and meant to give it to his daughter, he would not have thought of declaring that it was not to be subject to the *jus mariti* of her husband. It was argued that he may have meant something of the nature of a fiduciary fee; but I think that argument is destroyed by the other consideration which has been pressed, that the father was waiting here till children should be born, for if the children were to be the fiars there was no longer, after the birth of a child or children, the necessity for a fiduciary fee in their mother. If the truster was waiting till children were born in order that they should be the fiars, this clause, in that view, would have no meaning whatever. Accordingly as you advance in the clause both parts make it clear that a fee was given to the daughter. I quite feel that the words which follow present a difficulty, and a difficulty which has led to the difference of opinion here, and I do not disguise that a serious question is raised by the declaration that "the same shall be an alimentary and inalienable provision for my said daughter during her life." But in regard to these words, in the first place, let me say this, that in the absence of the trust which the truster directed to be brought to an end, even the liferent right would not be protected against Mrs Ross' own deeds or the diligence of creditors. That seems to me to follow from the recent decision in White's Trustees (*supra*, p. 786). It is said that the intention of the testator is to be carried out, that it is plain he meant this should be an alimentary and inalienable provision, and that effect must be given to his intention. That cannot be after the trust comes to an end, even as regards the liferent right. But further, what about the moveable estate we are here dealing with? The trustees have given us a statement of the funds, and apparently there seems to be about £15,000 in cash to be handed over, and which the trustees are entitled to hand over, to this lady. It is said this estate is declared to be an alimentary and inalienable provision for the daughter during her life, but how is it proposed that the £15,000 shall be so treated, consistently with handing it over to her? It is said you shall give effect to the intention of the truster, and that whatever machinery is required to do that must be imposed. The only machinery that could by possibility do that would be the creation of a trust. You cannot give this lady £15,000 and at the same time make it an alimentary and inalienable provision for her, because the moment she gets the money she is entitled to dispose of it, and I do not understand any of your Lordships to have suggested a course that would prevent that. And so, next, advancing to the heritage, I think we are very much relieved of any difficulty that might arise in regard to it, and at the same time find a ready answer to the argument referring to this part of the estate, by the fact that really a great portion of this estate cannot be put into the position in which it is said the truster intended it to be. I rather think it appears from the deed that the truster did intend that in some way his estate should be alimentary and inalienable; but, upon the other hand, I find it as clear as words can make it that he intended at the same time, first, that the trust should come to an end; and, secondly, that

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while there should no longer be a trust, there should be a fee conveyed to his daughter. If those two things are to be done, if you are no longer to have a trust, and if you are to have a fee conveyed, and if it be inconsistent with that to create an alimentary and inalienable provision, why should the fee be taken away and the trust continued to carry out the latter part of the deed? The truster seems to have had some crude notion that though the fee was to be thus conveyed it could in some way be protected like an entailed estate. In that he was wrong. But it would be going against the intention of the truster to say that while he said there was to be a fee, and that the trust was to come to an end, you are, in order to make this provision inalienable, to take away the fee, and, if necessary, introduce a trust in order to work out the other part of his intention. I think that would be injustice to this lady, who has a right to the fee; and I think the Court is not entitled, in order to work out the subsequent part of the clause, to go back upon that which the truster has quite distinctly said. I have only further to mention an additional reason that leads me to the conclusion at which I have arrived, viz., that a deed which would give this lady the estate in life for her life for use alienably, and to her children in fee, whom failing to her father's heirs and assignees whomsoever, would have this extraordinary effect, that supposing the children who are now alive should die and that she had no other children, this estate would go entirely beyond her control—that is to say, the truster's only child would have no power of disposing of or dealing with it in any way whatever, and it would go to heirs and assignees of her father unknown. I think that circumstance strongly confirms the general view that what this gentlemen meant was that after his daughter's marriage and the birth of a child this estate should be given to her, to be her own, but with a right of succession in favour of her children, which she could only defeat by onerous deed—and I may say I think this right of succession is to be directly inferred from the power of apportionment which is given.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Find that at the death of the truster, the said William Walker Gibson, his only child, Ellen Percival Gibson or Ross, was a married woman, and that a child had been born of the marriage and is still in life, and that another child has since been born of said marriage: Find that in respect of the birth and existence of a child of the marriage, and in accordance with the sound construction of the trust-disposition and settlement of the said William Walker Gibson, the nominal raisers and pursuers as trustees under said trust-disposition and settlement are bound, after providing for the annuity of £400 per annum payable to the truster's brother, John Gibson, to convey and dispose the residue of the trust-estate to the said Ellen Percival Gibson or Ross in fee, but exclusive of the *jus mariti* and right of administration of her present or any future husband, whom failing to the children already born or to be born of her present or any future marriage, equally among them, also in fee, subject to the condition that the right of succession of the said children to the said residue, or to a sum of money equal to the value of the said residue, on the death of their mother, shall not be defeated or prejudiced by any gratuitous act or deed done or executed by her, whether *inter vivos* or *mortis causa*, but with power to the said Ellen Percival Gibson or Ross to divide the said residue or equivalent in money among her said children in such proportions as she may think fit, and failing children of the said Ellen Percival

Gibson or Ross then to the nearest heirs and assignees whomsoever of the said deceased William Walker Gibson, the truster: To this extent and effect sustain the claim of Ellen Percival Gibson or Ross and her husband, and repel the claims of the pursuers and nominal raisers, and of the curator *ad litem* for the pupil children of the said Ellen Percival Gibson or Ross, and decern: Reserve for future consideration the claim of the marriage-contract trustees of the said Ellen Percival Gibson or Ross and her husband: Remit to the Lord Ordinary to proceed further in the cause as shall be just, and consistent with the above findings: Reserve all question of expenses," &c.

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J. & R. D. Ross, W.S.—MORTON, NEILSON, & SMART, W.S.—GRAHAME BINNY, W.S.—
MELVILLE & LINDSAY, W.S.—Agents.

ALFRED DONALD MACKINTOSH, Pursuer.—*Kinnear—Murray.*
BARON ABINGER AND OTHERS, Defenders.—*Balfour—Keir.*

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Teinds—Heritable Right—Prescription—Possession.—A proprietor of lands who had no title to the teinds conveyed in 1766 several parcels of land to trustees for family purposes, "with the several manor-places, milns, teinds, &c. belonging to and on the said respective lands above disposed, and contained in the particular charters and infestments thereof." The trustees, as directed by the truster, executed a conveyance in 1772 to a beneficiary in the same terms. The subsequent titles contained no mention of teinds. The proprietors did not pay teind to any titular, but they submitted to localities in 1837 and 1862, made on the footing that they had no heritable right to the teinds. In an action raised by the heritor in 1875, for reduction of the decrees of locality, and declarator of his heritable right to the teinds, *held* (1) that it was competent to ascertain by examination of the previous titles, though beyond the prescriptive period, whether the truster had a right to his teinds in 1766; (2) that as he had no such right, the trust-deed conveyed none.

Observations on the possession necessary to establish a heritable right to teinds.

THIS was an action by Mr Mackintosh of Mackintosh, concluding for reduction of two decrees of locality of the parish of Kilmonivaig, dated in 1837 and 1862, and for declarator that the pursuer had a heritable right to the teinds of his lands of Brae Lochaber, commonly called Glenroy and Glenspean, in that parish, and that new allocations should be made as for 1834 and 1861 downwards. The Lord Advocate, the minister of the parish, the presbytery, and the other heritors of the parish, were called as defenders.

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Lord Ruther-
furd Clark.
Teind Clerk.

Defences were lodged by Lord Abinger and Mr Ellice, two of the heritors.

The pursuer averred that he had a heritable right to his teinds in virtue of his titles, and that by the decrees sought to be reduced his lands had been erroneously localled upon as if he had no heritable right. The defenders maintained that the pursuer's titles did not instruct a heritable right, and that as he had not alleged such a right in any of the localities of the parish he was not in any view entitled to decree in terms of the conclusions.

The first title founded on by the pursuer was a trust-disposition and settlement by Æneas Mackintosh of Mackintosh in 1766, conveying lands in several parishes, and lastly, "the lands of Brae Lochaber, commonly called Glenroy and Glenspean, lying within the parish of Kilmanivach and sheriffdom foresaid, with the severall manner places, milns, teinds, fishings, woods, sheallings, grazeings, priviledges, parts, pendicles, and

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 Mackintosh v. various annuities and provisions, and thereafter to convey the residue of
 Abinger, *et al.* the lands to the truster's nephew on his attaining majority, and a series of substitutes. The precept directed infeftment to be given by delivery of “an handful of grass and corn for the tythes.”

The trustees were infeft, and in 1772 conveyed all the lands in precisely the same terms to the truster's nephew, Æneas Mackintosh, afterwards Sir Æneas, who was infeft in 1776.

In August 1819 Sir Æneas executed an entail of his estates, consisting of several parcels of land in different parishes. The lands in question were thus described :—“As also All and Whole the towns and lands of Glenspean and Glenroy in Lochaber, viz. the lands of Bohunton, Kinkellie,” &c. “with the woods, fishings, houses, biggings, tofts, crofts, parts, pendicles, outsets, gleus, shealings, grazings, and universal pertinents thereof, lying within the lordship of Lochaber and shire aforesaid.” The only parcel conveyed with the teinds was certain lands in the parish of Laggan.

In September 1819 Sir Æneas was served heir in special to his uncle in the lands in question, and was infeft upon a precept from Chancery following upon the retour. In these deeds there was no mention of teinds.

In 1820 Alexander Mackintosh was served heir of tailzie and provision to Sir Æneas, and also heir-male in general, and he expedie in the same year a crown-charter of resignation and confirmation in favour of himself and the other heirs of tailzie, proceeding on the procuratories in the entail and in the trust-disposition of 1766, and confirming the trust-disposition, on which he was infeft, and also in 1822 granted a charter of resignation and confirmation in favour of himself and the other heirs of tailzie upon which he was infeft. In these deeds, and all the subsequent entail titles, the lands were described as in the entail, without any mention of teinds.

From the titles prior to 1766 it appeared that the proprietor was not infeft in the teinds of the lands in question at that time.

It appeared from the extract decree of locality of 1837 that the amount of free teind in the parish was £447 from the lands of four heritors, of which the sum effeiring to the lands of Mackintosh of Mackintosh was £374. The common agent reported—“This sum, therefore, of £447, 15s. 5½d. falls to be allocated upon the respective heritors of the parish *pari passu*, in the proportion of their different valuations for the augmented stipend due to the minister, none of the heritors having, or pretending to have, any right to their teinds (as far as has come to the knowledge of the common agent), except the Duke of Gordon and Alex. M'Donall, Esq. of Glengarry, who, as already stated, insist not on any privilege arising to them therefrom at present.”

It appeared from the same decree that there were several competing claimants for the titularity, none of whom had made good their claims, and none of the heritors paid any teind to the titular. In the locality Mr Mackintosh had to pay a large portion of the augmentation which he would not have had to pay if he had instructed a heritable right. The same thing happened again in 1862; but on that occasion all the other heritors except Mr Mackintosh and one other produced and established heritable rights to their teinds.

The Lord Ordinary assoilzied the defenders.*

* “NOTE.—The pursuer maintains that he has a heritable right to the teinds

The pursuer reclaimed, and argued ;—Long possession of teinds, with very little evidence of original right, was sufficient to exclude the titular.¹ No. 164.
All inquiry into prior titles was excluded.²

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The defenders argued ;—It was competent to look at titles beyond the prescriptive period for the purpose of ascertaining the true meaning of a conveyance.³ On a sound construction of the trust-deed the teinds were never conveyed by it. Besides, there had been no possession distinctive of the right.

At advising,—

LORD PRESIDENT.—The pursuer asserts a heritable right to the teinds of his in question in virtue of a title commencing in 1770, followed by possession. Apart from this prescriptive title he does not pretend any right.

“The original title on which the pursuer founds is a *mortis causa* trust-disposition, dated 2d December 1766, whereby Aeneas Mackintosh conveyed to trustees a variety of lands, including the lands of Brae Lochaber, ‘with the several manor places, milns, teinds, &c. belonging to and on the said respective lands above disposed, and contained in the particular charters and infeftments thereof.’ On this deed the trustees were infeft in 1770. The instrument of sasine contains no limitation such as exists in the disposition by reference to the previous charters and infeftments.

“In 1772 the trustees, in execution of their trust, conveyed the lands to Aeneas Mackintosh and a series of heirs. The description of the subjects so conveyed is the same as in the trust-deed, and the infeftment following on the disposition is the same as the infeftment of the trustees.

“The deeds which have been just mentioned did not contain any special description of the lands conveyed ; but the subsequent titles do so. The lands of Brae Lochaber are conveyed without the teinds, and no title subsequent to the trust-deed and the disposition by the trustees contains them.

“The defenders object to the dispositions of 1766 and 1772, that they are mere general conveyances referring to the previous charters and infeftments for the subjects which are actually conveyed, and they plead that they are explained by the subsequent titles, which contain a particular description and convey the lands of Brae Lochaber without the teinds. They farther produce the infeftment of the granter of the trust-deed, which shews that he was not infeft in the teinds of Brae Lochaber.

“The Lord Ordinary is of opinion that the defenders are right. The dispositive clause contains the measure of the subjects conveyed. Whether the teinds of Brae Lochaber were included or not depended on the previous charters and infeftments, and these shewed that the granter of the trust-deed was not the proprietor of them. The titles following on the disposition by the trustees shew that neither they nor the truster intended to convey the teinds of Brae Lochaber.

“Besides, in the opinion of the Lord Ordinary, the pursuer and his predecessors have not possessed the teinds under the titles on which they found. In the several localities they have been localled on as not possessing the teinds on a heritable right. It appears that there has been a dispute as to the titularity, and the pursuer alleges that he and his predecessors have never paid the surplus teinds to any one. But when they have been localled on on the footing that they have no heritable right, it seems to the Lord Ordinary to be impossible to hold that they have been possessing their teinds as the owners thereof.”

¹ Solicitor of Teinds v. Budge, May 4, 1797, Hume’s Dec. 455 ; Watt’s Trustees v. King, Nov. 10, 1869, 8 Macph. 132 ; Campbell v. Earl of Moray, 1770, M. Teinds, App. 4 ; Scott v. Muirhead, 1672, M. 15,638 ; Dunning v. Creditors of Tillibole, 1748, M. 15,659 ; Mansfield v. Robertson, May 26, 1835, 13 S. 832, 7 Scot. Jur. 382.

² Duke of Buccleuch v. Cunynghame, Nov. 30, 1826, 3 Ross, L. C., L. R. 338.

³ Earl of Dalhousie v. M’Inroy, July 20, 1865, 3 Macph. 1168.

No. 164. lands of Brae Lochaber, otherwise called Glenroy and Glenspean, in the parish of Kilmonivaig. On that ground he seeks to set aside the last two final decrees of July 12, 1877. of locality of the parish, because the lands have there been localled upon on the Mackintosh v. Abinger, *et al.* footing that there was no such right, and he also concludes for declarator that he has such a heritable right, and that all allocations of stipend must hereafter be made upon that footing.

Now, the title by which the pursuer says the right was conveyed dates from the last century. The first instrument is a disposition in 1766, upon which infestment followed, and there is another disposition in 1772 upon which also infestment followed. The first disposition is granted by Æneas Mackintosh, then proprietor of the lands, to trustees, and the obvious intention of the deed is to convey the truster's whole landed estate, consisting of various parcels, for family purposes. The disposition in that view may be called a general disposition of heritable estate, because, though the parcels of land are named they are not described at length as in the other titles. After describing all the parcels this clause follows,—“With the several manner places, milns, teinds, fishing woods, sheallings, grazeings, priviledges, parts, pendicles, and haill pertinenz belonging to and on the respective lands above dispoined and contained in the particular charters and infestments thereof.” It is obvious that this clause was intended to cover everything that there might be in any of the previous titles, and so vest it in the disponees. But the contention that it was intended to convey anything except what was in the previous titles cannot well be maintained.

The trustees, after being in possession for a few years, conveyed the same subjects to Æneas Mackintosh, the nephew of the truster, and their conveyance is exactly in the same terms, and the infestment which followed is also substantially in the same terms.

Now, the pursuer maintains that these instruments give him a good title to the teinds of these lands, and he has cited several cases which are very familiar to us, in which teinds have been held to have been impliedly conveyed. But I am not sure that these cases are in any way applicable, because in all of them the question was whether the disponent being the undoubted proprietor of the teinds had conveyed them along with the lands. But here it cannot be assumed that the party who granted the deed was the owner. If it had been shown that he was so, there could be very little doubt that this conveyance would be sufficient to convey the teinds. But it cannot be assumed from the deed that Æneas Mackintosh, the truster, was owner of the teinds, especially looking to the fact that it is a conveyance *intra familiam* for family purposes. It may remain a question of doubt whether he intended to convey any teinds whatever, and particularly those appertaining to the one parcel with which we are dealing.

It appears to me that in order to solve that question it is competent to look both at the previous and the subsequent titles. No doubt if we were considering what constituted the feudal progress upon which the pursuer founds, we should not be entitled to go beyond this deed, and if it were clear on the face of the deed that it was intended to be a conveyance of the teinds of this parcel of land I do not think we could go further. But on that matter the deed is, to the contrary, quite ambiguous, and we are all the more entitled to refer to the previous titles where the truster has himself expressed his intention to convey what was contained in the previous charters and infestments, and nothing else.

When we go back to the previous titles we find it as clear as possible that the granter had no right to the teinds. No. 164.

Again, when we look at the subsequent titles we find no conveyance of teinds in any title applicable to these particular lands. The disponee from the trustees who acquired his right in 1772 possessed on that title down to 1819, so that if he had a good title to prescribe there was abundance of time. But when that gentleman comes to deal with the estate and make up his title he serves himself heir to the truster, and so takes up the estate as it stood in him. He then obtains a precept from Chancery to infeft him under that retour, and the proper officers took the last crown-charter which was in favour of the truster for their guidance, and by their precept enabled Sir Æneas, the disponee from the trustees, to put himself in the position in which the truster stood in 1766; and what was that position?—the proprietor of Glenroy and Glenspean without the teinds. Thus, the first step which Sir Æneas took in making up his title with the Crown was to put himself in the position of proprietor without the teinds.

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In anticipation he had made an entail. Clothed with the crown-right he grants procuratory resigning the lands for new infeftment in favour of a series of heirs whom he subjects to the fetters of an entail, and in that procuratory no teinds of Glenroy and Glenspean are mentioned. Indeed, they could not be, because the entailer had made himself a crown-vassal in the lands without the teinds.

No doubt he had also acquired the right which was conveyed by the trust-disposition, and the next heir, Alexander Mackintosh, gets that right confirmed, and if the effect of that had been to give the teinds, the heirs of entail might have been entitled to take infeftment in the teinds as well as the lands, but they did not do so, and up to this time no one has attempted to do so.

The right therefore depends entirely on the clause in the disposition of old Æneas Mackintosh to trustees for family purposes. It is clear that clause only found a place there from his anxiety to embrace everything. But it is limited—and that is most important—by a reference to the previous titles. These shew that there was no right to the teinds in the person of the granter, while the subsequent titles shew that none of his successors imagined that they had or could convey to others any such title.

If we take into consideration as a third element the state of the possession,—here speak, not of the forty years' possession requisite to fortify a title, but of the possession as interpreting the title,—we find the possession to have been consistent with all the other titles, and inconsistent with the disposition to the trustees as now sought to be interpreted, because during the whole time the owner was localled on in the parish on the footing that he had no heritable right to his teinds.

Taking these three things together, I can arrive, with perfect satisfaction, at the conclusion that it was not intended by the disposition of 1766 or the infeftment which followed in 1772 to convey the teinds of Brae Lochaber. That is sufficient for the decision of the case. But I think it right to say that if the title had been good I should have had great difficulty about the possession. No doubt the proprietor was not called on to pay teinds to the titular. But he has been called on to pay a large proportion of them to the minister. The teinds in his hands were subject to the burden of stipend. But if they belonged to him they were subject to the burden to a much less extent. But he paid the

No. 164. full sum demanded on the footing that they did not belong to him. That was a most serious invasion by the party making the locality, and all concerned, on July 12, 1877. this gentleman's possession; for if he possessed the teinds in virtue of the Mackintosh v. Abinger, *et al.* deed of 1766, as conferring a good heritable right, he could have kept to himself a much larger share of them.

I agree with the Lord Ordinary on both grounds.

LORD DEAS.—The question in this case is whether the pursuer has instructed a heritable right to the teinds of his lands of Brae Lochaber, commonly called Glenroy and Glenspean.

The title founded on by the pursuer is a *mortis causa* trust-disposition and settlement executed by his predecessor, Æneas Mackintosh, on 2d December 1766, and instrument of sasine thereon, dated 19th and other dates in October 1770, and recorded in the Register of Sasines on 20th November 1770.

By that trust-disposition the granter (who left no family), on the narrative of love and favour for his friends and relatives therein named, "and for preventing all debates and differences about the succession to or management of my means and estate," conveyed a variety of lands belonging to him, and, *inter alia*, the lands of Brae Lochaber, commonly called Glenroy and Glenspean, in the parish of Kilmanivach and sheriffdom of Inverness, to Alexander Boswell of Auchinleck, Esq., one of the Senators of the College of Justice, and, failing him, to certain other persons named in succession, and their assignees, "as trustees, to the ends, uses, and purposes" thereafter set down, viz. for payment of the truster's debts, an annuity to his widow, and annuities and pensions to various other persons named in the deed, with power to borrow or sell so far as might be necessary, and a direction to convey the remainder and residue of the lands and estate thereby disposed to the truster's nephew, Æneas Mackintosh, and the heirs-male of his body, whom failing, to the truster's nearest heir-male whatever. In short, the deed was a mere *mortis causa* settlement for family purposes, and, as might be expected in such a deed, a clause was added bearing that the lands were conveyed "with the severall manner places, milns, teinds, fishings, woods, sheallings, grazings, priviledges, parts, pendicles, and hail pertinents belonging to and on the said respective lands above disposed, and contained in the particular charters and infeftments thereof." The object obviously was, by the use of general terms, to avoid the risk of omitting anything which might be contained or comprehended in the previous charters and infeftments in favour of the truster and his authors, and so to make sure that whatever he had a right to convey should be carried to his trustees for behoof of the beneficiaries under the deed.

The deed contained procuratory of resignation and precept of sasine in terms corresponding to the dispositive clause, the precept authorising infeftment to be given by delivery "of earth and stone of the ground of the said respective lands, the clapps and happers of the milns, an handful of grass and corn for the tythes, and of all other symbols usual and necessary in the like cases." The infeftment expedite upon the precept was, of course, in these terms accordingly.

Now, it is obvious to remark that the deed on which this infeftment followed does not enable us *ex facie* to know what teinds, if any, were thereby conveyed. The deed refers for that information to the previous charters and infeftments, and when we examine these previous charters and infeftments,—commencing with the charter by James the Sixth in favour of William Mackintosh of 6th

February 1621,—we find in them, indeed, the lands of Glenroy and Glenspean, No. 164. but we find no mention or conveyance whatever of the teinds of these lands. It is true the previous charters and infeftments might have been lost, and, if they had been so, a question would then have arisen, what was the presumption on the face of the trust-disposition of 1766 and infeftment thereon? But they are not lost, and that question, therefore, does not arise. July 12, 1877.
Mackintosh v. Abinger, et al.

I do not think it necessary, however, to affirm that if there had been possession of the teinds in question for the period of the long prescription in the unequivocal character of owner, such a title as that constituted by the deed of 1766, and infeftment thereon, might not have been sufficient. But it is essential to keep in view, that from the date of the deed of 1766 down to the present time, embracing the whole of the prescriptive period, the pursuer and his predecessors have been paying a heavy burden of stipend to the minister out of these teinds, viz. £55 or thereby, prior to 1837, and £232 or thereby since that date, for which sums they were not liable if they had had a heritable right to the teinds. Coupling this with the fact that there was no titular in the field claiming the surplus teinds, and no known titular to whom, supposing teinds to be exigible, they could have been paid, I do not think the possession, which has thus consisted solely in the surplus teind being left undrawn, can be held to have been possession of the teinds in the character of owner, of the unequivocal kind necessary to exclude all reference to the previous charters and infeftments, and to require us to construe and give effect to the deed of 1766 as if it had been an *ex facie* absolute conveyance of the teinds in dispute.

I think what I have said is enough, without going into the terms of the entail title, to warrant an adherence to the Lord Ordinary's interlocutor.

LORD MURK.—The case is shortly put in the Lord Ordinary's note, and I am satisfied he has taken the sound view.

The existing title to the estate, which is the entail title, does not contain any conveyance of these teinds, either general or special, while it does contain a conveyance of the teinds of other lands, namely, those in the parish of Laggan.

But it is said we are to go back to the dispositions of 1766 and 1772, which carry teinds. These deeds, however, are open to the observation that they do not convey, even in general terms, the teinds of these lands *per expressum*, but only the teinds "contained in the particular charters and infeftments thereof." The conveyance being so qualified, it is necessary to go back to the previous charters, and when that is done, it is clear that they contain no right to the teinds of the lands in question, so that the granter does not appear to have had the teinds to convey.

Then as to the possession. It has never been asserted by the proprietor that he had a heritable right; and though there has been no payment of teinds to the titular, they have been localled on, and that has always been distinctly upon the footing that there was no heritable right.

LORD SEAND concurred.

THIS interlocutor was pronounced:—"Recall the interlocutor of the Lord Ordinary reclaimed against: Sustain the defences stated for Lord Abinger and Edward Ellice: Assoilzie them from the conclusions of the summons, and decern: Find the said defenders entitled to expenses," &c.: "*Quoad ultra* dismiss the action, and decern."

TODS, MURRAY, & JAMIESON, W.S.—DUNDAS & WILSON, C.S.—Agents.

No. 165.

SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY, Pursuers.—

*Balfour—Pearson.*July 13, 1877. ROBERT BUIST AND OTHERS, Defenders.—*Fraser—Scott—J. P. B. Robertson.*Scottish
Equitable Life
Assurance
Society v.
Buist, &c.*

Insurance — Reduction — Fraudulent Misrepresentation.—Circumstances in which a policy of life assurance in the hands of onerous assignees was reduced on the ground of false statements made by the assured in applying for the policy, with reference (1) to his habits of life, (2) his health, and (3) his transactions with other companies.

Observations (per Lord President) on the duty of an insurance company towards assignees or others interested in the event of their ascertaining during the currency of the policy that it is open to challenge.

1st DIVISION.
Lord Young.
B.Vide 14th July 1876, *ante*, vol. iii. p. 1078.

This was an action raised at the instance of the Scottish Equitable Life Assurance Society for reduction of a policy of insurance granted by them on the life of the late George Moir, cattle-dealer, Edinburgh, on 22d June 1872, against Robert Buist and others as Moir's assignees.

Several points of law were raised by the defenders which were disposed of by the Court on 14th July 1876 by an interlocutor which repelled the 1st, 3d, 5th, 7th, and 11th pleas for the defenders, and remitted to the Lord Ordinary of new to allow the parties a proof of their averments.

The ground on which the pursuers sought reduction of the policy was that the statements made by Moir in his answers to the printed questions contained in the form of proposal submitted by him to the society were false in material points.

Appended to the form of proposal was the following declaration, which was signed by Moir:—"I, the above designed George Moir, do hereby declare that the above particulars are correct and true throughout, and that I have not concealed or withheld any circumstance tending to render an assurance on my life more than usually hazardous; and I do hereby agree that the foregoing proposal, together with what is therein contained, and this declaration, shall be the basis of the contract between me and the Scottish Equitable Life Assurance Society, and that if any untrue averment is contained in this declaration, or in the answers above given, or if it shall hereafter appear that any of the matters above set forth have not been truly and fairly stated, then all monies which shall have been paid on account of the assurance to be made in consequence hereof shall be forfeited and belong to the society; and all claim to any benefit out of or interest in the funds of the said society, in virtue of any certificate or policy that may be issued or delivered in relation hereto, shall be barred and excluded, and the policy itself shall be absolutely null and void. And I hereby declare my accession to the articles of agreement and constitution of the society, and to all the alterations thereof, and to the by-laws and regulations of the society. Signed at Edinburgh this 12th day of May 1872 years. (Signed) GEORGE MOIR"

The particular questions founded on and the corresponding answers were,—“5. Are your habits sober and temperate? Yes. Have they always been so? Yes. 9. Have you ever been affected with insanity.

* Two other actions, *The Scottish Widows' Fund and Life Assurance Society v. Robert Buist and Others*, and *The General Life and Fire Assurance Company v. Walter Kidd*, arising out of similar transactions in the same circumstances, were disposed of of the same date, but there were no specialities to distinguish them from the case reported, in which a proof applicable to all three cases was led.

apoplexy, palsy, dropsy, asthma, liver complaint, rupture, consumption, No. 165. or spitting of blood, epileptic or other fits, or any disorder tending to impair the constitution or shorten life? No. 15. Has your life ever been proposed for assurance? if so, name the office, and state the date and result? No."

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The pursuers pleaded;—(1) The statements and answers made by Mr Moir as aforesaid having been untrue, the said policy and the assurance bearing to be thereby effected are void, in terms of the stipulation to that effect, and the same ought to be reduced, with all that has followed thereon. (2) At all events, Mr Moir having, in making the said statements and answers, made misrepresentations and concealed facts and circumstances material to the said contract of assurance, and, *separatim*, having done so fraudulently, and having thereby induced the pursuers to enter into the same, the said policy, and all that has followed thereon, is reducible, and ought to be reduced.

The defenders denied that the answers to these questions were false, or at least that Moir made them knowing them to be false, and with a fraudulent intention.

They also averred as the ground of a special defence—"That any of the facts alleged by the pursuers in their condescendence which are material, if true, were known to the pursuers before accepting payment of premiums from the defenders, and these premiums were taken payment of from the defenders without any intimation that liability would be repudiated in the event of Moir's death. At least they continued to take payment of premiums from the defenders after they knew of said facts, or after they had ample means of ascertaining them, and had been put upon their inquiry. The pursuers hold out their policies to the public as negotiable documents and good investments either for purchasing or lending money on."

The defenders pleaded, *inter alia*;—(6) The pursuers, after ascertaining the facts, or at least having the means of ascertaining them, and being out on their inquiry, having admitted the claim made by the defenders, cannot now dispute the same. (7) Any fact material to the issue having been known to the pursuers before accepting payment of the premiums or some of them, from the defenders, or at least having continued to take premiums after knowing said facts, they are now barred from objecting to the claim.

Proof was led in terms of the interlocutor of the First Division of 14th July 1876. The result of the evidence will appear from the opinion of Lord Mure.

The Lord Ordinary, on 9th February 1877, having considered the proof, repelled the defences, and pronounced decree of reduction as craved.*

* "OPINION.—This is an action to set aside a policy of life assurance, and is based on a breach of the conditions on which it was issued, viz., that the answers given by the assured to queries submitted to him, and the declaration, forming with these answers part of his proposal for insurance, were true. The particulars in which these are alleged to be false are specified on record, and I need not repeat or summarise them. The relevancy of the action is undoubted, and the only question is whether or not the evidence is sufficient to sustain it in fact. At the conclusion of the evidence, and after hearing counsel for the parties, my strong impression was that the pursuers had proved their case—so strong, indeed, that in an ordinary case I should not have hesitated to act upon it by giving judgment at once. But to reduce a policy of insurance upon a *post mortem* inquiry regarding the habits of the assured, and the bodily ailments with which he may have been afflicted prior to the insurance, is not an ordinary or common-place matter, and I accordingly delayed judgment until I had recon-

No. 165. The defenders reclaimed.¹
At advising,—

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LORD MURE.—In this action of reduction, which has been brought by the

sidered my impression with such aid to my memory and notes as the shorthand writer's notes of the evidence might give me.

"As my judgment on the whole matter is in favour of the insurance office, it is, I think, all the more proper that I should say distinctly that in my opinion a policy ought not to be easily set aside upon a comparison of the result of what I have characterised as a *post mortem* inquiry into a man's habits and bodily ailments, and the answers which he has given to the queries answered in his proposal for insurance. With respect to sober and temperate habits, in particular, I should certainly not be induced to hold an answer false, and a breach of condition by evidence of habitual generous living or even of occasional excess. Nor with respect to disease, or ailments short of what are generally called diseases, should I consider it material that the assured had in his answers and declaration altogether omitted to notice several trifling illnesses and even several temporary bodily troubles arising from folly or indiscretion. A man is not, for anything I now decide, and I think really is not, obliged, as a condition of insuring his life on the terms usually exacted by insurance offices, to make a minute confession of his sins and misfortunes, and their effects on his health, provided these affects, though they occasioned temporary inconvenience, with more or less anxiety, have passed away without results from which permanent or lasting injury to health is reasonably to be apprehended. I express this opinion only to guard more distinctly against the supposition that anything to the contrary is involved in the decision which I now pronounce, for the facts as proved really present no such case for consideration. I mean, however, to express my opinion distinctly to this effect—that an insurance office challenging a policy after the death of the assured on the ground of untrue answers to queries, and untrue declaration made by him regarding his health and habits of life, undertakes a heavy *onus*, to the discharge of which it must be strictly held. I do not go the length of saying that gross and wilful falsehood must be proved. But, first, the falsehood must be clear, and on a subject which is or reasonably may be material to the risk; and, second, if not wilful, it must be inexcusable in this sense—that it consists in a blameably reckless or careless assertion or omission of which an honest man giving ordinary attention to the matter in hand would not have been guilty, and which in fairness to the office which was deceived cannot be treated and passed over as immaterial or trifling. There may be and no doubt are cases in which these propositions would require qualification or modification, and I only submit them as sufficient for the case immediately before me.

"My judgment on the evidence is that the answers and declaration of the assured were wilfully false in the several respects specified by the pursuers or record. Short of this, and as a milder view of the assured's conduct in the matter, I am of opinion that his answers and declaration were false in fact, and inexcusable so in the sense which I have explained. I have arrived at this conclusion on a careful consideration of the evidence with reference to the heavy *onus* that lay on the pursuers according to the opinion which I have already expressed. I made a precis of the evidence for my own use, but do not think that it would be useful to enter upon any examination of the evidence here.

"I therefore repel the defences, sustain the reasons of reduction, and decree as concluded for, with expenses. The pursuers do not seek to avail themselves of the clause forfeiting to them the premiums which they have received.

¹ *Authorities*.—Watson v. Mainwaring, 1813, 4 Taunton, 763; Rose v. Blandshaw, 1 Wm. Blackstone, 312; Life Association of Scotland v. Foster, Jan. 31, 1873, 11 Macph. 351, 45 Scot. Jur. 240; James v. The Provincial Insurance Company, 1857, 3 Scott's C. B. Rep., new series, 65.

Scottish Equitable Life Assurance Company against the assignees to a policy of insurance issued by the pursuers in May 1872 on the life of the late George Moir, the pursuers seek to have the policy reduced, on the ground that false statements and misrepresentations were made by Moir in answer to the questions put to him when he proposed to insure his life. The document which contains these answers is headed "Proposal," and the declaration attached to it, and which was signed by the assured, bears that it is to be "the basis of the contract" between him and the insurance company; and that "if any untrue averment is contained in this declaration, or in the answers above given, or if it shall hereafter appear that any of the matters above set forth have not been truly and fairly stated," the policy to be issued "shall be absolutely null and void."

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The pursuers have set forth on the record various particulars as to which that document is said to contain false statements; and in the defences lodged, not for the assured or his executors, but for his assignees, various pleas in law applicable to the defenders' position as assignees were stated in defence, in respect of which it was maintained that the pursuers were not entitled to succeed in the present action. These defences, which were chiefly of a preliminary nature, and went to the exclusion of all proof, were before the Court in July 1876, and were disposed of after careful consideration. On the 14th of that month the 1st, 3d, 5th, 8th, and 11th pleas for the defenders were repelled,¹ and the case remitted to the Lord Ordinary to allow a proof. That proof has been led, and we have before us the judgment of the Lord Ordinary dealing with the case on the question of fact, being the main if not the only one which your Lordships have now to consider.

The Lord Ordinary has found that the facts averred by the pursuer have been established, and he has pronounced an interlocutor repelling the defences, and decerning in terms of the reductive conclusions of the summons. In the note of his opinion, after making some remarks on the question of *onus*, and without going into the detail of the evidence, the Lord Ordinary says,—“My judgment on the evidence is that the answers and declaration of the assured were wilfully false in the several respects specified by the pursuers on record. Short of this, and as a milder view of the assured's conduct in the matter, I am of opinion that his answers and declaration were false in fact, and inexcusably so in the sense which I have explained. I have arrived at this conclusion on a careful consideration of the evidence, with reference to the heavy *onus* that lay on the pursuers, according to the opinion which I have already expressed.” The question, therefore, which we have now to consider is, whether the Lord Ordinary's views as to the evidence are sound?

There are three leading points on which the pursuers maintain that false and wilfully false statements were made by the assured. First, as to his general habits in the matter of sobriety and temperance; secondly, as to the state of his

notwithstanding the now declared invalidity of the policy, and stated their readiness to return them. This is not only becoming, and what was to be expected, but is probably only consistent with the form of action which the pursuers adopted, and the decree of total reduction which they have asked and obtained. However this may be, it will be quite understood that the pursuers agree to complete restoration and make return of the premiums accordingly.”

¹ *Vide, ante*, vol. iii. p. 1078.

No. 165. health; and thirdly, as to what transactions he had had with other insurance companies prior to the proposal in question.

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In the proposal required by the pursuers to be submitted to them these questions occur—(Reads 5th, 9th, and 15th questions quoted *supra*, p. 1076-7). Having carefully examined the evidence I have come to the same conclusion as the Lord Ordinary on these three points :—

(1) As regards the habits of the assured, it is in my opinion very clearly proved that at the time these answers were given in the deceased was a man of intemperate habits, and that he had been so for a considerable period. The proposal was made on the 12th of May 1872, and it is distinctly proved that during the years 1870 and 1871 his intemperance had reached such a pitch that he was more than once under treatment for *delirium tremens*. I can have no doubt of this after the evidence of Dr Joseph Bell, who speaks to two if not three severe attacks during that period. But it is also, I think, proved by the people in whose house the assured lodged; and the treatment which he then underwent is inconsistent with any other ailment. It is plain therefore that when the assured answered the fifth question in the proposal in the affirmative he wilfully made a false statement as to his habits of life. (2) As to the question of health it is proved that from 1869 to the spring of 1871 he was suffering from syphilis as set forth on the record. James Nisbet, in the employment of Mr Hannah, chemist, Calton Street, to whose shop the assured was in the habit of going for his medicines, and Dr Sinclair, are both distinct on this point, and equally distinct as to the assured's knowledge that it was syphilis from which he was suffering. The people in whose house he lodged understood that he was suffering from that disease; and Dr Joseph Bell depones that he warned the deceased to the effect his habits would have upon his health, and went so far as to tell him on 15th May 1872 that he was then suffering from the disease in its secondary or even tertiary stage, and that he must inform the Standard Insurance Company, who had referred a proposal of assurance to Dr Bell, that his life was not insurable. Dr Bell's answer to the Standard Company appears to have been written in Moir's presence on the 15th of May, which was three days after the proposal had been made by Moir to the pursuers' company. But then the policy now in question was not delivered to Moir until the 22d of May. So that when he received the policy he knew that a statement had been made to the Standard Insurance Company, by his regular medical attendant, to the effect that his life was not insurable, owing to the condition of his health. I think, therefore, that as to the matter of health, concealment, and wilful concealment, on the part of the assured of a disorder tending to impair the constitution is proved. (3) On the last point, viz., as to transactions with other offices, there can be no doubt, for the assured was not only in treaty with the Standard Insurance Company as above mentioned, but he had shortly before been in treaty with three other offices. In August 1871 he had effected an insurance with the Scottish Widows' Fund. In March 1872 he had made a proposal to the Scottish Amicable Assurance Society, which was afterwards dropped. Later on in 1872, viz., in the month of April, he made a proposal to the North British and Mercantile Insurance Company which was declined. And on the 5th April 1872 he had also made a proposal to the General Life Assurance Company which was accepted, and on which a policy was issued in June of that year. There is therefore positive proof that he was transacting, or had transacted, with four

other insurance companies at the time he gave the answer to the fifteenth question in the proposal made to the pursuers. No. 165.

I have had no difficulty therefore in coming to the same conclusion as the Lord Ordinary upon the import of the evidence; and I am of opinion that his Lordship's judgment on that main question should be adhered to.

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But another point has been argued before us, which does not appear to have been raised before the Lord Ordinary, viz., whether in consequence of some suspicions which were thrown on the life of the assured during the currency of the policy, which the pursuers took no steps to investigate, and of which they did not inform the defenders as assignees to the policy, the pursuers are now barred from insisting in this action, or are, at any rate, bound to refund the premiums which they received. Now, upon the evidence adduced, I do not think that it is proved that anything more than mere rumour ever reached the pursuers, and of such a kind that they could not with propriety take cognisance of it. I am of opinion therefore that the defenders have failed to prove facts necessary to instruct this very special defence, and I think it right to add, that I have considerable doubts whether there is, upon the record in this case, any averments relevant to raise the defence; and that is, in all probability, the reason why it is not referred to by the Lord Ordinary in his opinion.

LORD DEAS and LORD SHAND concurred.

LORD PRESIDENT.—I entirely concur. There can be no question that this policy of insurance was obtained by gross and deliberate fraud.

A point has, however, been raised by the defenders, of the nature of a plea in bar. What is averred on record by the defenders is, that the material facts now bounded on were known to the pursuers, at least before receiving any premiums of assurance from the defenders, who had in good faith advanced certain sums of money on the security of the policy, and intimated an assignation of it to the pursuers, and that the premiums were afterwards received by the pursuers without any intimation to the defenders that the policy would be repudiated on Mr Moir's death, or at least that the premiums were received by the pursuers after they had been put on their inquiry and had ample means of ascertaining the facts.

This defence, however, even if it be a sufficient defence, is not supported by evidence. All that is proved is that certain rumours came to the ears of certain of the officers of the pursuers' company that raised or should have raised their suspicions. But these rumours were of the vaguest possible nature. Nothing could have been more rash and ill-advised than that the company on such information should have intimated to anybody concerned a challenge or anything approaching a challenge of the policy. I do not know exactly what it is that the defenders suggest was the duty of the company in the circumstances alleged. Were they instantly to raise an action of reduction, or were they to refuse further premiums, and announce that they held themselves no longer bound by the policy? Either would have been a most rash and impolitic course, and might have involved them in very serious liabilities to the insured as well as to the assignees, which was certainly not justified by the information before the company at the time.

If after a policy has been assigned the insurance company become aware of objections to its validity, so clear and conclusive that the mere statement of

- No. 165. them is enough, I do not say that there may not then be a duty of communication to those whom the company know to be interested in the policy. It would not be consistent with good faith that they should, in such circumstances, go on receiving the premiums on a policy that they intended to challenge in the end. But there is nothing approaching such a case here, and therefore we need not consider the question.
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THE COURT adhered.

J. A. CAMPBELL & LAMOND, C.S.—JAMES M'CAUL, S.S.C.—Agents.

- No. 166. JOHN BRACK BOYD AND OTHERS (W. B. Boyd's Marriage-contract Trustees);
First Parties.—*Asher—Darling.*
July 13, 1877. MRS ELIZABETH BELL WILSON OR BOYD AND HUSBAND, Second Parties.
Boyd's Trustees v. Boyd.
—*Balfour—Low.*

Marriage-Contract—Clause of Conquest.—*Held* that life interests and annuities to which a married woman became entitled during the subsistence of the marriage did not fall under a general conveyance of *acquirenda* by her to the trustees under her antenuptial contract, such a clause being read only as referring to principal sums.

- 2D DIVISION.
R. BY antenuptial contract, dated June 1862, between William Brack Boyd and Elizabeth Bell Wilson, the latter, in consideration of the portions made to her by her intended husband, assigned, disposed, transferred, and conveyed to certain persons therein named as trustees a sum of £2000 then belonging to her, "and also all and sundry other estate and effects which she, the said Elizabeth Bell Wilson, may conquest and acquire during the subsistence of the said marriage, by purchase, succession, bequest or otherwise, provided the same shall amount to £300 sterling or upwards. By the purposes of the trust the income out of the trust-estate was made payable to the said Elizabeth Wilson during the subsistence of the marriage, the whole or one-half of the fee of the trust-estate being settled on the children of the marriage, according as the husband or the wife predeceased."

The marriage took place, and there were four children thereof.

By a trust-disposition and settlement, dated 1850, and which was referred to in Mr and Mrs Boyd's marriage-contract, the late James Wilson of Otterburn, father of Mrs Boyd, bequeathed to her "the interest of £3000, declaring that the said interest should be payable to his said daughter, exclusive of the *jus mariti* of any husband whom she might marry, and that the receipts for the same to be granted by her alone should be valid and sufficient to the receiver thereof without the consent of her said husband."

Mr Wilson died before his daughter's marriage, and was succeeded in the estate of Otterburn by his son John Wilson, who died in 1870, leaving a trust-disposition and settlement, dated in 1868, whereby he directed his trustees to pay over the whole free annual proceeds of the residue of his estate to his sister, Mrs Boyd, until her eldest son should have attained the age of twenty-one, when her interest in the trust-estate should be restricted to an annuity of £300, "declaring that the said William Brack Boyd shall have no concern with the rents, interests, and profits of the said residue of my estate and effects or with the said annuity in virtue of his *jus mariti* or any other title whatever, and that the same shall not be liable to his debts or deeds, nor subjected to the legal diligence of his creditors, but that notwithstanding it shall be in the power of the said Mrs Elizabeth Bell Wilson or Brack Boyd, by herself alone, without the consent of her husband, to uplift and discharge the rents, interests, and

profits of said residue, and the said annuity, and her receipts and discharges therefor shall be sufficient." No. 166.

The free annual income derived from the residue of John Wilson's estate was about £1500 a-year. July 13, 1877.
Boyd's Trustees v. Boyd.

The marriage-contract trustees for some years allowed Mrs Boyd to receive payment of the interest of the sum of £3000 from her father's estate, and also of the free annual income of the residue of her brother's estate from his trustees. Doubts, however, arose as to whether under the provisions of the marriage-contract they were justified in doing so, and a special case was presented to the Court by the marriage-contract trustees of the first part, and Mrs Boyd and her husband of the second part. The trustees maintained that, on a sound construction of the marriage-contract, the said interest and income (and the annuity of £300 when such should become payable) formed part of the estate and effects conquered and acquired by Mrs Boyd during the subsistence of the marriage, and that the same ought therefore to be paid over to them, to be by them capitalised for the purposes of the trust, and only the interest thence arising to be paid to the spouses.

Mrs Boyd and her husband maintained, on the other hand, that these annual provisions did not fall to the trustees, but that the terms of the marriage-contract with regard to *acquirenda* applied to principal sums only, and were not intended to include any right which Mrs Boyd might acquire to the interest of a capital sum or to an annuity.

The questions submitted to the Court were—“(1) Whether the parties hereto of the first part are entitled to demand that the interest of the sum of £3000 provided to Mrs Boyd by her father's settlement shall be paid over to them for the purposes of the trust created by the said marriage-contract? (2) Whether the parties hereto of the first part are entitled to demand that the annual income of the residue of the estate of the deceased John Wilson, and the annuity of £300 when it arises, shall be paid over to them for the purposes of the said trust? (3) In the event of the two preceding questions, or either of them, being answered in the affirmative, whether the parties hereto of the first part are bound to pay the said interest and income, or either of them, and the annuity when it arises, to Mrs Boyd as income, or to capitalise the said interest and income, or either of them, and the annuity, when it arises, by selling the same to an insurance office or otherwise.”

Argued for the trustees;—The words of the dispositive clause were unquestionably sufficient to cover any sums which Mrs Boyd should succeed to, provided the same amounted (*i.e.*, amounted in all) to £300. Incidentally, the exclusion of small sums supported the universality of the clause. If the trust-conveyance had been one for behoof of creditors it would have been impossible to contend that the funds in question did not fall under the assignation, and there was no reason for applying a different principle of construction to such a conveyance in a marriage-contract. It was not, indeed, disputed that a testator might taint upon a bequest such a personal character as to exclude the trustees. This was all that was decided in the English cases quoted on the other side. If there had been in the settlements of Mrs Boyd's father and brother expressions clearly indicating that the funds bequeathed should not fall under the trust, they must have received effect. But there were no such indications of intention to be found in these deeds. There was no reported decision of the Court of Session having much bearing on the question, but the opinion of Professor M. Bell was in favour of the view submitted by the trustees.¹

¹ Bell's Lectures on Conveyancing, vol. ii. 903, 2d edition (846, 1st edition).

No. 166. Argued for Mr and Mrs Boyd;—(1) Apart from any indication in the deed conferring the provision a life-interest or annuity was not comprehended in a clause of conquest such as the present. The object of the conveyance to the trustees in the marriage-contract was to secure the capital sum or stock, the annual fruits of which were to be enjoyed by the spouses, and accordingly there was no ground for making the clause applicable to annual fruits, the stock producing which was already secured, and, if possible, still less to an annuity. This was recognised as law in England, and was in accordance with reason.¹ If the interest, as it accrued, vested in the trustees, and fell to be capitalised by them, it followed (supposing there were no exclusion of small sums) that the interest of the interest must be dealt with in the same manner, and so on. A power to accumulate was not to be presumed. (2) There were indications in the settlement of Mrs Boyd's father and brother that the funds bequeathed by them should be personal to Mrs Boyd, and not pass to the marriage-contract trustees.

At advising,—

LORD JUSTICE-CLERK.—We have had an able argument, but my first impression of the case was that there was not much doubt what the decision should be, and now that we have heard all the authorities I am very clearly of opinion that this impression was right. It is not necessary to go into the details of these instruments, as I think that the principle on which the case should be decided admits of being stated in very general terms. I am of opinion that when a clause of conquest in a marriage-contract mentions “estate,” “property,” “effects,”—it signifies estate in fee, the capital stock which bears fruits. The scope of the contract is that the wife undertakes to secure the capital by a trust, while she is to have the fruits during her life. It is reasonable to infer that property coming to the wife, which is not a right of fee, is not comprehended in the trust-conveyance. The meaning is that the trustees shall hold the *corpus, saltem substantia*, of the wife's property. But if the *corpus* is in the hands of others there is no necessity for protection, seeing that there is no capital which might be dissipated. There could be no better illustration of this than an annuity. The trust-conveyance in the marriage-contract never can comprehend estate, the very nature of which implies annual enjoyment. That general view is sufficient for the decision of the cause, and I am the more fortified in this view that Lord Hatherley lays it down as settled that life-interests and annuities do not fall under such covenants.² The case of *Briggs v. White*³ was precisely the same as the present, for the life-interest in that case fell quite as much under the terms of the marriage-settlement as the £1500 a-year in the present case.

The whole tenor of this marriage-contract clearly corroborates the view which I have stated, for incidentally, I may almost say accidentally, the word “principal” slips into the marriage-contract as applicable to conquest. The trustees are directed to invest a sum of £2000 contributed by the wife, “or other principal sums conquest as aforesaid;” and again they are empowered to advance the said sums, “or other principal sums conquest as aforesaid,” from which I draw the conclusion that my interpretation of the dispositive clause is correct, and

¹ *In re Mainwaring's Settlement*, June 1866, L. R. 2 Eq. 487 (Vice-Chancellor Page Wood's judgment, 496); *St Aubyn v. Humphreys*, April 1856, 22 Beavan, 175; *White v. Briggs*, July 15, 1848, reported in note, 22 Beavan, 176; *Townshend v. Harrowby*, March 18, 1858, 27 L. J., N. S. Q. B. 176.

² *In re Mainwaring's Settlement*, June 1866, L. R., 2 Eq. 487.

³ July 15, 1848, reported 22 Beavan, 176, note.

applies to the *corpus*, the fruits of which are to be reaped by the wife, and that where the trustees do not hold the *corpus* the trust-conveyance does not apply. No. 166.

There is a second ground of judgment which might also be sufficient. By July 13, 1877. *Boyd's Trustees v. Boyd.*
John Wilson's settlement, the husband is entirely excluded from the bequest. The husband is the creditor in the marriage-contract, and it necessarily follows from the special exclusion of his rights in John Wilson's deed that he cannot enforce the provisions of the marriage-contract *quoad* this bequest. That is one of the grounds on which Lord Hatherley founded in the case of *Mainwaring*.

On the whole, then, I am of opinion,—(1) That from the nature of the fund itself, apart from any indications on the part of the testator, it does not fall under the marriage-contract trust; and (2) That from the words of John Wilson's deed the husband's rights are entirely excluded from that £1500 a-year.

This annual income is to be restricted, as soon as the eldest son shall attain majority, to an annuity of £300. I cannot bring myself by any process of reasoning to hold that an annuity falls under such a clause of conquest.

I do not think it necessary to go into the distinctions between the terms of the bequest in John Wilson's deed and those of the bequest of the interest of £3000 in the father's deed, because the clause excluding the husband's rights is not substantially different in the two deeds.

I propose therefore that we should answer the first and second questions in the negative, and find it unnecessary to answer the third question.

LORD ORMDALE and LORD GIFFORD concurred.

THE COURT pronounced this interlocutor:—“(1 and 2) Find that the parties hereto of the first part are not entitled to demand that the interest of the sum of £3000, provided to Mrs Boyd by her father's settlement, shall be paid over to them for the purposes of the trust, nor are they entitled to demand that the annual income of the residue of the estate of the deceased John Wilson, and the annuity of £300 when it arises, shall be paid over to them for the purposes of the said trust: (3) Find it unnecessary to answer this query, and decern.”

JAMES STORMONTH DARLING, W.S.—J. & J. TURNBULL, W.S.—Agents.

WILLIAM M'GIBBON, Pursuer and Appellant.—*Scott.*
WILLIAM THOMSON, Defender and Respondent.—*Balfour—*
J. P. B. Robertson.

No. 167.

July 14, 1877.
M'Gibbon v.
Thomson.

Sheriff Courts Act, 1876 (39 and 40, Vict. c. 70), sec. 20—Decree by Default.
—In an action in the Sheriff Court the Sheriff-substitute assoltized the defender in respect of no appearance by or on behalf of the pursuer at the diet of proof. The pursuer appealed to the Sheriff, and represented that his failure to appear was caused by the illness of his procurator, and a mistake on the part of his clerk. The Sheriff adhered, and the Court refused an appeal.

Observed, that parties are sufficiently protected from hardship by the appeal to the Sheriff, who can receive explanations, and, if necessary, institute an inquiry, and that the Court will not lightly interfere with his discretion.

In an action raised in the Sheriff Court of Lanarkshire, by W. M'Gibbon, 1st Division.
merchant, Stranraer, against W. Thomson, commercial traveller, Glasgow, Sheriff of
for payment of £38, the amount of a bill, the Sheriff-substitute (Lees) Lanarkshire.
appointed 2d May 1877 as a diet of proof. On that day he pronounced M.
this interlocutor:—“The Sheriff-substitute having heard parties' procurators, and the defender having stated that he has no other witnesses in

No. 167. attendance, but that he intended to examine the pursuer, who he thought would be present, discharges the diet of proof assigned for to-day, and in lieu thereof assigns Wednesday, the 23d day of May, at ten o'clock forenoon, as a diet for proof in the cause, at which diet allows the defender to examine himself as a witness, and the pursuer if duly cited for that diet."

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On 23d May the Sheriff-substitute pronounced this interlocutor:—"In respect of no appearance by or for the pursuer at the diet of proof to-day, holds him confessed as not insisting in the action; and, on defender's craving, sustains the defences: Assoilzies the defender from the conclusions of the libel, and decerns: Finds the defender entitled to expenses," &c.

The pursuer appealed to the Sheriff (Clark), who adhered.*

The pursuer appealed to the Court of Session. It was stated for him that his procurator had been confined by illness, and that his clerk had neglected to observe the diet of 23d May.

At advising,—

LORD PRESIDENT.—This is a very important point in the practice of the Sheriff Courts. We must not leave out of view what the great object of the recent statute was, and what mischiefs it was intended to remedy. The great evil was the excessive delay in Sheriff Court procedure which arose from the agents having it in their power to consent to prorogations. The object of the Act was to take away that power, and to arm the Sheriff with power to go on, and to compel the parties to go on whether they like or not, and, accordingly, the 19th section provides that "it shall not be competent of consent of parties to prorate the time for complying with any statutory enactment or order of the Sheriff, whether with reference to the making up and closing of the record, appointing a diet of proof, diet of debate, or otherwise."

These are extremely important provisions, and, I hope, are carried out strictly. In exactly the same spirit and for the same end is the 20th section. The result of it is, that failure to attend any diet is followed by these consequences. If both parties fail to attend, the case goes out of Court. If one party fails, the judgment is to pass in favour of the other. This is made imperative unless a sufficient reason appears to the contrary. The question whether there is a sufficient reason is, of course, in the first instance, for the consideration of the Sheriff-substitute, if it is before him that the diet takes place. He must act as prescribed by this section, whatever the amount of his knowledge of the circumstances may be, if one of the parties is absent.

I have no doubt that it was not intended to prevent an appeal. It is plain enough that the Sheriff-substitute might not be aware of the reasons which would explain the default. There might be many cases in which it could be accounted

* "NOTE.—In this case it was strongly urged for the pursuer that his non-attendance on 23d May 1877 arose from an innocent mistake, and it may be that something might be said in that respect. I do not, however, consider myself at liberty, unless some very strong ground indeed is made out, to recall an interlocutor such as that under review, pronounced by the Sheriff-substitute after a full knowledge of the facts. Sec. 20 of the present Sheriff Court Act is very specific in its provisions, and if every excuse were to be taken as a ground for recalling interlocutors pronounced in accordance with that section it may as well be held *pro non scripto*. That is my reading of the Act, and if I have fallen into a mistake of undue strictness I shall be glad to be directed by the Supreme Court as to the proper construction of the provision in question, and will endeavour to follow out such directions to the best of my ability."

for sufficiently, but no one might be there to account for it. It would be an unreasonable and strained construction of the clause to hold that a sufficient excuse, if proved afterwards, should not be received. It is reasonable that the party should have an appeal to the Sheriff, to whom he can explain fully the nature of his excuse. No. 167.
July 14, 1877.
M'Gibbon v. Thomson.

Accordingly an appeal was taken in this case. But what is the state of the facts? On 2d May the Sheriff-substitute, having both parties before him, assigned the 23d as a diet of proof, "at which diet allows the defender to examine himself as a witness, and the pursuer if duly cited for that diet."

On the 23d, accordingly, the defender appeared. He had not cited the pursuer, and, therefore, he had shewn that he did not mean to examine him. But the defender appeared, and whether he meant to examine himself we cannot tell, or whether he intended to ask for absolvitor without examining any witnesses. In either case it was indispensable that the pursuer should be present, and he had been ordered to be present by himself or his procurator by the interlocutor of 2d May. But nobody was there to represent him. In these circumstances I do not see that the Sheriff-substitute could have done anything but what he did. But the pursuer appealed to the Sheriff, and his view of the case is very distinctly stated in his note.

There is a great deal of force in the Sheriff's observations. If everything that could be represented as an innocent mistake were to be accepted as an excuse the clause would be in great peril of being set at nought.

It would be very easy to get up the aspect of an innocent mistake—which would really mean an explanation by the procurator or his clerk, not an inquiry—and we know how an explanation can be coloured so as to look plausible, though there has really been negligence. It was negligence that was intended to be punished, and the Sheriff seems to have satisfied himself that there was that amount of negligence which not only justified the Sheriff-substitute in doing what he had no alternative but to do, but justified the Sheriff in refusing to admit the excuse.

It was represented that the procurator was for a considerable time confined by illness, and that his clerk neglected to observe that the diet was fixed for the 23d. That is precisely the same thing as if the procurator himself had been guilty of that failure of observation,—and is that not negligence and fault? It is just the kind of negligence and fault which was intended to be stopped by this stringent clause. I wish to say, at the same time, that even if this were not so plain a case, I should have great hesitation in interfering with the discretion of the Sheriff. He has the best means of discovering the truth. He has the procurators before him, and if he thinks it necessary he can institute an inquiry. We have not the same facilities, and unless a party comes here with a very distinct allegation of a reasonable excuse which is capable of being proved directly I do not think it would be safe for us to interfere. I do not say there might not be such a case. But I am quite clear that the present case is not of that character.

LORD DEAS and **LORD MURE** concurred.

LORD SHAND.—I am also of opinion that the appeal should be refused. The purpose of the enactment is to prevent the delay and expense of adjournments caused by the neglect of agents to attend at diets of the Court, at which their attendance is necessary for procedure in the cause.

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The Sheriff-substitute had no choice but to assoilzie the defender, for there was no appearance for the pursuer at an important diet of proof, and no reason for refraining to give effect to the express provision of the statute. Cases may occur of the absence of a party, for which, within the knowledge of the Sheriff-substitute or on information before him, there may be a sufficient reason, and in which the severe consequences of the statute would not take effect, but that was not the case here. I entertain no doubt that on appeal the Sheriff might recall an interlocutor so pronounced. But I am equally clear that that is not to be lightly done; and if it appears that the default was in consequence of such neglect as left no sufficient reason or ground of excuse to account for the parties' absence, then no ground for recall of the interlocutor is made out. I accept this case as one in which the Sheriff, in full knowledge of the facts, after hearing an explanation from the pursuer's procurator, thought that his non-attendance was the result of such neglect as I have spoken of, and that therefore there was no ground for opening up the case.

THE COURT refused the appeal.

A. KELLY MORISON, S.S.C.—MACRAE & FLETT, W.S.—Agents.

No. 168.

GEORGE LEES, Petitioner and Appellant.—*Crichton—Guthrie Smith—R. V. Campbell.*

July 14, 1877.
Lees v. Marr
Typefounding
Company.

THE MARR TYPEFOUNDING COMPANY (LIMITED) AND MRS JANET B. MARR.
Respondents.—*Sol.-Gen. Macdonald—Jameson.*

Lease—Petition for Judicial Inspection of Premises.—Held that a petition by the landlord for judicial inspection of premises which the tenants were taken bound to keep in repair, with a conclusion for the expense of the repairs which the tenants should be found bound to execute in implement of the lease, was a competent and proper proceeding, although presented upwards of a year before what the landlord averred was the termination of the lease, the tenants having vacated the premises and taken up the position that the lease was at an end.

2D DIVISION.
Sheriff of Mid-
lothian and
Haddington.
I.

ON 27th March 1876 George Lees, LL.D., proprietor of certain premises in New Street, Canongate, Edinburgh, presented a petition in the Sheriff Court at Edinburgh, setting forth that in 1862 he had let the said premises to James Marr, typefounder, for five years, that the lease had been renewed from time to time in favour of Mr Marr, and his widow Mrs Janet B. Marr, the last renewal being for five years from Whitsunday 1872, thereby extending the term of the lease to Whitsunday 1877; that in 1874 Mrs Marr had assigned the lease and disposed of the business and plant to the Marr Typefounding Company (Limited); that some months before the petition was presented the Marr Typefounding Company had removed from the premises, taking with them all, or nearly all, of their plant and fittings; that the lease contained a clause by which the tenants "declare that the premises as at present occupied by them are in a good and sufficient state of repair for the purpose of the business carried on by them therein, and they undertake to keep and leave them in like condition at the expiry of this tack, excepting always from this obligation such damage as may necessarily be occasioned by the removal of the foresaid benches or other fittings used in the business of the foundry; but in the event of any extraordinary repairs being necessary, such as the falling in of a roof or walls, the said George Lees and the foresaids shall be at the expense of such extraordinary repairs;" that notwithstanding this obligation the respondents had allowed the premises

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to become much dilapidated; that the petitioner had called upon them to put the same in proper order and repair under the tack, or to concur with him in appointing a man of skill as referee to inspect and report upon the premises, but that they had refused. He therefore prayed the Sheriff to appoint a man of skill to inspect the premises foresaid, to hear parties, and report thereon to your Lordship, and if it shall be found on considering the said report, or such other procedure as your Lordship shall see fit to adopt, that the respondents or either of them have not implemented and fulfilled the obligations undertaken by them under the said lease, and renewals thereof from time to time, as above specified, to decern and ordain them at the sight of such men of skill to make the said repairs, or failing their doing so to authorise the petitioner to execute the same at the expense of the respondents, and to decern against them or either of them for the expenses of such repairs, as those may be ascertained in the course of the process to follow hereon: And farther, to find the respondents liable to the petitioner in the expenses of this application, and whole warrants and procedure to follow hereon, and to decern therefor."

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A record was made up, in which the respondents stated substantially that the lease had been brought to a close before the petition was presented, in terms of an agreement by which the landlord, as they said, consented, upon certain conditions, to depart from all claims under the lease. They also denied the petitioner's averments in regard to the dilapidation of the premises.

The respondents pleaded, *inter alia*;—(3) The petition is incompetent as laid, in respect that the said lease founded on has been brought to a termination before the raising of the action. (10) Assuming that the lease is still binding upon the respondents, or either of them, the petitioner is not entitled to the remedy craved until the natural expiry hereof.

The Sheriff-substitute (Hallard) pronounced an interlocutor, which, after certain findings, proceeded:—"Before further answer, and under reservation of all pleas of parties, remits to Mr Robert Morham junior, architect, Edinburgh, to inspect the premises referred to in the petition, to report whether the same are in a fit condition to carry on a type-founding business similar in all respects to that which has been lately carried on therein by the respondents and their authors, with a statement of the extent and cost of such repairs as may, in the reporter's opinion, be necessary for that purpose, and to report *quam primum*, reserving all question of expenses."

The respondents appealed to the Sheriff (Davidson), who pronounced his interlocutor:—"Recalls the interlocutor appealed against: Finds that the petition is premature, and *hoc statu* incompetent: Therefore dismisses the petition: Finds the respondents entitled to expenses," &c.*

The petitioner appealed to the Court of Session, and argued;—The ground on which the respondents resisted the petition was that it was too late. They now turned round and said that it was too early. Whether the

* "NOTE.—The respondents say the lease is at an end, the whole obligations and rights of parties under it having been fixed by an arrangement in February 1876, by which the lease was terminated. On the other hand, the petitioner denies that, and avers that the lease is still subsisting, and that the respondents are still in possession, and that the payments made to him were not in virtue of an alleged arrangement, but simply two payments of half-yearly rents. If this be so, and the statement of the petitioner must, in dealing with his petition, be taken as correct, then, as the lease does not come to its natural termination till Whitsunday 1877, the petitioner is premature in his application in March 1876. And that he alleges to be wrong may be put right before the lease ends in 1877."

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petitioner or the respondents were right as to the term at which the lease ended, there was a dispute as to the point, and the landlord was clearly not bound to run the risk of losing his remedy of judicial inspection by delay.¹

The respondents maintained that the competency of the petition must be judged of upon the petitioner's averments, and that upon his own shewing there was at the date of the petition more than a year of the lease to run.

The Court, on 4th November 1876, pronounced this interlocutor:—"Recall the interlocutor of the Sheriff appealed against: Before answer, remit to Mr William Watherston, builder in Edinburgh, to report upon the existing state of repair of the subjects in dispute, reference being had to the statements of parties on record."

Mr Watherston reported that the appearance of the premises afforded evidence that they had been for many years in the same condition of repair as at the date of his inspection, except that there was a considerable excess of broken panes in the windows, and that the premises were as fit for carrying on a typefoundry business as they had been for many years previous. He subsequently, at the request of parties, fixed the sum payable for excess of broken glass at £12.

The debate was then resumed. Both parties claimed expenses, the respondents, on the ground that they had been successful on the merits, the averments of the petitioner having proved to be unfounded except as regards the trifling item for broken glass; the petitioner, on the ground that the greater part of the expenses had been incurred by the respondents maintaining that the petition was incompetent on grounds which were mutually destructive as well as erroneous in point of law.

LORD JUSTICE-CLERK.—As to the competency of the petition I have no doubt. It may be that where no action has been taken by the tenant the landlord is not entitled to have a judicial inspection till the close of the lease. But the answers of the respondents themselves make the position of matters quite distinct. In article 5 of his condescendence the petitioner avers that "some months ago" the respondents removed from the premises, taking with them nearly all their plant. The respondents' answer is,—“Admitted, and reference made to the respondents' statement of facts.” Then, in the 7th article of the petitioner's condescendence there is a specification of the damage, which he says the respondents are bound to make good. In their answer the respondents say,—“The said lease was terminated of consent on 29th February 1876, at all events before the raising of the present action,” and they again refer to their statement of facts, in which they give a detailed statement to the same effect. So that on the record there is an allegation by the respondents that they had given up the lease.

In these circumstances the landlord had no choice but to act as if that allegation were correct. I have no doubt that he was entitled to have the state of the premises judicially ascertained, for otherwise, in the event of the tenant's allegation as to the lease having terminated proving well founded, he might have been held to have cut himself out of his remedy by delay. The Sheriff's substitute was thus entirely right in making the remit. The respondents, however, appealed to the Sheriff, and he recalled his Substitute's interlocutor, and dismissed the petition. The petitioner was thus unfortunately obliged to come here. We made a remit to Mr Watherston, and we have now his report. I confess that when we made the remit the petitioner's statements led me to expect that the damages would prove to be of a more extensive character than the

¹ *Baird v. Mount*, July 3, 1874, *ante*, vol. i. p. 1176.

are ascertained to be. On the whole, I think we should find the petitioner entitled to expenses in this Court, and find no expenses due in the inferior Court.

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LORD ORMDALE and LORD GIFFORD concurred.

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THE COURT pronounced this interlocutor:—"Sustain the appeal, approve of the report by Mr Watherston, No. 36 of process, and in respect that payment of the sum of £12, mentioned in the report, has been tendered by the respondents to the appellant at the bar, find it unnecessary to pronounce any other judgment on the merits of the cause: Find the appellant entitled to expenses in this Court," &c.

D. TODD LEES, S.S.C.—G. C. BANKS, S.S.C.—Agents.

JAMES GARDNER, Petitioner.—*Kinnear—Lorimer.*

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EDWARD A. LUCAS AND OTHERS (Beresford's Trustees), Respondents.—*Balfour—J. P. B. Robertson.*

July 17, 1877.
Gardner v.
Beresford's
Trustees.

Leave to Appeal to the House of Lords.—In an action raised by a landlord for reduction of a lease of a quarry, on the ground that it had been obtained by fraud, and for removal and accounting, the tenant pleaded that in the event of his lease being reduced he was entitled to retain possession of the quarry under a separate agreement with the landlord. A jury found that the landlord had been induced to grant the lease by fraud, and thereafter the Court reduced the lease and repelled the tenant's plea that he was entitled to retain possession, and remitted the case to the Lord Ordinary to proceed with the conclusions for accounting. On the defender applying for leave to appeal it was granted, on condition that he found caution for violent profits, and that the petition of appeal was presented and an order of service obtained thereon within eight days.

Landlord and Tenant—Violent Profits.—*Observed*, by the Lord President, that violent profits consisted in all that the pursuer could have made of the subject if he had been in possession, and all the damage done to the subject by the defender.

Supra, p. 363 and p. 885.

1st DIVISION.
B.

This was a petition by James Gardner for leave to appeal to the House of Lords against a unanimous judgment of the First Division pronounced on 13th June 1877. As the judgment was interlocutory it was necessary to obtain the leave of the Court under sec. 15 of 48 Geo. III. c. 151.

Argued for petitioner;—If he succeeded in getting the interlocutor reversed, so far as it dealt with the third plea in law (*supra*, p. 885), he would be entitled to remain in possession of the quarry. If he was not allowed to appeal at the present stage he never could resume possession, but all that could be given would be a new possession under a different lease. This could not be done under the present action. It would be very inconvenient for him to be turned out, and no prejudice would arise to the respondents by his remaining until the case was finally decided. The petitioner was solvent, and the respondents might recover any damage they might sustain from his being allowed to remain.

Argued for respondents;—It had been finally settled by the verdict of the jury that the lease was obtained by fraud, and the petitioner ought not to be allowed to continue to possess under it. Even though the defender might be entitled to obtain possession under the agreement he was not entitled to continue the possession which he obtained on the faith of the lease which had been reduced. If an appeal was now allowed there might be another appeal when the question of accounting was decided. The more convenient course was that the whole cause should be appealed after a final judgment.

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LORD PRESIDENT.—An application of this kind is addressed to the discretion of the Court, and it is sometimes very difficult to say whether it is more expedient to grant or to refuse leave to appeal. I am very much inclined in most cases where the cause is not exhausted to lean to the side of refusing to grant the leave unless the interference of the Court is clearly expedient. It is apt to cause an interruption to the final disposal of the action. But here there is a great peculiarity, because, as Mr Kinnear very pointedly observed, if the leave now asked is not granted there never can be an appeal, and all that a judgment of the House of Lords could give would be a restitution of the lessee's possession, not under the lease by which he at present possesses, but under another and a different lease. I do not think that the pursuers have any great interest to resist the application, provided they are secured against any loss consequent on continuance of possession. If caution is found for violent profits they will be amply secured, because violent profits embrace not only all profits which the pursuers could make if they were in possession, but also all damages which the subject may receive at the hands of the defender. One cannot conceive any other loss which can arise to the pursuers if the application is granted.

Besides, the interruption in the progress of the case is not of so much consequence here as in many cases. The accounting may perhaps occupy some time, and it is not a thing requiring any great hurry in the settlement. The defender, so far as we know, is quite solvent, and therefore the delay which will occur cannot create any prejudice to the pursuers. I therefore think we may grant leave to appeal if the defender will lodge in process a bond of caution for violent profits; and also under the distinct understanding that he will present his appeal to the House of Lords within a certain short time. Probably eight days should be the limit, as Parliament is now sitting.

LORD DEAS.—The specialty on which the respondents found against granting leave to appeal at this stage is the fact that the lease which has been reduced was obtained by fraud. But the question to be raised in the appeal is whether our judgment giving effect to that specialty is right. The defender says—True, my title has been reduced on the ground of fraud, but I had two titles, and I possessed on both of them, and I ought not to be turned out of possession until it has been found that one title is bad as well as the other. Our judgment, no doubt, was unanimous, but that is just the reason why leave to appeal is necessary. We may have been wrong in that judgment. It may be held that there are two titles,—that the defender is in possession under both, and ought not to be removed. These are considerations against granting leave to appeal. But, on the other hand, if the conditions which your Lordship has suggested are complied with—if the petitioner finds caution for violent profits, and undertakes to present his appeal within a given time—these considerations are to a great extent obviated, and I am in that view favourable to granting the leave asked.

LORD MURE and LORD SHAND concurred.

CAUTION for violent profits having been found by the petitioner the Court, on 17th July, pronounced this interlocutor:—"In respect of caution for violent profits having now been found, in terms of bond, No. 27 of process, grant leave to the petitioner, James Gardner, to appeal to the House of Lords against the interlocutor

of this Court of 13th June 1877, as prayed for, on condition of the petition of appeal being presented and an order of service obtained thereon within eight days from this date."

ADAMSON & GULLAND, W.S.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

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HECTOR MACFIE AND OTHERS (Duncan's Trustees), First Parties.—

M'Laren—Darling.

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JOHN ABBEY ELLISON AND OTHERS, Second Parties.—*Asher—Moncreiff.*

JANET DUNCAN M'CALLUM AND OTHERS, Third Parties.—*M'Laren—*

Darling.

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Trust—Succession—Payments of income in anticipation of Vesting—Parent and Child—Provisions to Children.—Where trustees were directed to hold £5000 and shares of residue for behoof of a mother in liferent, and of such of her children as should reach the age of twenty-five years and the survivors in fee, and where these provisions had not at the death of the liferenter vested in any of the children by reason of none of them having reached that age, the Court held that the children as a class were entitled to the accruing income for their education and maintenance, it being admitted that the testator had placed himself in *loco parentis* to them, and that the advances were necessary.

MR JAMES DUNCAN, formerly merchant in Valparaiso, died in Rothesay on 21st October 1874, leaving a trust-disposition and settlement dated 28th November 1867, and codicil dated 19th October 1874. Hector Macfie and others were appointed trustees and executors and tutors and curators to minor beneficiaries.

After various directions there came the following:—"In the seventh clause . . . (Third) I direct and appoint my trustees, at the first term of Whitsunday or Martinmas happening six months after my decease, to set aside and hold, and when opportunity offers to invest, in their own names, as trustees foresaid, the sum of £5000 sterling," and to pay the annual interest thereof to the testator's sister, Mary Duncan, if alive, and failing her to Mrs Maria Lyall or Ellison (who was an illegitimate daughter of a sister of the testator). Upon the decease of both ladies the trustees were to "hold the fee of the said sum of £5000 for behoof of such of the children of the said Maria Lyall or Ellison, whether by her present or any future marriage, as shall be then surviving, and shall have attained or shall afterwards attain the age of twenty-five years complete, and for behoof of the issue of any child or children who may have predeceased the cessation of said liferents, or, if there be no liferenter, who may have predeceased said last-mentioned term, or who may die before attaining the foresaid age leaving issue; and I direct and appoint my trustees to pay and divide said sum to and among said children and issue upon their respectively attaining the foresaid age of twenty-five years complete, the division being *per stirpes*." Four other sums of £5000 were also provided to various persons in liferent and fee.

In the ninth purpose the testator directed his trustees to divide the residue of his estate into five equal shares, of which two were to be invested and held for the liferent use of the testator's brother, Colin Duncan, and a niece, Miss Janet Duncan M'Callum, respectively, "and, with reference to the disposal of the fee of the said two shares, I direct and appoint my trustees, upon the decease of the said liferenters respectively, to divide the shares liferented by them respectively into three equal proportions, and to hold, apply, and dispose of the same according to the destination, and in the same way and manner in all respects (subject always to the provision as to vesting hereinafter written) as is hereinafter appointed with reference to the three remain-

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ing shares of said residue and remainder: But notwithstanding what is before written, I provide and declare that none of the proportions of said two shares, or any part thereof, shall become vested interests in the persons who may become entitled thereto until the same shall be paid over to them respectively." . . . "With reference to the disposal of the three remaining shares of the residue and remainder of my means and estate, I direct and appoint my trustees to hold, apply, and dispose of one of the said shares for behoof of the said Mary Duncan and Maria Lyall or Ellison, and the children of the said Maria Lyall or Ellison, and the issue of predeceasing children, for their respective rights of life rent and fee, . . . all in the same way and manner in all respects . . . as is hereinbefore provided with reference to the three several legacies of £5000 hereinbefore conceived in favour of the said persons."

Mr Duncan was survived by the two life renters, his sister (Miss Duncan) and Mrs Ellison, but Mrs Ellison, the last survivor, died on 25th May 1876. She was survived by eight children, two of whom had at that date attained majority, but none had attained the age of twenty-five years.

The total funds in the trustees' hands for the behoof of these children consisted of (1) the £5000 bequeathed to them; (2) one-third (or about £16,000) of the shares of residue set apart for the life rent use of the testator's brother (who predeceased him), and his niece, Miss M'Callum; and (3) one-fifth (or about £24,000) of residue.

A special case was presented to the Court, to which the trustees were first parties, Mr Ellison on behalf of his children and the children themselves were second parties, and the sole surviving next of kin of Mr Duncan were the third parties. The case, after setting forth the facts and passages of the deed above referred to, proceeded as follows:—"It is admitted that, from the circumstances of the children (of Mrs Ellison) the application of the whole or the greater portion of the income on their respective shares is urgently required for their maintenance and education, and the trustees have power to make such application. It is also admitted that the truster in the end of 1872 intimated to Mr John Ellison an intention of giving to his wife, the said Mrs Maria Lyall or Ellison, for herself and family, £100 every six months, and that the truster thereafter during his lifetime regularly made payments to Mrs Ellison in accordance with an intimated intention. It is submitted by the first parties (the trustees) that there is no power in the trust-disposition and settlement of Mr Duncan (at least no express power) sanctioning the advancement of any portion of the income for either of the above purposes, and that the children have at present no vested interest in their said provisions, or any of them." "It is submitted by the second parties, with reference to each of the provisions (1) that the children collectively have such an interest in their said provisions as entitles the trustees to apply the income thereof, or so much as may be necessary for the purposes of their maintenance and education; and (2) that the second parties have a vested interest in all the three recited provisions, or one or more of them."

The questions were,—(1) Have the second parties a vested interest in the provisions contained in the said recited clauses of the settlement, or in any and which of them? (2) Are the second parties entitled to have the income of any of said provisions paid over to them or applied for their behoof before they become entitled to payment of the shares of the capital, and, if so, to which of the provisions does this apply? (3) If the second parties are so entitled, are the trustees bound to pay over or apply, in the manner stated, the whole income; or, if not, how much? (4) If they are not so entitled, how does the income, or the appropriated portion thereof, fall to be applied?"

Argued for the second parties;—(1) The provisions must be held to be

to have vested in the children.¹ (2) If the provisions had not vested in the children as individuals they must be held to have vested in them as a class, subject to the contingency of survivorship, and in that case they were entitled to get the accruing income for their maintenance and education.²

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At advising,—

LORD JUSTICE-CLERK.—The material questions which arise for decision in this special case are contained in the first two heads of those put to us. The first is, whether the second parties, the children of Mrs Ellison, have a vested interest in the provisions contained in the clauses of this settlement, and, if in any, in which of them; and the second is whether, if they have not yet a vested interest in those provisions, they are entitled to have the income of them paid over to them or applied for their behoof, until the period of vesting arrives. These two questions depend upon the terms of a clause bequeathing a sum of £5000 to the children of Mrs Ellison, and on the residuary clause. The last of these must be construed in the first instance, for reasons which appear plainly from its words. The ninth purpose of the trust-deed, which contains the residuary bequest, is in the following terms:—(Reads.) As here expressed this clause gives rise to considerable perplexity, arising mainly from the conveyancer using a complicated plan to express a very simple destination. The clause in its substance, although not in its words, amounts simply to this: The testator divides the residue substantially into three parts, among three classes of liferenters and fiars. The first of these are Mary Duncan and Maria Lyall or Ellison, and the children of Mrs Ellison. These last are the second parties in the case. The second family is Margaret Ann M'Callum or Johnston and her children; and the third, Hilarion Duncan and his widow and children, "for their respective rights" (as the deed bears) "of liferent and fee." In other words, Mary Duncan and Maria Lyall or Ellison are to have the liferent of one-third of the residue, and Mrs Ellison's children are to have the fee of that third. But this bequest of residue is burdened by a liferent of two-fifths of the whole residue provided in favour of Colin Duncan and Janet Duncan M'Callum in the proportion of one-fifth to each. These last-mentioned liferenters are dead, and Mary Duncan and Maria Lyall or Ellison are likewise dead, and therefore the fee of one-third of the whole residue has now opened to the children of Maria Ellison, and the question we have to decide is whether it has vested or not.

Now, looking at the residuary bequest in the light of this explanation, it does not appear to me that there is any difficulty in deciding that question, for the deed expressly bears that all the shares of the ultimate residue are left "in the same way and manner in all respects, excepting only as aftermentioned, as is hereinbefore provided with reference to the three several legacies of £5000 hereinbefore conceived in favour of the said persons." Therefore, the question is to when these shares of the residue are to vest depends upon the conditions

¹ *Alves' Trustees v. Grant*, June 31, 1874, *ante*, vol. i. 969; *Mathew v. Scott*, Feb. 21, 1844, 6 D. 718; *Maitland's Trustees v. M'Dermid*, March 15, 1871, 23 D. 732, 33 Scot. Jur. 372.

² *Boddy v. Dawes*, Dec. 20, 1836, 1 Keen, 362; *Chaworth v. Hooper*, 1780, *Brown's Chan. Cases*, 82; *Williams on Executors*, vol. ii. 1430; 2 *White and Tudor's Leading Cases* (4th ed.), 312, note to *Ashburner v. M'Guire*; *Hardman v. Guthrie*, June 6, 1828, 6 Sh. 920; *Templer v. Templer*, April 1, 1828, 3 W. and S. 47; *Campbell v. Reed*, June 12, 1840, 2 D. 1084, 12 Scot. Jur. 515; *Ralston v. Ralston*, July 8, 1842, 4 D. 1496, 14 Scot. Jur. 573; *McIlvie v. Cumming*, Jan. 27, 1852, 14 D. 363, 24 Scot. Jur. 180, July 7, 1856, 19 D. (H. L.) 7, 28 Scot. Jur. 646.

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under which those legacies were left. Before turning to them I may remark that the only difficulty which has arisen in the case is founded on the fact that the testator divided in point of form his residue into five shares, although, in truth, he had only three classes of fiars among whom he intended it should be divided, the division into five shares being only applicable to the liferent rights. But he deals, first, with the two-fifths of the residue which was to be liferented by Colin Duncan and Janet Duncan M'Callum, and after providing that when these liferents fail the fee of the shares should fall to the same persons and in the same proportions as the rest of the residue, he has this clause:—"Subject always to the provision as to vesting hereinafter written as is hereinafter appointed with reference to the three remaining shares of said residue and remainder; but notwithstanding of what is before written, I provide and declare that none of the proportions of the said two shares or any part thereof shall become vested interests in the persons who may be entitled thereto until the same shall be paid over to them respectively."

In the view which I take of the case, as has been seen, the whole of these provisions were entirely superfluous, seeing that the fee of the two shares, the income of which was to be drawn by the liferenters, was simply to fall into the residue and to be divided accordingly. The regulating clause in regard to the conditions on which this was to take place is found in the general provision towards the end of the residuary clause. I am therefore quite unable to give effect to the contention that the words about vesting which I have just read create, as regards the fee of those two liferented shares, any distinction whatever between them and the other shares of residue which have been left to those persons. It follows that the provisions and conditions applicable to the legacy of £5000 are those which must regulate the succession to all the residue.

Now, when we turn to the clause under which those bequests were left I find no room for doubt so far as this matter of vesting is concerned. This legacy of £5000 to the daughters of Mrs Ellison is in the following terms:—"My trustees shall hold the fee of the said sum of £5000 for behoof of such of the children of the said Maria Lyall or Ellison, whether by her present or any future marriage, as shall be then surviving, and shall have attained or shall afterward attain the age of twenty-five years complete, and for behoof of the issue of any child or children who may have predeceased the cessation of the said liferent, or, if there be no liferenter, who may have predeceased the said last mentioned term, or who may die before attaining the foresaid age, leaving issue." These are the directions under which the residue is to vest, and is to be paid over, and I am very clearly of opinion that no vesting can take place under these provisions in any of the children until they attain the age of twenty-five years. As the clause is expressed this is a condition, and there is, in my opinion, no ground for holding that this is merely a postponement, as regards the individual children, of the period of payment. I think, therefore, the first question must be answered in the negative.

The second question is one of very considerable difficulty. The fee being entirely cleared of the liferent rights, what is to become of the accruing income prior to the period of vesting? I have come to be of opinion that we are entitled to direct that the accruing income of this provision should be applied for the benefit of the presumptive fiars. In the first place, although, as I have said, the clause under which the legacy of £5000 is left postpones vesting until a child arrived at the age of twenty-five, I am of opinion that the whole sum, both of legacy and of residue, vested in the children as a class. There is no alter-

destination. The whole interest, whatever it is, vests in the children themselves, No. 170. although the individual shares have not vested. The case of Maitland (23 Dunlop, 732) is a strong authority to that effect. In that case it was held, in July 17, 1877. regard to a clause expressed in a way very similar to the present, that although Duncan's Trustees and Others. the children predeceased the period at which the vesting was to take place, if one of them survived all vested in him, although he might not have arrived at the age at which individual vesting was to take place. This decision proceeded on the principle that as no other interests whatever were involved, and it was quite certain that no one could claim to share with the surviving child, the whole necessarily vested in him. It seems to me that this rule embodies a principle of good sense as well as of law,—that if a fund is devoted for the benefit of the family as a class, and not destined to any one failing those legatees, it is reasonable that the money should be applied for the benefit of the survivor, seeing that the only object of the provisions postponing vesting have no longer any application.

There are not many cases in our books on this subject, but it seems to be settled in the law of England that where a fund like this is in the hands of trustees for the behoof of a family, although payment and vesting may be postponed, it is within the power of the Court to direct the trustees to apply the accruing income for the benefit, maintenance, and education of the children. It is true that this rule seems to be confined to cases in which the testator stands *in loco parentis*, and in which it might be presumed from his relationship to the persons favoured by the will that such was and must have been his intention. This element is not absent here. I find it stated in the case that it is admitted that from the circumstances of the children the application of the whole or greater part of the income of their respective shares is urgently required for their maintenance and education. It is also admitted that the truster in the end of 1872 intimated to Mr John Ellison an intention of giving to his wife, the said Mrs Maria Lyall or Ellison, for herself and family, £100 every six months, and that the truster thereafter during his lifetime regularly made payments to Mrs Ellison in accordance with the said intimated intention. That being the state of the family and the position in which the testator stood, the case seems to me to come completely within the rule which I find laid down in Williams on Executors. I need not go over the cases. They are quoted in that work, and were commented on from the bar. In the circumstances in which this family stands, I am of opinion that the accruing income of the property which is ultimately to vest in one or more of them is not more than sufficient to maintain and educate those who require it.

While, therefore, I propose to answer the first question in the negative, I think the second should be answered in the affirmative, and in that case the third and fourth will not require to be answered.

LORD ORMDALE.—This special case raises some questions of nicety and difficulty. They resolve substantially into two—1st, Are the provisions intended for the second parties to be held as vested in them, notwithstanding that they have not attained the age of twenty-five? and 2dly, Are the second parties not at least entitled in the meantime to the income or interest of these provisions, or to have it applied for their behoof?

In regard to the provision of £5000, referred to in the third branch of the seventh purpose of the testator's settlement, it seems to me to be too clear for doubt that it has not vested, and cannot vest in the second parties, till, in the

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words of the testator, they "shall attain the age of twenty-five years complete," which none of them have yet done. Not only is this expressly declared, but there is a survivorship, and also ulterior interests, attached to the destination of the provision, which would require to be disregarded in order to its being held as now vested.

The other provisions, consisting of one-third of the two shares of residue referred to in the ninth purpose of the deed of settlement, although dealt with by the testator in peculiar terms, must, I think, be held to stand in the same position as the £5000 provision already noticed. The argument founded upon the phraseology employed by the testator in regard to the provisions now in question raises too slight an implication, if any at all, to entitle the Court to distinguish them, as regards the matter of vesting, from the other provision of £5000.

And so, also, I am unable to hold it implied that the testator meant and intended any of the provisions to vest in the beneficiaries before they attained the age of twenty-five years, merely because there is to be found in his deed of settlement an appointment of tutors and curators to all persons taking benefit under it "who may be in pupillarity or minority, *quoad* such benefit, during their respective pupillarities and minorities." I am not satisfied there might not have been persons beneficiaries under his settlement other than the second parties to the present case to whom the appointment of tutors and curators might not have been applicable when the deed of settlement was executed. For example, there are several persons referred to in the fourth purpose of the deed, legatees to the extent of £250, some of whom may have been in pupillarity or minority when the deed was executed in 1867. There are also legacies bequeathed by the testator in his codicil to children expressly, and it may very well be that the general clause as to the appointment of tutors and curators was inserted in his settlement in order to meet the case of pupil or minor legatees whom he might favour in any codicil he might afterwards execute.

In regard to the second question, relating to the interest or income of the residue, I have more difficulty. In the general case, interest or income cannot well be held to be payable to any party in whom the capital has not yet vested, unless there be a direction, express or implied, to that effect. But in the present case, although there is no express direction, yet, when I keep in view the rule which appears, from the cases which were cited at the debate, and as explained by your Lordship, to operate in the Equity Courts in England, to the effect that parties, and more especially children as a class, as here, having merely prospective contingent interests in a capital sum, may be entitled to the interest of it,—a principle which seems to have been given effect to in this Court in the case of *Campbell v. Reed*, 12th June 1840, 2 D. 1084,—I am not disposed to dissent from what I understand is the opinion of both your Lordships, that the interest or income in question, which is not directed to be otherwise accumulated, may be paid to or applied to the benefit of the second parties.

LORD GIFFORD.—The will of the late James Duncan, on the construction of which depend the questions raised under the special case, is a somewhat complicated instrument, and I have found some of the questions to which it gives rise attended with considerable nicety and difficulty.

The first question relates to the period of vesting of the provisions which the testator makes for the children of Mrs Maria Lyall or Ellison. These provisions are three in number—1st, A sum of £5000, which the testator directs to be set aside, held, and applied in the third sub-section of the seventh purpose of his deed; 2d, One-third of two-fifth shares of the residue of the estate, which two-

fifth shares were to be liferented by Colin Duncan and Janet Duncan M'Callum, No. 170.
as provided in the ninth purpose of the trust-deed; and, 3d, One-fifth share of
the residue of the estate, also provided in the ninth purpose of the deed.

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I am of opinion, on a construction of the terms of the whole deed, that none of these provisions have yet become vested interests in any of the children of the late Mrs Maria Lyall or Ellison, who are the second parties to this special case. I think that no vesting can take place under Mr Duncan's deed until the children of Mrs Ellison respectively attain the age of twenty-five years. The main clause in the trust-deed, so far as the question of vesting is concerned, is the third sub-section of the seventh purpose of the deed, for although this clause only refers to the first provision—the legacy of £5000—it really governs all the other provisions in favour of the Ellison family, and the testator expressly refers back to it in constituting the subsequent provisions.

Now, in reference to the fee of this £5000, the interest of which was to be paid to Mary Duncan and to Mrs Ellison in succession, the testator provides that, after the death of Mary Duncan and Mrs Ellison, “my trustees shall hold the fee of the said sum of £5000 for behoof of such of the children of the said Maria Lyall or Ellison, whether by her present or any future marriage, as shall be then surviving, and shall have attained, or shall afterwards attain, the age of twenty-five years complete,” and then there is a destination to the issue of such children as may die before attaining that age. It appears to me that the attainment of twenty-five years is a proper condition, essential to any of Mrs Ellison's children, as individuals, taking a vested interest in the provision. The condition is imposed in the strongest way, namely, by way of limiting the class who are to take. The bequest is not to all Mrs Ellison's children, with a mere postponement of payment,—it is a bequest only to “such of the children” as may attain twenty-five, so that if any child predeceases that age he or she is not an ultimate beneficiary or legatee at all. I think this is conclusive against the vesting in any child until the age of twenty-five.

Nor is the case different with regard to the other two provisions, which consist of shares of the general residue of the trust-estate. These shares of residue are given to Mary Duncan and Mrs Ellison, and to the children of Mrs Ellison “for their respective rights of liferent and fee”—“all in the same way and manner in all respects (excepting only as aftermentioned) as is hereinbefore provided with reference to the three several legacies of £5000 hereinbefore conceived in favour of the said persons.” The exception here mentioned only relates to the estimated interest which is to be added to the legacy of £5000, and which estimated interest, at four per cent, is not to apply to residue, which will only receive the actual interest which may accrue thereon. The result appears to be, in so far as relates to the fee of the residuary bequests, that the same will not rest in any of Mrs Ellison's children individually until such children respectively attain the age of twenty-five years complete. The same rule is applicable to the residue as to the legacy of £5000. Both are only to belong to “such of the children” as attain that age. I am of opinion, therefore, that the first question put in the special case should be answered in the negative. No vesting of any of the provisions has yet taken place.

The remaining questions in the special case are attended with still greater difficulty, and it is not without considerable hesitation that I have come to think that although no part of the capital or fee of the provisions has yet vested in any of Mrs Ellison's children, the interest now accruing on these provisions is

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The general rule is, that where a money legacy is only due and payable upon the occurrence of an uncertain event, that is, upon the purifying of a proper or uncertain condition, no interest is due until the condition is purified and the legacy becomes payable. Interest is not due upon legacies, any more than upon debts, until they fall due and become payable. This rule is necessarily subject to an exception when the legacy consists of a general residue, or of a share thereof, for in such cases the intermediate interest must necessarily go along with and accrue to the legacy itself. Accruing interest on residue is really just a part of that residue when it is not otherwise disposed of. It is a different question whether in the case of a conditional or contingent bequest of residue the accruing interest can be paid before the term of vesting of the residue itself, or whether it must not accumulate for behoof of the legatees who may ultimately take the residue.

Still it is always an important element that in bequests of residue the accruing interest does not go to any third party, but necessarily belongs to the residuary legatees, whether it be paid *ad interim* or whether it accumulate till the final payment of the residue itself. In the present case, although the first provision is not residue, but a money legacy of £5000, I think the rule will apply that the interest thereon must be dealt with as interest upon residue, for the same parties who are entitled thereto are entitled to the corresponding shares of residue, so that their provision is really a provision of residue, increased by £5000, the other residuary legatees having a like share of residue increased by a like increment. I think, therefore, I may deal with the question of interest as if it were all interest accruing on shares of residue.

Now, in the first place, when a residue or share of residue is to be liferented by a parent and the fee thereof is destined to her children, and where there is no provision for accumulation of interest, I think there is a strong presumption that the testator did not intend the payment of the annual interest on the residue to stop at the mother's death, however young and unprovided for her children might then be, although the fee of the residue might only be given to such of the children as might attain majority or be married. Accumulation is not to be presumed where not specially directed, and it would be a very hard and somewhat inequitable result if Mrs Ellison's young family should by their mother's death be deprived of the income or interest which their mother enjoyed, and should be obliged to do without that interest in the meantime, and without the means of support to wait for that interest accumulating for them till they respectively attain the age of twenty-five. Wherever interest of residue is payable to a parent in liferent, and the ultimate fee destined to the children, but payment thereof postponed, it will be very easy to presume that the testator intended the pupil or minor children to get the same benefit of annual proceeds as their father or mother had enjoyed. Accordingly it seems to be quite settled by the authorities that where a parent himself provides to his children shares of residue or even simple legacies, the payment or vesting of which is postponed till majority or marriage or other contingent event, the children will nevertheless be entitled to the intermediate accruing interest for the purposes of maintenance. But this principle has been extended beyond the case of children to cases where the testator held or assumed the position of being *in loco parentis* to the children to whom he destined the fee of the provision. This rule has been

established by the following, among other, cases,—*Acherley v. Vernon*, 1 P. Williams, 783; *Beckford v. Tobin*, 1 Vesey senr. 307; *Hill v. Hill*, 3 Vesey and Beam, 183; *Campbell v. Reid*, 2 D. 1084; *Ogilvie v. Cumming*, Jan. 27, 1852, 14 D. 363; *Maitland's Trustees v. M'Dermid*, 23 D. 732; *Hardman v. Guthrie*, June 1, 1828, 6 S. 920; *Templer v. Templer*, April 1, 1828, 3 W. and S. 47.

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In the present special case it is expressly admitted that the truster placed himself *in loco parentis* to Mrs Ellison's children, and that for at least two years before his death he promised to pay and did actually pay to Mrs Ellison for behoof of herself and "family" the sum of £100 every six months. The precise relationship between the testator and Mrs Ellison's family is not stated in the case, but I understand it was very close, although perhaps not bearing a legal character.

In the whole circumstances, though not without hesitation, I am of opinion that Mrs Ellison's children are entitled to the interest of their provisions, and that before the capital thereof vests in them by their attaining respectively the age of twenty-five, and although the accruing interest is of considerable amount, I think that the trustees are entitled to pay the whole in equal proportions to or for behoof of the eight children of Mrs Ellison. It is stated in the case that the whole or nearly the whole income is urgently required for the maintenance and education of the children, and the trustees should see that it is applied for the children's benefit. The second and third questions, therefore, should be answered to this effect, and the fourth question is superseded.

LORD JUSTICE-CLERK.—It is an omission in the case that the relationship between the parties was not made quite specific. However, though that is so, we have not proceeded on any unfounded ground in the judgment.

THE COURT pronounced an interlocutor, finding—"1. That the second parties have not a vested interest in the provisions contained in the recited clauses of the settlement of James Duncan: 2. That the second parties are entitled to have the income of all of said provisions paid over to them, or applied for their behoof, before they become entitled to payment of their share of the capital: 3. Find it unnecessary to answer the two last queries: Find the expenses of both parties payable out of the capital of said provisions, and decern."

WEBSTER, WILL, & RITCHIE, S.S.C.—**JOHN CARMENT, S.S.C.**—Agents.

THOMAS ANDERSON (Thomson's Factor), Pursuer and Real Raiser.

ROBERT THOMSON AND OTHERS, Claimants.—*Kinnear—Jameson.*

THOMAS GLASS AND OTHERS, Claimants.—*M'Laren—Asher.*

WILLIAM SPENCER AND OTHERS, Claimants.—*Trayner—J. P. B. Robertson.*

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Anderson v.
Thomson, &c.

Succession—Special Legacy—Ademption—Deposit-receipt.—A lady, on 23d March 1875, left a sealed packet with her law-agent marked, "to be opened only in the event of my death," containing a letter dated the same day addressed to the law-agent with, *inter alia*, the following testamentary direction—"I empower you to uplift the deposit-receipt lying with you for £4000, to lodge it in your own name, and to hold it in trust for my mother's brothers and sister and for their children." She at the same time verbally instructed her law-agent to transfer the £4000 on deposit-receipt to his own name, promising to send written instructions as to its disposal, which were not sent. The law-agent, at the same time, said that he had made advances for her of £200 and would keep that sum out of the £4000, to which she agreed, and the balance was put in deposit-receipt in his name "in trust." On 12th May 1875 the law-agent suggested to her the investment of this sum upon a heritable security, for the purpose of obtaining

No. 171. higher interest. She agreed to £3500 being so invested, and this was done. The testatrix died on 8th June 1876. *Held (dub. Lord Justice-Clerk)* that the legacy was special, and had been adeemed.

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Observations (per Lord Justice-Clerk) on the doctrine that ademption does not depend upon intention.

Succession—Fee and Liferent—Residue.—A testator, in a testamentary letter of instructions, after bequeathing certain legacies, directed her law-agent “to hold the residue of my estate and distribute it annually between the following gentlemen.” *Held* that this was a bequest of the fee of the residue to the persons named.

2d Division.
Lord Rutherford
Clark.
R.

THIS action of multiplepoinding was raised by Mr Thomas Anderson, writer, Glasgow, judicial factor on the estate of the late Miss Jane Thomson, who died in Glasgow on 8th June 1876 possessed of heritable and moveable property to the extent of upwards of £19,000, for the distribution of the estate. On 23d March 1875 Miss Thomson, preparatory to leaving home to travel for some time upon the Continent, had left with Mr Anderson (who acted as her law-agent) a packet enclosed in a sealed envelope addressed to him, and endorsed “to be opened only in the event of my death.—J. T.” He had retained this packet until Miss Thomson’s death and then opened it, when it was found to contain a testamentary writing, holograph of Miss Thomson, in the following terms:—“9 Jane Street, Glasgow, 23d March 1875. Mr Anderson,—Dear Sir—As I purpose going from home, I think it right to leave written instructions with you in the event of my death, and request you to carry out the following instructions and arrangements. I empower you to uplift the deposit-receipt lying with you for £4000, to lodge it in your own name, and to hold it in trust for my mother’s brothers and sister, and for their children; further to make payment to Miss Annie Glass, Montreal”—(then followed various legacies.)—“and to hold the residue of my estate and distribute it annually between the following gentlemen—Mr William Spencer, Mr Bromhead, and Mr James Lindsay, along with the following presents to them: To Mr Lindsay my dining furniture.” &c. “I hope I have made everything explicit, and mean this to remain as my settlement of my affairs, and to be acted upon and carried out by you in the event of my death, and reserve to myself the power to alter or revoke these arrangements during my lifetime.—I am, dear sir, yours very sincerely, Jane Thomson, 9 Jane Street, Glasgow, 23d March 1875.”

A few days after Miss Thomson’s death her former law-agents intimated to Mr Anderson that they had in their possession a general disposition and settlement by Miss Thomson, dated 18th February 1861, whereby she conveyed her whole estate to her mother, Mrs Catherine Glass or Thomson, who predeceased her, and her heirs and assignees. Miss Thomson had no brothers or sisters, and her next of kin on her father’s side were her uncle and aunt, Robert Thomson and Mrs Margaret Thomson or Campbell. She had, however, a large number of relations on her mother’s side, consisting of the families of her mother’s four brothers of the name of Glass, and other collateral relatives.

Robert Thomson and his sister lodged a claim in the process in which they claimed express provisions made to them in the testamentary letter; and, in addition, the fee of the residue of the estate after the expiry of what they alleged to be the liferents of Messrs Spencer, Bromhead, and Lindsay.

The Glass family claimed the £4000 referred to in the letter, and shares of the residue after the expiry of the liferents, in virtue of the conveyance in the disposition of 1861.

Messrs Spencer, Bromhead, and Lindsay claimed their special bequests, and also the residue of the whole estate, including the sum of £4000 provided to the Glass family, which they contended had been adeemed.

A proof having been allowed in the competition, Mr Anderson was examined with regard to the actings of the testator upon which the plea of ademption of the £4000 was founded. The important parts of his evidence were as follows:—"I am a member of the firm of M'Gregor, Donald, and Company, writers, Glasgow. I was agent for the late Miss Jane Thomson. I managed her money matters for her. She called at my office on 23d March 1875. At that time she had £4000 lying on deposit-receipt in the City of Glasgow Bank, being the balance uninvested of the proceeds of a property in Argyle Street which I sold for her. . . . I produce the deposit-receipt, which is dated 5th March 1875. At the time she called she was on the eve of going to the Continent with some friends for a trip, and she asked me to transfer the money lying on deposit-receipt into my own name in the meantime. From an entry made in my books at the time I see that she 'promised to send me instructions as to the application of the same.' She gave me no reason for desiring that I should transfer the deposit to my own name, and I did not ask her for any. She gave me no written instructions that day, but promised to send me written instructions. She endorsed the receipt. I did not receive any written instructions from her while she was on the Continent. I had advanced £182 to pay an account of M'Tear the auctioneer, and £20 or £30 in the settling of the price of the ground-annuals, and when she instructed me to transfer the deposit I said I had advanced the £182, and that I would keep £200 out of the amount of the deposit. She agreed to that at once. In consequence of these instructions I directed my clerk to cash the deposit-receipt, to retain £200, and redeposit the balance and interest on the balance, amounting to £3804, 18s. 6d., in my name in trust, 'in trust' being added to shew that it was not my own money. . . . I had a meeting with Miss Thomson on the 12th of May, which must have been shortly after her return from her Continental trip. The following is the account of that meeting entered in my books:—"Meeting you to-day (12th May), when you requested us to remit your uncle, Mr Robert Thomson, £100 per annum, half-yearly, and receiving written instructions to that effect; advising as to investment of money in bank, handing you valuation and rental of property, Paisley Road, over which £4500 wanted, when you agreed to give £3500, to rank equally with another for £1000.' That referred to the investment of the sum which stood in my name in trust. (Q.) Do you remember whether Miss Thomson asked you to invest the money, or you proposed it? (A.) She called, and I proposed it. I did not write to her about that. (Q.) What was her object in calling? (A.) It was coming on to term time, and I suppose she called to ask about her property. (Q.) Had she called to give you directions about remitting the £100 per annum? (A.) Her object was to get £10 on account of interest due at Whitsunday, and she gave instructions to remit £50 every six months until further notice. The written instructions are below the receipt for the £10, which I now produce. The proposal to invest the money originated entirely with myself, and she agreed at once. She was to get 4½ per cent. of interest, which was a good deal more than was allowed by the bank. I can't say exactly what the bank rate then was. There were no other uninvested funds belonging to Miss Thomson, so far as I am aware, out of which this loan could have been made. After receiving her instructions I cashed the deposit-receipt, and made the advance she agreed to on heritable security. The transaction was really a Whitsunday transaction, but was actually carried through a few days later—on the 31st of May. The money continued to stand out on heritable security until Miss Thomson's death. It is given up in the inventory."

The Lord Ordinary, on 20th February 1877, pronounced this interlo-

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No. 171. *cutor*:—"Finds that the legacy of £4000 contained in the deposit-receipt mentioned in the testator's will has been adeemed: . . . Finds that the residue of the estate is divisible in equal shares between and among the claimants William Spencer, Horatio Kelson Bromhead, and James Lindsay; . . . and appoints the cause to be put to the roll for further procedure." *

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Thomas Glass and others reclaimed, and argued;—(1) As to the £4000. It was a legacy of so much money, and not a specific legacy of the money contained in the deposit-receipt. The receipt was only referred to for convenience.¹ The true doctrine with regard to the ademption of legacies laid down in the civil law² was that there must be an intention to revoke on the part of the testator. The form in which the security had been taken had nothing to do with the payment of the legacy, which was an ordinary pecuniary one.³ (2) As to residue. The terms of the letter shewed that there was only a bequest of the *liferent* of the residue to the three persons named, and the fee fell to be disposed of according to the destination in the deed of 1861, which had never been revoked.

Argued for the Thomsons;—The predecease of the testator's mother evacuated the conveyance in the deed of 1861.⁴ The bequest of the annual income of the residue being only one of *liferent*, the fee of the residue went to the heirs *ab intestato*. A gift of interest did not carry the principal, even though it was not otherwise disposed of.⁵

Argued for Spencer and others;—(1) As to the £4000. This was a specific legacy,⁶ and it had been adeemed.⁷ It was fixed law that the intention of the testator was not to be considered in a question of ademption.⁸ (2) As to the residue. The intention of the testator was clear. The bequest was one of the fee of the residue.

* "NOTE.—The Lord Ordinary has felt much difficulty in this case, and he has pronounced the preceding interlocutor with great hesitation.

"(1st), He has come to be of opinion that the bequest, relating to the deposit-receipt is specific, and that it has been adeemed in consequence of the contents of the receipt having been uplifted and otherwise invested during the testator's lifetime. The form in which the bequest is made, and the manner in which alone it can be made effectual, seems to him to lead to this result.

"(3d), He is of opinion that the testator meant to dispose of her whole estate. She says that the letter was intended to be a 'settlement of my affairs,' and in the opinion of the Lord Ordinary it must be read, if possible, in such a way as to exclude intestacy. No construction can be put on the clause disposing of the residue which does not do violence to the words. But the Lord Ordinary has endeavoured to construe it as far as possible in conformity with what he considers to be the testator's intention."

¹ *Lambert v. Lambert*, Jan. 16, 1806, 11 Vesey, 607; *Clark v. Browne*, July 25, 1854, 2 Smale and Giffard, 524.

² *Just. Inst. ii.*, 20, 12.

³ *Pagan v. Pagan*, Jan. 26, 1838, 16 Sh. 383, 10 Scot. Jur. 236; *Chalmers v. Chalmers*, Nov. 19, 1851, 14 D. 57; *Congreve's Trustees v. Congreve*, June 27, 1874, *ante*, vol. i. 1102.

⁴ *Findlay v. Mackenzie*, July 9, 1875, *ante*, vol. ii. 909.

⁵ *Sanderson's Executor v. Kerr and Others*, Dec. 21, 1860, 23 D. 227, 35 Scot. Jur. 114; *Humphreys v. Humphreys*, July 24, 1789, 2 Cox, 184.

⁶ *Williams on Executors*, vol. ii. 1160; 2 *White and Tudor's L. C.* 277.

⁷ *Jack v. Lauder*, 1742, M. 11,357; *Pagan v. Pagan*, and *Chalmers v. Chalmers*, *supra*, note 3; *Gardner v. Hatton*, April 2, 1833, 6 Simon, 93.

⁸ *Roper on Legacies*, i. 333, 202, 338; *Lord Thurlow in Stanley v. Potter*, July 16, 1829, 2 Cox, 180; 2 *White and Tudor's L. C.* 291.

At advising,—

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LORD ORMDALE.—The first question which was discussed by the parties at the debate in this case is, whether the bequest of £4000 is a specific one, and if it is so to be held, whether it was adeemed by the testatrix? The Lord Ordinary, while he has answered this question in the affirmative, says that he has done so with great hesitation.

I concur with the Lord Ordinary.

The question resolves into two branches—(1) Is the legacy a specific one? and (2) has it been adeemed?

In reference to the character of the legacy, it must be borne in mind that a particular sum of money, as distinguished from others, may constitute a specific legacy. Thus, the bequest of £1000 lent on bond to two persons named, as in *Pagan v. Pagan*, January 26, 1838, 16 Sh. 383, or of a sum of money in a particular bag, as in *Lawson v. Stitch*, 1 Atk. 508, are specific legacies, while a bequest of a sum of money generally out of the testator's estate is not so. And where a certain sum is given, and the fund in which it is invested is described or pointed at merely, the legacy will be demonstrative, as illustrated by the cases referred to in the 2d vol. of *White and Tudor's Leading Cases*, 2d ed. p. 241.

Having regard to these distinctions, it appears to me that the legacy in question is a specific one; for it is not merely a sum of £4000 generally, but the £4000 "lying with you," that is, Mr Anderson, to whom the testamentary letter is addressed by the testatrix. The bequest is in this way identified as a particular sum, separated and apart from the testator's estate generally. Nor do I think that it destroys this characteristic of the legacy that the testatrix goes on to instruct Mr Anderson to uplift the £4000, and re-deposit it on a receipt in his own name, and "to hold it in trust for my mother's brothers and sister and their children." I rather think that, in place of doing so, the identity of the sum, as separated and laid apart from the testatrix's general estate, is made all the more marked.

Assuming, then, that the legacy must be regarded as a specific one, the question next arises—Has it been adeemed?

About the facts on which this depends there is no dispute. Mr Anderson states them distinctly. His statement amounts to this—that the testatrix had anticipated, so to speak, the direction in her testamentary letter, and at a personal call before she left for the Continent indorsed the deposit-receipt for the £4000, and directed him to re-deposit the money in his own name "in the meantime;" that he did so under deduction of £200, which he retained, as he told her at the time he would do, to pay some outstanding debts of the testatrix; and that on the following day the testamentary writing was sent him by the testatrix enclosed in an envelope, which he did not open till after her death.

But in the interval between the time when the testatrix returned from the Continent and her death important acts in connection with the £4000 occurred, which are founded upon as shewing that she had adeemed the legacy. These acts are referred to by Mr Anderson as follows:—"I had a meeting with Miss Thomson on the 12th of May, which must have been shortly after her return from her Continental trip. The following is the account of that meeting entered in my books—'Meeting you to-day (12th May)

No. 171. when you requested us to remit your uncle, Mr Robert Thomson, £100 per annum half-yearly, and receiving written instructions to that effect; advising as to investment of money in bank; handing you rental and valuation of property July 17, 1877. as to investment of money in bank; handing you rental and valuation of property Anderson v. Thomson, &c. Paisley Road, over which £4500 wanted, when you agreed to give £3500 to rank equally with another for £1000.' That referred to the investment of the sum which stood in my name in trust. (Q.) Do you remember whether Miss Thomson asked you to invest the money or you proposed it? (A.) She called, and I proposed it. I did not write to her about that. (Q.) What was her object in calling? (A.) It was coming on to term time, and I suppose she called to ask about her property. (Q.) Had she called to give you directions about remitting the £100 per annum? (A.) Her object was to get £10 on account of interest due at Whitsunday, and she gave instructions to remit £50 every six months until further notice. The written instructions are below the receipt for the £10, which I now produce. The proposal to invest the money originated entirely with myself, and she agreed at once. She was to get $4\frac{1}{2}$ per cent of interest, which was a good deal more than was allowed by the bank. I can't say exactly what the bank rate then was. There were no other uninvested funds belonging to Miss Thomson, so far as I am aware, out of which this loan could have been made. After receiving her instructions I cashed the deposit-receipt, and made the advance she agreed to on heritable security. The transaction was really: Whitsunday one, but was actually carried through a few days later, on the 31st of May. The money continued to stand out on heritable security until Miss Thomson's death. It is given up in the inventory."

Now, it will be observed from this statement that the identity and character of the £4000, as shewn in the testamentary writing are entirely changed. It is no longer a sum deposited in bank on a receipt either in the name of the testatrix or of Mr Anderson, and the sum itself has been considerably reduced. £3500 of it has been laid out on heritable security, and the remainder otherwise disposed of. And all this was done by Mr Anderson during the testatrix's life, and in obedience to her instructions, and of course in her knowledge.

With reference to these circumstances, and having regard to the decided case on the question of ademption, I do not see how the conclusion can be resisted that the bequest in dispute has been adeemed by the testatrix. It seems to be firmly established in England, ever since the judgment of Lord Thurlow in the cases of *Ashburner v. M'Guire* (2 Br. C. Cases, 108), and *Stanley v. Potter* (1 Br. C. Cases, 180), that the test of ademption is whether the specific thing bequeathed by a testator continued to exist at his death, or had been converted into something else, and this independently altogether of the *animus adimendi*, a consideration which has been discarded on the ground that it was calculated to create confusion and uncertainty. Accordingly the principle of ademption appears to have been given effect to in England by numerous cases which are noticed in *Whitton and Tudor's Leading Cases in Equity* (2d ed. vol. ii. 143, *et seq.*) And some of these cases approach very closely to the present; for example, in *Green v. Symonds* (1 Br. Ch. Cases, 129), where the testator bequeathed to C all his books at his chambers in the Temple, and afterwards removed them to the country, it was held that the removal effected an ademption; so in *Gardner v. Hatton* (6 Sim. 53) where a testator bequeathed a sum of £7000 secured on mortgage of an estate at W, belonging to R Y, and the £7000 with interest having been received after the date of the will by the testator's agent on his account, and immediately after

£6000 of it was invested upon another mortgage, on which it remained at the testator's death, it was held to be adeemed. No. 171.

There are Scotch cases to the same effect. Thus, in the case of *Jack v. Lauder*, July 17, 1877. *Anderson v. Thomson, &c.* July 27, 1742, Mor. 11,357, it was held that a testator receiving payment of the contents of a bill which he had bequeathed to a legatee had revoked or adeemed a legacy. So in *Pagan v. Pagan*, already alluded to, a special legacy of £1000 lent on bond to E and J was held to be put an end to in consequence of the debtor having voluntarily paid up the bond two years before the testator's death. And in the case of *Chalmers v. Chalmers and Others*, November 19, 1851, 14 D. 57, where a testator by his trust-settlement directed one of four houses to be conveyed to each of his nephews, and thereafter one of the houses having been compulsorily taken by a railway company, and the testator having afterwards died without making any alteration in his settlement, or in any way setting aside the price of the house for his nephew, it was held that the nephew to whom the house had been destined had no claim for its value, the principle of the decision being that the specific thing bequeathed having ceased to exist before the death of the testator the legacy must be held to have been adeemed.

I think therefore the Lord Ordinary's judgment in regard to the £4000 legacy is right. It may operate considerable hardship on some of the parties, but not greater than in some of the cases to which I have referred, and at any rate such a consideration cannot be allowed to affect the decision of the Court.

The second and only other contested question which requires now to be decided relates to the residue clause, which is undoubtedly in some respects very awkwardly expressed. I cannot doubt, however, having regard to the Titles to Land Act, 1858, and the cases which have since followed upon it, that the clause is habile and sufficient to carry the residue. The disputed point was not so much that, as whether the persons named in the clause are to be held entitled to the fee or capital of the residue, or merely of the annual interest or income that may accrue from it. Now, when I see that the testatrix expressly directs that the residue of her estate shall be distributed among the persons named by her, although she adds "annually," I feel myself constrained to hold that the fee or capital is to be at once paid over to them, and that the word "annually" must be disregarded as having been used inadvertently by the testatrix, and at any rate without intending thereby to convert into a life interest an expression, by-the-bye, which she does not use—that which otherwise I think, as I have said, must be held to be a disposal once and for all of the entire residue. I feel strengthened in this conclusion by the consideration that the testatrix directs the residue to be distributed to the persons named by her "along" with certain articles of plate and furniture which were clearly to be given over to them at once, and not merely life-entailed by them.

I am therefore of opinion that the Lord Ordinary is also right in regard to this matter, the result being that his interlocutor reclaimed against will fall to be adhered to, and the case remitted to him to proceed further as may be just.

LORD GIFFORD.—The questions raised under the holograph settlement or testamentary letter of the late Miss Jane Thomson, dated 23d March 1875, are attended with great difficulty, chiefly owing to the imperfect and doubtful manner in which Miss Thomson has expressed herself in that letter, and to the difficulty of gathering therefrom what was Miss Thomson's real purpose and intention in regard to the final distribution of her means and estate.

No. 171. For I am of opinion that the questions raised are in substance questions regarding the true intention and meaning of the testator, Miss Jane Thomson, and July 17, 1877. I think that if her true intention can be sufficiently and satisfactorily gathered Anderson v. Thomson, &c. from the terms of her testamentary letter then there is no legal obstacle to these intentions being duly and effectually carried out. It appears to me that the leading questions in the case do not depend upon technical rules or upon technical words; but if it can be made to appear what the testator intended to be done with her estate after her death then that intention falls to receive effect. Perhaps I should except from the generality of this statement the question of the ademption of the legacy, for there is high authority for saying that in questions of ademption of special legacies the rule depends, not on the intention of the testator, but on the form in which the estate is left at the testator's death.

Of course, the testamentary intention of Miss Thomson must be learned and gathered solely from her testamentary writings, and I think that in the present case the sole testamentary writing with which we have to do is Miss Thomson's letter addressed to Mr Anderson and dated 23d March 1875. This letter was placed in Mr Anderson's hands, or rather sent to Mr Anderson by Miss Thomson with a letter dated 24th March 1875, enclosing to him in a sealed packet only to be opened after her death, the testamentary letter dated 23d March being the previous day. This document remained under seal in Mr Anderson's custody until Miss Thomson's death, which happened about fifteen months afterwards, on 18th June 1876.

There was, no doubt, a previous disposition and settlement by Miss Thomson dated 18th February 1861, but as I read the testamentary letter of 23d March 1875 it supersedes all former settlements, and by itself constitutes a complete *mortis causa* settlement of Miss Thomson's whole estate. If I am right in this the disposition and settlement of 18th February 1861 is altogether suspended and inoperative, and in this view it need not be looked at. It is only in the event of its being held that the testamentary letter of 23d March 1875 does not dispose of Miss Thomson's whole property that there would be any occasion to fall back upon Miss Thomson's earlier testament.

I take, then, the letter of 23d March 1875, and I read it in order to see if it was intended to form a final and complete settlement *mortis causa* of the writer's whole estate. I think it does, and it effectually regulates her whole succession.

The letter begins by stating that Miss Thomson purposes going from home, and it gives Mr Anderson certain instructions "in the event of my death;" but although these expressions might suggest that the settlement was only interim and temporary, in case of accident to the writer during her foreign journey, all doubt on this point is completely removed by a sentence at the end of the letter where Miss Thomson says—"I hope I have made everything explicit: and I mean this to remain as my settlement of my affairs, and to be acted upon and carried out by you in the event of my death." It appears to me that this is equivalent to an express declaration by the testator that the writing is Miss Thomson's last will and settlement, which is "to be acted upon and carried out" by Mr Anderson as a settlement of her whole affairs. If, therefore, the writing does purport to direct the disposal of Miss Thomson's whole estate I think it must receive effect as a universal settlement.

It is true that the writing does not contain any dispositive words, or words of conveyance or assignation. It does not convey *in terminis* the whole estate to Mr Anderson as trustee or executor. It is conceived in a different manner.

is in the form of instructions to Mr Anderson, directing him what to do with the estate, and what arrangements he is to carry out after Miss Thomson's death. But if the instructions embrace the distribution of Miss Thomson's whole succession, it is not of the least consequence in what form the will is expressed. It must receive effect according to its true intent and meaning. Now, in reference to the claim of Mr Spencer, Mr Bromhead, and Mr Lindsay, I am of opinion that the letter contains an effectual bequest in their favour of the whole residue of Miss Thomson's estate. The words are—"And I empower you also" (and then after providing for two annuities the testatrix proceeds) "to hold the residue of my estate, and distribute it annually between the following gentlemen—Mr William Spencer, 160 Hope Street; Mr Bromhead, architect, 196 St Vincent Street; and Mr James Lindsay, Gualequay, Chu, Buenos Ayres, South America, along with the following presents to them." Of course, the only difficulty here is the occurrence of the word "annually." Without that word there could be no doubt that the whole residue is disposed of. The opposing claimants maintain that the word "annually" necessarily implies that it was the income or annual proceeds of the residue that was given, and that the capital or fee of the residue was not disposed of at all by the writing, but either falls under the previous settlement of 1861 or belongs as intestacy to Miss Thomson's next of kin or heirs-at-law. I cannot accept this contention. What is it that is to be distributed annually among the three gentlemen named? Not the income or the annual proceeds of the residue, but the residue itself—"the residue of my estate." These words are hardly susceptible of construction; and when to this is added that the letter is expressly declared "my settlement of my affairs"—that is, of my whole affairs—an entire settlement, not a partial one—I cannot interpolate words which would make the testatrix say annual proceeds of residue instead of what she does say, "residue of my estate"—and which would have the effect of destroying the writing as a universal settlement, and of converting it into a very partial settlement indeed. If it is necessary to give a meaning to the word "annually," I think it is sufficiently satisfied by remembering that there were considerable annuities which were provided for, and which are all described by Miss Thomson as "yearly payments." These amount to about £250 per annum, and the testatrix might well contemplate that a considerable sum of residue would fall to be retained in Mr Anderson's hands, which might annually be relieved as the annuities fell in or as their annuities were satisfied. But even if there were no such explanation I could not hold the use of the word "annually" as restricting an express bequest of residue to a bequest of the mere interest of residue, the effect being to produce intestacy or something equivalent thereto, for in the present question the setting up of the settlement of 1861 would have a very analogous effect. I hold therefore that Messrs Spencer, Bromhead, and Lindsay are, equally among them, Miss Thomson's residuary legatees.

There is no dispute as to Mr Robert Thomson's annuity of £100 a-year, nor as to the claims of Miss Howard and Isabella Lindsay, or as to the bequests of furniture or specific articles, and the only remaining question, which is, however, to my mind the most difficult question in the whole case, relates to the legacy of £4000 in favour of the brothers and sister of Miss Thomson's mother.

The Lord Ordinary has held that this bequest has been adeemed in consequence

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No. 171. of the deposit-receipt, on which the money was originally in bank, having been
 July 17, 1877. uplifted and otherwise invested during the testator's lifetime.
 Anderson v. Thomson, &c.

With great difficulty, and I do not hesitate to say with the greatest possible reluctance, I feel myself compelled to agree with Lord Ormisdale and with the Lord Ordinary that this bequest has been adeemed by the sum in the deposit-receipt having been invested on real security under a bond taken in favour of Miss Thomson herself and her heirs and assignees whomsoever. I feel the authorities both in Scotland and England—some of which have been referred to by Lord Ormisdale—to be too strong to be overcome, although I am perfectly satisfied that Miss Thomson by adopting, on the suggestion of her agent, Mr Anderson, the heritable security, had no intention whatever to interfere with or take away the bequest which she had made in favour of her mother's brothers and sister and their issue. I think the ademption so effected produces in this case, and in many other similar cases, results of great hardship, and indeed I may say of great injustice—results which in England seem to have been mitigated to some extent by the 23d section of 1st Vict. cap. 26, which, however, does not apply to Scotland. I would very willingly have held, if I could, that the instruction to Mr Anderson in the testamentary writing of 23d March 1875, of which he knew nothing till Miss Thomson's death in June 1876, was an instruction not merely regarding a deposit-receipt (which, of course, was a document of a temporary nature, and implying only a temporary lodgment of the fund in bank at low interest till a better investment could be found), but an instruction regarding the fund itself wherever invested, and an instruction which would follow the fund itself wherever it could be traced. I regret more than I can express to be compelled to follow decisions which lay down, as I think, an arbitrary rule—a rule which, in the present case, is productive, as I cannot help thinking, of injustice; but I feel bound to administer the law, and not to amend it.

LORD JUSTICE-CLERK.—On the question as to whether the bequest of residue is one of liferent or fee I concur with your Lordships, and I have no farther observations to make. It is unnecessary to give a specific meaning to the word “annually.” There is a clear omission here, and the clause is inaccurate, but as it stands it imports a bequest of the fee of the residue and nothing else.

With regard to the legacy of £4000, I am very much in the position in which Lord Gifford has stated that he feels himself to be. The authorities are very strong, and looking to them I cannot see my way to differ from the conclusion arrived at by the Lord Ordinary and your Lordships. I wish, however, to make a few observations upon the general doctrine of ademption. It seems to have been laid down by Lord Thurlow, and to my mind too closely followed in subsequent decisions, that the intention of the testator to adeem in a question of ademption is not a matter to which the Court is to look. This is certainly a very unusual rule to lay down in construing a last will and settlement. Yet it has been laid down that in questions of ademption of legacies not only is the intention of the testator not to be the rule to be followed, but however clearly evinced, to be immaterial. This seems to be a deviation from the ordinary rules of construction.

The doctrine of ademption was derived originally from the Roman law, and is a clear principle of jurisprudence. It is simply a form of revocation requiring, of course, indications of an intention to revoke. No doubt, if a specific thing

has been bequeathed and has then perished the bequest falls, although even in such circumstances the civil law supplied a remedy in particular cases. No. 171.

If a change was made in the position in which a specific legacy stood it is clear that in the Roman law the intention of the testator was considered. This is apparent from the following passage in the Institutes of Justinian:—"If a testator give his own property as a legacy, and afterwards alienate it, it is the opinion of Celsus that the legatee is entitled to the legacy, if the testator did not sell with an intention to revoke the legacy. The Emperors Severus and Antoninus have published a rescript to this effect. . . . If, again, a part of the thing given as a legacy be alienated, the legatee is of course still entitled to the part which remains unalienated, but is entitled to that which is alienated only if it appear not to have been alienated by the testator with the intention of taking away the legacy"—Sandars' Justinian, lib. ii. tit. 20, sec. 12). Now, it seems to me that that exposition of the judicial rule is founded on the clearest grounds of equity and justice. In the English cases, however, it has been decided that the intention of the testator is to be disregarded, and this view seems to have been followed in this Court, and very notably so in the cases of Pagan and Chalmers.

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I can only say that these decisions appear to me to be utterly at variance with any principle of jurisprudence.

To my mind the intention of the testator should be the sole rule. We are bound, however, by these judgments, and I can only express my want of coincidence in the principle upon which they have been decided.

The only remaining doubt I have in this case is one which I think it right to explain, namely, whether this is really a specific legacy at all? I think there are grounds for saying that it is a legacy of £4000, and nothing else. That view I am inclined to take, not so much from the words of the settlement, but from the circumstances. This £4000 was the balance of another transaction, and was deposited in bank for a fortnight for temporary custody, not as a permanent investment. Before the testatrix delivered this testamentary letter, and within a day of its date, she directed Mr Anderson to uplift the deposit-receipt, shewing that it was the money and not the obligation for it she meant to leave. She certainly did not mean Mr Anderson to keep the money; she meant him to invest it; which he did. But if the legacy attached to the £4000, placed by Anderson in his own bank account, it remained simply a money legacy when invested, it being plainly not the obligation but the amount for which it was granted which she meant to bequeath.

I think it far from clear that this is not a general legacy. But I do not place enough reliance on these doubts to induce me to differ from the judgment.

THE COURT adhered.

The unsuccessful claimants asked for their expenses out of the fund.

LORD JUSTICE-CLERK.—The frame-work of this letter is such as justified the parties in getting a judicial opinion on it, and the expenses must therefore come out of the residue.

WALLS & SUTHERLAND, S.S.C.—MURRAY, BEITH, & MURRAY, W.S.—
WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

No. 172.

July 17, 1877.
Maxwell.SIR HERBERT EUSTACE MAXWELL, Compeerer.—*Kinnear—Blair.*
JOHN LATTA (William Maxwell's Tutor *ad litem*), Respondent.—
Lee—Moncreiff.

Entail—38 and 39 Vict. cap. 61, sec. 12—Charging improvement debt—Death of heir.—Section 12, sub-section 3, of the Entail Amendment Act, 1875, provides for applications under the Act being carried on by personal representatives and others, "according to their respective rights and interests," should the heir of entail die before decree had been obtained. Held that the provisions of this section were framed to regulate procedure only, and that this provision did not of itself confer a right upon the representatives of a deceased heir of entail to be sisted in a petition at his instance to charge improvement debt.

38 and 39 Vict. cap. 61, sec. 11—*Express Conveyance.*—*Opinions* (per Lord Justice-Clerk and Lord President), that a general disponee of an heir of entail is not in the position of having "expressly" conveyed to him, in the sense of the 11th section of the "Entail Amendment Act, 1875," a sum of money which the heir of entail was, before his death, in course of charging against the estate as an improvement debt.

2D DIVISION,
with four
Judges of
the First
Division.
Lord Adam.
R.

On 1st March 1877 Sir William Maxwell, Bart., of Monreith, as heir of entail in possession of the lands of Monreith and others, presented a petition under the "Entail Amendment (Scotland) Act, 1875" (38 and 39 Vict. cap. 61), for leave to charge £8397 as improvement debt. The petition was duly served and intimated, and Mr Latta, S.S.C., was appointed tutor *ad litem* to William Maxwell, one of the respondents, who was in pupillarity. Remits were made to reporters, who were proceeding with the necessary inquiries when Sir William Maxwell died on 23rd March 1877. He left a disposition and settlement, dated 5th February 1867, wherein he assigned and disposed in general terms to his only son, Sir Herbert Eustace Maxwell, his whole means and estate, heritable and moveable, for the purposes therein set forth. He also appointed Sir Herbert his sole executor.

On 18th May 1877 Sir Herbert lodged a minute in the petition process wherein he set forth the above facts, and also the 3d sub-section of section 12 of the "Entail Amendment (Scotland) Act, 1875,"* and craved that the Lord Ordinary should sist him as general disponee and executor of the late Sir William, and also, as heir of entail in possession, as petitioner in room and place of Sir William.

On 26th May 1877 the Lord Ordinary pronounced this interlocutor—
"Refuses to sist Sir Herbert Eustace Maxwell as petitioner in room and place of the petitioner, his father, the late Sir William Maxwell."†

* 38 and 39 Vict. cap. 61, sec. 12,—“Subject to such rules in regard to matters in this section mentioned as the Court are hereby authorised and required to make by Act of Sederunt on or before the 15th day of November 1875, and thereafter from time to time to vary or extend as they shall see fit, the following provisions shall have effect with reference to all applications to the Court under this or any other Entail Act.

(3) Should the applicant die, his personal representative, or his successor in the entailed estate, or his disponee, legatee, or assignee, or any of them, according to their respective rights and interests, shall, except in the case of application in which it is necessary to obtain the consent or the dispensing with the consent of one or more heirs of entail, be entitled to be sisted in the process, at whatever stage the death may happen, and to prosecute the same.”

† NOTE.— . . . It was not disputed that the general disposition of Sir Herbert's favour was not sufficient to give him a title to the improvement expenditure in question under the 11th section of the Act, which requires the

Sir Herbert Maxwell reclaimed. The case was debated before the Second Division on 14th June, and was by them appointed to be heard before seven Judges. No. 172.
 July 17, 1877.
 Maxwell.

Argued for Sir Herbert;—The policy of the Acts allowing heirs of entail to charge for money expended on improvements was to encourage such expenditure, and accordingly every facility was intended to be given to an heir of entail in recovering money so laid out. In construing the provisions of the present statute it was necessary to read the 11th and 12th sections together.* It was difficult to see upon what principle it was maintained that this right did not transmit. If a man had a right so vested in him that he could assign it, it would pass by force of law to his representatives *ab intestato*, or, as in this case, by force of general disposition. Otherwise an assignee would be in a better position than the original creditor. The original heir of entail who had expended the money created a right of credit in which the entailed estate was debtor, and that right was personal to him. Under the provisions of the Montgomery Act if an heir of entail preserved evidence of improvement expenditure in the manner therein provided the right to charge transmitted to his per-

the sums expended shall be 'expressly' bequeathed or conveyed. As general disponee, therefore, it appears to the Lord Ordinary that Sir Herbert has no right or interest in the sums in question, and has no title to be sisted in that character.

"The Lord Ordinary is further of opinion that the fact of Sir Herbert having succeeded to and being in possession of the entailed estate does not give him any right or interest in these sums. In that character he is rather in the position of being a debtor than a creditor.

"But the 3d sub-section of the 12th section of the Act provides that parties shall be entitled to be sisted 'according to their respective rights and interests.' In the opinion of the Lord Ordinary, Sir Herbert has no right or interest in the sums in question, and therefore has no title to be sisted in room and place of his late father."

* 38 and 39 Vict. cap. 61, sec. 11.—"Where any heir of entail in possession of an estate in Scotland, holden by virtue of a tailzie dated prior to the 1st day of August 1846, shall have executed improvements on such estate of the nature contemplated by this or any other entail Act, as the case may be, and shall have died after the passing of this Act without having charged the estate with the amount which he is entitled to charge of the sums expended in such improvements, it shall be lawful for any person to whom such heir of entail may have expressly bequeathed, conveyed, or assigned such sums, or any part thereof, to make application by summary petition to the Court, praying the Court, after such inquiry as to the Court shall seem proper, to find and declare that the sums specified in the petition, or any part thereof, have been expended on improvements on the said estate by the deceased heir of entail, and that the petitioner is in right thereof; and to decern and ordain the heir in possession of such entailed estate to execute in favour of the petitioner, or of any other person such petitioner may think fit, a bond and disposition over the said estate other than the mansion-house, offices, and policies thereof, or over some sufficient portion of the said estate other than as aforesaid, for the amount of which the deceased heir of entail himself might, under the provisions of these Acts, have charged the estate, which bond and disposition in security shall contain all clauses proper to be inserted in bonds and dispositions in security which, in virtue of this Act, may be granted by an heir of entail in possession for sums expended by himself on improvements on his estate; provided always, that the said sums shall only be deemed to be a debt against the entailed estate and the heirs of entail therein, and shall only bear interest from and after the date of the decree of the Court pronounced in such petition."

Section 12, *supra*, p. 1112, note.

No. 172. **sonal representatives.** The mere manifestation of an intention to charge was enough to make the right transmit in that case. Here the heir had actually presented his petition and was in the act of charging. Why should the right not transmit? The intention of the two Acts were the same, the only difference being that the present Act was one meant to enlarge the powers of the heir to charge. The presentation of the petition conferred a right upon the representative of the petitioner to get the judgment of the Court upon it. The word used in the statute was "expressly" not "specially," so, unless it was to be held that the particular debt must be conveyed to the representative, a general disposition would carry it and confer the privilege in the statute.

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Argued for William Maxwell's tutor *ad litem*;—Sir William died at a time when he might still have withdrawn his application, and so there was no right to transmit to his representative unless he himself expressly mentioned it. The 12th section of the statute of 1875 applied only to procedure—it was so designed on the margin of the Act. Such a section could not confer a right which did not before exist. It was necessary for the persons enumerated in that section to shew that they had a right to go on with applications such as this. Moreover the section applied to all procedure under the Entail Acts, including disentailing, &c. Could it be said that the section conferred a right upon the personal representative of an heir born after 1848 to carry on a petition for disentail after the original petitioner's death? It had been held that even after an instrument of disentail had been executed and the consents obtained that disponees could not carry on the petition after the heir's death.¹ Under the 11th section an express conveyance was moreover necessary, and there was none such here. The right to charge was merely a personal faculty in the heir in possession, and did not form part of his estate. It was worthy of notice that the general conveyance which was said to include this sum was executed in 1867, long before the debt was in existence or the right to transmit it created by Act of Parliament.

At advising,—

LORD JUSTICE-CLERK.—In dealing with the question involved in this petition it is necessary to keep clearly in mind—what was rather overlooked in the course of the argument—the precise position of an heir of entail in possession who has expended money in improving his estate. He only occupies a position different from a fee-simple proprietor who has improved his landed property in this, that while a fee-simple proprietor may burden his heir or his heritage with sums so expended as he pleases, the heir of entail can only do so through the intervention of the Court under the entail statutes. But if in either case the proprietor takes no step to make the expenditure a burden on the land, the estate has the benefit, the money is spent, and that is the end of it; and in neither case has the personal representative of the proprietor who spent the money any claim against an estate which never belonged to him, or for repayment of money which never became a debt affecting that estate. In both cases the expenditure can only be raised into a debt by the voluntary act of the proprietor of the landed estate, and if he do no act for that purpose no debt is ever created.

It is therefore clear that a general settlement containing no express reference to the power which the granter had to make these sums a burden on the entailed

¹ *Robertson v. Robertson*, June 10, 1864, 2 Macph. 1178, 36 Scot. Jur. 590.

estate could not possibly fulfil the conditions of the 11th section of the recent Entail Act, because such a settlement would be perfectly consistent with the absence of all intention on the part of the heir in possession to burden his entailed estate with the expenditure. Any power he had to do so arose, not from his expenditure of the money only, but from his having expended it as heir in possession, and this is clearly a power which was personal to him, and which ceased when he ceased to possess.

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But the 11th section introduces an equitable remedy for cases in which the heir in possession clearly evinces his intention that the sums advanced for improvements shall burden, not his personal representatives, but the entailed property, although he has not adopted the statutory procedure. The words of the section are as follows—(reads—*supra*, p. 1113, note).

I think the word “express” quite sufficient for the purpose of the clause, and indeed more suitable than “special.” Any words bearing express reference to the sums in question which are sufficient to evince a testamentary intention to bequeath them will be due compliance with the requisites of this clause.

Express words stand in legal contrast to general words; nor do I think there is any obscurity in the meaning which should lead us to interpolate words into this clause which are not to be found in the statute. In the present case the sums in question have not been expressly conveyed to the petitioner, and therefore no right has accrued to him under this clause. The general conveyance which he holds bears no reference to the sums in question, and neither expressly nor by implication conveys them.

It will, however, be observed on the privilege here given that its quality is peculiar. The last heir in possession never was the creditor of the entailed estate in these sums, and therefore there was no debt constituted in his person, and thus none which he could convey or assign. What he had to bequeath was not debt, but the privilege created by this clause of the statute; and that is not the right or faculty which he himself had, for that could only be exercised by the proprietor of the land, but a distinct representative power different from any which the heir in possession ever had, and one to be made effectual not by the heir in possession, but against him. This last consideration leads me to doubt whether, whatever the true meaning of the 3d sub-section of section 12¹ of the statute may be, the provisions of the 11th section can ever be carried into effect by the representative sisting himself as a party in a petition like the present. The true remedy is pointed out and provided for in the statute; and the application by the representative therein provided will contain a prayer entirely different from that of the present petition.

As to the 3d sub-section of section 12, if it had stood by itself as a substantive enactment, it cannot be denied that its words admit of being read as if it conferred a universal right on representatives of all kinds—heirs, disponees, executors, assignees—to take up and follow out for their own benefit any petition presented under the Entail Statutes which had not been carried through in the lifetime of the person who presented it. A little consideration, however, will shew that even on its own terms this could hardly be its meaning, for the indiscriminate power thus supposed to be given to representatives, according to their respective rights, might lead to most anomalous and inextricable consequences. The applica-

¹ *Supra*, p. 1112, note.

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tion may in many instances be such as an heir of entail in possession could alone act on if the petition were granted, of which indeed the case now under consideration is a good example; and if we are to assume that the object of the clause was to devolve on some one or other representative or successor the substantial title and interest in every such petition which may be depending at the death of an heir in possession, it would certainly require a very different set of provisions to define the persons to whom these rights are to descend with any chance of effectual application.

But when the context of this clause is considered all substantial difficulty as to its true meaning is removed. It is obviously a procedure clause merely, and it is only meant to provide that when the substantial interest in any such application does descend to representatives, or is capable of being and has been assigned, the representative may take up the depending petition, and need not be put to the expense of a new application.

This, I apprehend, may be fairly inferred from the fact that the 12th section is wholly a clause regulating procedure, so much so that its provisions are liable to be subject to rules made by the Court by Act of Sederunt—a consideration entirely inconsistent with the idea that it was intended to confer new and valuable patrimonial rights.

LORD DEAS.—I concur in the result arrived at by the Lord Justice-Clerk. I do so on much narrower grounds.

This minute has been given in under sub-section 3 of section 12 of the Entail Amendment Act of 1875, and its object is that Sir Herbert Maxwell may be assisted in room and place of his father Sir William in an application made by Sir William to have money expended by him created a burden upon the entailed estate of Monreith.

I am of opinion that sub-section 3 of section 12 relates simply to forms of procedure. I have come to that conclusion upon two grounds, 1st, because the sub-section is both preceded and followed by other sub-sections, all of which relate to procedure, and procedure alone; 2d, because I cannot think that sub-section 3 had been intended to confer upon certain classes of persons patrimonial rights, which they would not otherwise have had, to improvement de facto a power would have been conferred, such as, in that view, must be held to have been conferred by section 12 upon this Court, from time to time, to vary or extend these rights, by Act of Sederunt, as the Court shall see fit. Upon these two grounds I concur in the proposed judgment.

As regards section 11 of the statute I am very clearly of opinion that the application made to us by this minute does not come within it. In the case provided for by section 11 application must be made by a substantive petition. We have no such petition here, and I therefore refrain from giving any opinion upon the construction of that section.

LORD ORMDALE.—I concur in the opinion of the Lord Justice-Clerk, and generally in the views which he has expressed. I only desire to make one observation with regard to section 12. I understood his Lordship to have said that this Court had the power to vary the provisions in the sub-sections. I doubt whether that is so. It rather appears to me upon consideration of the words of the section that the rules of Court or Acts of Sederunt which the Court may pass are what can be varied and not the provisions in the sub-sections.

the statute itself. With that observation, I entirely concur in the proposed judgment. No. 172.

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LORD MURE, LORD GIFFORD, and LORD SHAND concurred.

LORD PRESIDENT.—I am of opinion with all your Lordships that the 12th section of this Act is directed entirely to matters of procedure. I am a great deal influenced in coming to this conclusion by the introductory words, in which it is expressly provided, “subject to such rules in regard to the matters in this section mentioned as the Court are hereby authorised and required to make by Act of Sederunt, and thereafter, from time to time, to vary or extend, as they shall see fit,” and that the provisions enacted in the section are enacted subject to such rules. I do not think that it follows from that that everything enacted in the section is subject to alteration, and I therefore agree with Lord Ormidale’s observation. I come to this conclusion because it is said in the sub-section that applications shall be competent, “except in the case of applications in which it is necessary to obtain the consent of one or more heirs of entail.” Now, I do not think we could apply the provisions of that sub-section to the excepted cases.

Apart from that I think that these sub-sections are intended generally to regulate procedure, and this 3d sub-section is directed to the question of sisting parties in such applications, if they have otherwise right and interest to insist in them.

With regard to the 11th section it is quite true, as Lord Deas has observed, that in order to dispose of Sir Herbert Maxwell’s minute it is not necessary to decide anything with regard to that section. But after having heard a full argument upon its construction, and seeing how nearly it touches the question before us, I think that we should not refrain from expressing the opinions which we have formed upon it. I may say therefore that—although not without difficulty—I have come to concur in the opinion of the Lord Justice-Clerk as to that section also. The difficulty has arisen from the inaccurate use of language. The section says, “it shall be lawful for any person to whom such heir of entail may have expressly bequeathed, conveyed, or assigned such sums or any part thereof.”

The word “express” is commonly opposed to “implied” and not to “general,” the word opposed to “general” being “special,” and so if “special” was intended there is here an inaccurate use of language.

But I think that it is not possible to sustain a general disposition, such as we have here, as coming within the provisions of this clause of the statute, as that would be utterly to deny all effect to the word “expressly.” I feel myself, however, bound to give effect to “express,” and the only effect I can give to it is to read it as “special,” and I am therefore of opinion that Sir Herbert Maxwell has no claim under section 11 either.

THE Second Division accordingly adhered to the Lord Ordinary’s judgment.

HUNTER, BLAIR, & COWAN, W.S.—JOHN LATTI, S.S.C.—Agents.

No. 173.

THE SCOTTISH HIGHLAND DISTILLERY COMPANY (LIMITED) AND
ANOTHER, Pursuers.—*Sol.-Gen. Macdonald—Trayner.*
JAMES REID, Defender.—*Fraser—Rhind.*

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Property—Servitude of Dam.—An estate was sold in lots, two of the lots being the lands of A and B. The disposition in favour of the purchaser of A reserved to the purchaser of B “a right in common with the purchaser of the lot hereby disposed” to a dam (within the lands of A), and mill-lade “with right of access thereto for repairing the same.” The disposition in favour of the purchaser of B conveyed these lands “with a right also to our said disponee, in common with the proprietor of A,” to the dam and mill-lade, “and with right of access thereto for repairing the same.”

The dam had existed beyond the memory of man, and was used for a mill on A, as well as for mills on B.

The tenant of lands bounded by the burn which flowed from the dam, with the consent of the proprietor of A, proceeded to insert a pipe into the dam, with the view of taking advantage of the height of the stored water, to obtain a supply for his farm by means of a hydraulic ram, proposing to return the water not used by him to the burn before it reached the intake of the mill-lade leading to the B mills.

In an action of declarator and interdict at the instance of the proprietor of B, held that the pursuer was entitled to interdict against the defender interfering with or encroaching upon the dam, or the water stored therein, or executing any operations on the dam, reserving to the proprietor of A, and to the defender with his authority, all right competent to them to take the surplus water flowing over the dam by any means not injuriously affecting the dam, and not prejudicial to the defenders.

Opinions (per Lord Justice-Clerk and Lord Gifford) that the right of the proprietor of B was a servitude of dam and aqueduct.

Opinion (per Lord Ormisdale) that he had a right of joint property in the dam.

Observations (per Lord Gifford) on the distinction between a servitude of dam and aqueduct and other servitudes.

2D DIVISION.
Lord Adam.
R.

ABOUT 1855 certain lands near Peterhead belonging to trustees for the North of Scotland Banking Company were exposed for sale in lots under articles of roup.

Lot third, being the lands of Damhead or Invernettie Lodge, was purchased from the banking company by Provost Alexander of Peterhead. The disposition in his favour, dated 1865, reserved “to the purchaser of lot fifth, as described in the foresaid articles of roup, a right in common with the purchaser of the lot hereby disposed to the upper mill-dam and the mill-lade, with right of access thereto for repairing the same.”

In 1872 Mr George Whyte purchased also from the same authors a part of lot fifth, being the Invernettie Mills, and lands connected therewith. These subjects were disposed to him “with a right in common with the proprietor of those parts of Damhead, now called Invernettie Lodge, to the upper mill-dam, and the mill-lade, and with right of access thereto for repairing the same.”

In 1874 Whyte feued a portion of these subjects to the Scottish Highland Distillery Company, “with right to use the dams, mill-lades, sluices, &c., and right of access to the Damhead dam and sluice thereof, in common with the proprietors of the lands of Damhead or Invernettie Lodge.”

The dam in question was situated on Provost Alexander's lands of Damhead. It had been in existence beyond the memory of man, and was used for a mill on the Damhead property, as well as for the Invernettie Mills. The Invernettie Burn, which formed the dam, after leaving the dam, crossed under a public road, and then flowed between the lands

of Damhead, and the lands of Meethill, of which last James Reid was tenant. About 200 yards from the sluice was the intake of a lade by which the greater part of the water was diverted to Inverniettie Mills. With the object of supplying his farm with water for cattle and domestic purposes Reid proposed to take advantage of the height to which the water was raised by the dam, in order to construct a hydraulic ram. Having obtained the verbal consent of Provost Alexander, he proceeded to insert the feed pipe of the ram into the dam. He proposed to return the whole of the water, in so far as it was not used for domestic purposes and cattle, to the burn, within the lands of Meethill, and above the intake of the lade leading to Inverniettie Mills.

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The Scottish Highland Distillery Company and Whyte objected to Reid's operations, and raised the present action of declarator and interdict against him. They maintained that they had a right in common with Provost Alexander to the dam, and that consequently he had no right to grant leave to any one to execute operations on the dam, or to take water therefrom without their consent. A proof was taken, in which the defender led evidence to shew that his operations would still leave enough water for the purposes of the pursuers.

The Lord Ordinary pronounced this interlocutor:—"Finds (1) that the defender, James Reid, is not entitled, without the consent of the pursuers, to insert a pipe into the upper or Damhead dam on the lands of Damhead or Inverniettie Lodge, in order to enable him to construct and use a hydraulic ram: Finds (2) that the said defender is entitled to take water for the use of man and beast, and for the other primary uses of running water, from the Inverniettie Burn *ex adverso* of the lands of Meethill by means of a hydraulic ram, provided that the surplus water unused be returned to the said burn within the lands of Meethill, and above the intake of the covered lade leading to Inverniettie Mills: Therefore finds and declares that the pursuers are entitled to have the water of the said Inverniettie Burn transmitted to the said upper or Damhead dam and mill-lade, and to the said mills, lands, and others occupied and possessed by them, in the same course and quantity as they have flowed from time immemorial, but without prejudice to the said defender taking and using the said water for primary purposes as aforesaid: Further, finds and declares that the said defender is not entitled, without the consent of the pursuers, to interfere with or encroach upon the said upper or Damhead dam, or to interfere with or encroach on the water in use to be stored behind and within the said mill-dam, or to execute any operations on the said mill-dam without the consent of the pursuers: Further, finds and declares that the said defender is not entitled to execute any works or operations on the said burn or stream, or in connection therewith, whereby the water which has been in use to flow to and by the said mill-dam and mill-lade, and to and by the said lands and others occupied and possessed by them as aforesaid, may be abstracted or diminished in quantity, but without prejudice to the said defender taking and using the said water for primary uses aforesaid, and executing such operations as may be necessary or proper for that purpose: Further, interdicts, prohibits, and discharges the said defender from executing any works or operations upon the said upper or Damhead dam, mill-lade, and works connected therewith, or from interfering with or encroaching on the water stored behind within the said dam, and decerns: Finds the said defender liable in expenses, but subject to modification," &c.*

* "NOTE.—(After a narrative of the facts)—Such being the state of the facts of the pursuers and of Provost Alexander, it appears to the Lord Ordinary

No. 173. The defender reclaimed. Argued for him;—Had he taken water by a pipe from the burn as it passed his farm his right to do so would have been unquestionable, provided he took it, as he proposed to do, for primary purposes, and returned what was not so used to the burn before it left his farm. What he proposed to do was precisely the same, so far as the pursuers were concerned. He wished to catch the waste water before it left the dam, which would otherwise flow down into the burn.¹ The Lord Ordinary was in error in holding that the right of the pursuers in the dam was one of joint property. The terms of their titles gave them merely a right of servitude in the dam, and therefore they could not object to Provost Alexander taking or allowing the defender to take water from the dam, if their servitude was not thereby injuriously affected.² The proof shewed that abundance of water would remain for all the requirements of the pursuers. The defender was quite willing to avoid physical interference with the embankment. He was ready to conduct his operations at the sight of a man of skill appointed by the Court, so that no water would be taken from the dam except that which would otherwise have overflowed.

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Argued for the pursuers;—They were entitled, in the first place, to have the Lord Ordinary's judgment affirmed. Their right was one of joint property in the dam, but even if it was only a right of servitude they were entitled to prevent the threatened interference with the dam. As for the proposal made in the course of the debate it was plain that the defender would gain nothing by merely being allowed to take the surplus water from the dam, unless the pursuers were prevented from lowering the sluice, for by lowering the sluice a few inches they would render his machine useless. If he was allowed by the Court to have a machine at all in connection with the dam it would thus lay the foundation for very troublesome interference with the pursuers' rights.

At advising,—

LORD GIFFORD.—I am of opinion that the result reached by the Lord Ordinary

that the pursuers and Provost Alexander have a right in common to the upper or Damhead dam, and are joint owners of the subjects. This being so, the Lord Ordinary is of opinion that one of the owners of the common property has no power to grant authority to a third party, without the consent of the other owner or owners, to execute such operations on their common property as are proposed to be executed here. The Lord Ordinary does not think that Provost Alexander can give the defender a right to insert a pipe through the walls of the dam, and that whether it be for the purpose of taking away the water stored therein or the overflow water only.

"In the view which the Lord Ordinary takes of this case, as depending on the terms of quite recent titles derived from a common author, it is irrelevant and unnecessary to inquire into the state of possession of the subjects prior to the dates of these titles.

"Neither does he think it necessary that the pursuers should prove that they will suffer damage by the operations complained of, because he thinks that these operations amount to an unwarranted interference with their rights of property. So long as the operations of the defender are confined to taking only the overflow water from the dam he does not think it is proved that any sensible loss or injury would result to the pursuers. But the Lord Ordinary thinks that if the defender were allowed to establish a ram in connection with the mill-dam, he might, in course of time, acquire rights over the dam which might prove to be very inconvenient and prejudicial to the co-owners of the dam."

¹ Melville v. Dennison, May 21, 1842, 4 D. 1231.

² Erskine, ii. 9, 4; Bell's Prin. 987; Beveridge v. Marshall, Nov. 18, 1808. F. C.

in this case is substantially right, and that the interlocutor of the Lord Ordinary No. 173. reclaimed against ought to be adhered to, but in order to save the rights of parties, and to enable the defender, Mr Reid, with consent of Provost Alexander, or rather by authority of and by placing himself as in right of Provost Alexander, to take the surplus or overflow water, if he can do so without interfering with the dam and dam-dyke; and in order to reserve the right of Provost Alexander himself to secure that surplus or overflow water, if he can do so on his own ground, and without interfering with the existing dam or dam-dyke, I would suggest that a few words of reservation should be added to the Lord Ordinary's interlocutor. The reservation which I would suggest is to the following effect:—

“Reserving to Provost William Alexander, as proprietor of the *solum* on which the said dam and its dam-dykes are constructed, and to his assignees, all right competent to him to take the surplus or overflow water flowing over the said dam by any means competent, not injuriously interfering with or affecting the said dam or dam-dykes, or prejudicial to the rights of the Scottish Highland Distillery Company, or of their author, Mr George Whyte.”

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It is implied in what I have just said that I think Provost Alexander is the sole proprietor of the *solum* upon which the dam and dam-dykes in question are constructed. Speaking for myself, I have found it indispensable, for the due and satisfactory decision of the case, to form a definite and distinct opinion as to what are Provost Alexander's rights, and what are the rights of the distillery company, in the dam in question, with its accessories, and I have come to the conclusion that Provost Alexander is the sole proprietor of the *solum*. The whole ground is embraced within the boundaries and limits of Provost Alexander's titles, whereas the distillery company in their titles, or in those of their author, George Whyte, have nothing more than “a right to” or a “right to use” the dam, mill-lades, and aqueducts, with a right of access thereto for repairing the same. In short, I am of opinion, so far as I can judge from the titles before us, that the case is just an ordinary instance of the well-known prædial servitude of mill-dam and aqueducts. The dominant tenement is the mills or distillery belonging to the Scottish Highland Distillery Company, the servient tenement is the *solum* or ground belonging to Provost Alexander, and the obligation upon the servient tenement is to suffer a mill-dam, with all necessary dam-dykes, mill-lades, and aqueducts, and accessories, to be constructed and maintained thereon for the use and behoof of the dominant tenement, the distillery in question. Any other view, I think, is untenable. A good test is to ask whether the distillery company or Mr Whyte could alienate their right to use the dam, and give the use of it to a different property altogether, belonging to some third party, and situated in a different place. I think clear they could not do so. They can only use their right for the purposes of the dominant tenement, and for no other or different subject.

I do not think it makes any difference to the nature of the right that Provost Alexander is not only proprietor of the *solum* of the servient tenement, but has so a right in common with the distillery company to use the dam and aqueducts for behoof of his own mill situated upon his own lands. This right gives Provost Alexander, in common with the distillery company, the joint enjoyment of the dam, dam-dykes, and aqueducts, but it does not alter the nature of the right, which, I think, is simply a right of servitude of dam and aqueduct, the servient tenement being Provost Alexander's land.

But when a third party, such as the defender, Mr Reid, either in his own right

No. 173. or as in right of Provost Alexander, proposes to take part of the water confined by the dam, and to avail himself for any purpose whatever of the height to which the water in the dam is artificially raised by being confined by means of the dam-dykes, it is necessary to consider with some degree of exactness and precision what is the precise nature of the servitude of dam and aqueduct, and what are the precise rights which the proprietor of the servient tenement can claim without the permission or consent of the dominant tenement.

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I think that the servitude of dam and aqueduct differs from many other prædial servitudes in this, that it gives the dominant tenement not only a right and privilege to use the property of the servient tenement in a particular way, but it confers a special right to place and to maintain upon the *solum* of the servient tenement an *opus manufactum* or special erection of an extensive and complicated kind. The dam requires dam-dykes, with sluices and channels of various kinds. The aqueducts require retaining walls, with channels and all necessary appliances, and all these have to be constructed and maintained upon the land or *solum* of the servient tenement. Thus the servitude of dam and aqueduct differs from a mere right of way or similar servitude or easement in this, that it gives a right permanently to occupy and cover the *solum* of the servient tenement by erections and works. In most cases probably the dominant tenement has to construct the works at first; in all cases the dominant tenement has to keep them in sufficient repair, so as not to injure the servient tenement by leakage or overflow. Now, I am of opinion that several important consequences result from the fact that the dominant tenement not only uses the land of the servient, but has a right to place and maintain thereon, and has actually placed thereon, special, and, it may be, extensive structures. One consequence, I think, is that the servient tenement or its owner cannot interfere with or use these special structures without the consent of the dominant owner, even although such use should not appreciably injure the uses of the dominant tenement itself. For example, he who has a right of aqueduct may frequently exercise his right by means of pipes running in or over the servient land. But these pipes, though upon or actually embedded in the servient land, are not the property of the servient owner; they remain the sole and exclusive property of the dominant owner, by whom they were originally provided, and by whom they are maintained. The owner of the land in or on which they run cannot, for his own purposes, and apart from special bargain or stipulation, pierce them or alter their construction in any way without the consent of their owner, nor will he be permitted to do so without stipulation to that effect, though it should be shewn that his alteration will not materially injure the radical use of the pipe. In like manner if, in virtue of a servitude of support, I rest my beams or my pillars upon my neighbour's wall or ground, the beams or pillars will remain my property, and my neighbour although they rest upon his wall or land, must not, without my consent, interfere therewith, or use them for his own purposes. So if I give my neighbour, by special agreement, a right to throw an iron bridge or gangway over my close, and he does so, the iron bridge or gangway will not become my property because it is upon or over my ground, and I will have no right to use it for any purpose whatever without its owner's consent. He has bought from me a right to place it there, but unless there is some special bargain it does not thereby become mine or available for my use. It is his and not mine, and although he has purchased the right of putting it across my property he has not,

unless there be a special bargain, agreed to give me any use thereof or any right therein. No. 173.

Now, applying these principles to the case of the servitude of dam and aqueduct, where no special stipulations appear, I think the servient tenement as such has no right to interfere with the structures which the dominant tenement has made, or is maintaining in virtue of its right. Provost Alexander simply, *qua* servient owner, and supposing he had no right in common with the distillery, could not, I think, have pierced the distillery's embankments, or introduced pipes into their dam, or meddled with or altered their sluices, or even availed himself, as a mechanical power, of the height to which the distillery company have raised the water. If he wants such right he must buy it or get it by agreement, and if it does not prejudice the distillery the price will be so much less.

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Nor does it affect the present question that Provost Alexander is not only owner of the *solum*, but has a common right to the dam and aqueducts. He is, as it were, besides being servient, a *quasi* dominant owner, for although *res sua nemini servit*, and Provost Alexander cannot in strictness be called dominant owner, he has a right in common with, and of exactly the same nature as, the right of the distillery company. As in a question with the distillery company that company and Provost Alexander are simply common servitude holders, and as such common proprietors of the *opus manufactum* of the works and structures which have been placed and which they jointly maintain upon the *solum* of the servient tenement, and as between them the general rule applies, which applies to all common proprietors, that neither joint owner can apply the common subject to a special or extraordinary use without the consent of the co-owner. All the owners must concur if any material alteration is to be made on the common subject which is not necessary for its common use.

I have hitherto assumed that the defender, Mr Reid, is in the full right and place of Provost Alexander, and entitled to do everything which might be done by Provost Alexander himself, and I have thus taken the most favourable view for Mr Reid. But Mr Reid is hardly in this position. He holds no conveyance or assignation from Provost Alexander; he has not even any written consent or authority, and Provost Alexander is not a party to the present process. All that the defender has is a verbal statement made by Provost Alexander as a witness that he does not object to the defender's proposed operations. The defender will do well to consider if this is enough. Certainly in strictness he ought to have begun by taking an assignation or conveyance from Provost Alexander, putting him entirely as in Provost Alexander's rights, for without this he has no title to set a foot on the *solum* of the dam, or of the ground surrounding it.

It only remains to consider who has right to take and use the surplus or overflow water, which, after the dam is full, flows over it as waste water, and escapes by the channels or means provided for it as not needed for the purposes of the dam, and rejoins the natural channel of the stream. Now, this waste or overflow water flows over and upon Provost Alexander's ground, and it seems clear enough to me that if he can take it without interfering with the rights of the distillery company he is entitled to do so, and that at any point of its fall over the dam-dyke. The dominant tenement, that is, the distillery company and Mr Whyte, have a right to fill the dam, and to use the water therein for their purposes, conveying it by the aqueducts. But after the dam is full and overflows they seem to me to have no right or interest whatever in the overflow water, which

No. 173. belongs to the servient tenement, under the usual conditions that it must be so used as not to interfere with the rights of inferior heritors. The owner of the servient tenement, that is, Provost Alexander, may catch it as he pleases and where he pleases on his own ground, and use it in any way he pleases, provided only he restores it to the natural channel before it enters the land of the next inferior proprietor, and it is to save this right that I would suggest the reservation which I have proposed.

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LORD ORMIDALE.—(After stating the facts)—Such being the state of the titles, both of Mr Alexander and Mr Whyte, in relation to the mill-dam and lade in dispute, I find it impossible to distinguish the character of their rights, that is to say, to hold that the right of the one is proprietary, while the right of the other is merely of the nature of a servitude. If it had been intended to reserve from Mr Alexander and to confer on Mr Whyte a privilege or right of servitude merely of taking water from the dam I should have expected that to have been expressed in so many words. But when I find the right conveyed to Mr Whyte described as one in common with Mr Alexander I do not see how the one can be that of a servitude merely and the other a right of property. I do not understand how two rights, essentially different, could be called rights in common. Nor do I see how it being added to Mr Whyte's right to the mill-dam and lade that he is also to have a right of access thereto for repairing the same can be taken as indicating that the whole right was merely one of servitude, for supposing Mr Whyte's right to the mill-dam and lade to be a proprietary one, it would still be necessary for him to have a right of access over Mr Alexander's ground, which surrounds the dam and lade, for repairing the same. And just as little do I think it correct to say that Mr Whyte's title contains no disposition to the mill-dam and lade, for in point of fact the right given to them forms, part of the dispositive clause in his title, just as much as the lands themselves and teinds thereof.

I therefore, for these reasons, shortly stated, must concur with the Lord Ordinary in opinion that the pursuer, Mr Whyte, has a proprietary right in the mill-dam and lade in question, and, consequently, that the defender is not entitled to insert a pipe as proposed by him into the same without leave from the pursuer, Mr Whyte, as well as Mr Alexander; and that it is irrelevant for the defender to say that his doing so will not cause any injury or prejudice to the pursuers.

But, if I were to hold that the pursuers' right is merely of the nature of a servitude or privilege, it would follow that Mr Alexander, as owner of the servient tenement, would be entitled to allow, as he has done, the defender to insert a pipe as proposed into the dam for the purpose of taking away the overflow of water, provided no material injury or prejudice would thereby be occasioned to the pursuers. And, in this view, the evidence of the defender's skilled witness, Willet, could not, I think, be ignored, and the offer made by him at the debate to allow the proposed operations to go on at the sight of some person to be appointed by the Court to see that no injury was done to the pursuers could not be disregarded. A servitude, being a restraint upon property, the defender, as in the place of Mr Alexander, the owner of the servient tenement, cannot be prevented from exercising his right in any way a proprietor is entitled to do, so long as the party to whom the servitude is due is not injured or prejudiced, as is very well illustrated by the case of *Beveridge v. Marshall*, 18th

November 1808, F.C. where it was held that the proprietor of a stream of water liable to a servitude of watering cattle might cover over the rest of the stream so as to exclude cattle, provided they left open a part of it sufficiently extensive to admit the reasonable exercise of the servitude.

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Before concluding, it is right I should notice a question which was mooted at the debate, viz., whether the right of Mr Whyte, supposing it to be in any sense or to any extent a proprietary one, includes the *solum* of the dam and lade, or only the water and embankment and sluices. I rather think it is unnecessary to determine this question, which is not substantively raised in the record, for clear it is that, in either view, Mr Whyte would be entitled to prevent the proposed operations being carried into effect.

Nor do I think that it can avail the defender now to say, after finding the judgment of the Lord Ordinary adverse to him, that he is ready to give up his proposal to insert a pipe into the dam, or interfere with it in any way, as he finds he can accomplish his object without doing so. It is sufficient to remark that in the record the insertion of a pipe into the dam is stated by the defender to be his intention. It is in consequence of that threatened interference with the pursuers' right of property that they have brought the present action, and have obtained from the Lord Ordinary the necessary interdict. But the defender is at liberty to do anything lawful he pleases not struck at by the Lord Ordinary's judgment, it being, of course, open to the pursuers to object to his proceedings, and apply for another interdict against him if wrongful or prejudicial to them. But with such other proceedings the Court have nothing to do in the present action.

In the circumstances as now explained, and for the reasons I have stated and those stated by the Lord Ordinary, the interlocutor reclaimed against ought, in my opinion, to be adhered to.

LORD JUSTICE-CLERK.—I concur substantially in the opinion of Lord Gifford. I think that the right in the dam which Whyte obtained, and which he transferred to the distillery company, was one of servitude only, and not one of property. It is very material to have that clearly fixed, in order that the rights of parties may be properly understood.

The dam has existed long beyond the memory of man. It was used to supply the home mill of Damhead, but it was also used to supply the Invernettie Mills, to which the distillery company have succeeded. In short, these mills had a valid servitude over the dam. That Whyte got no title of property in the dam, I think, clear from these considerations: In the first place, it is not very probable that he should have had conferred upon him a feudal right of property in a bit of ground to which he had no right of access except by stipulation; such a right might be conferred, but it is not a very natural kind of right in the circumstances. In the next place, Provost Alexander's title is a title with a reservation, "reserving from the lot above disposed to the purchaser of lot fifth, as described in the foresaid articles of roup, a right in common with the purchaser of the lot hereby disposed to the upper mill-dam and the mill-lade, with right of access thereto for repairing the same," which plainly implies that if the reservation had not been there the disposition to Alexander would have carried the absolute and unrestricted property of the *solum* of the dam. What is reserved is not the dam, but a right in common with the disponee to the dam, that is, to use it. It is a burden on Alexander's right which is created. This

No. 173. is made quite clear from the terms of the distillery company's own title. They get the "right to use the dams, &c., and right of access to the Damhead dam." July 17, 1877. In short, I do not see how it is possible to regard their right as other than one Scottish Highland Distillery Co. v. Reid. of servitude.

But then it does not follow that the distillery company may not have the right of preventing operations on the dam over which they have a right of servitude, and which they have not only a right to keep in repair, but are perhaps under an obligation to repair. Whether this be so or not the servitude holder has a very specific right in relation to the *opus manufactum*, even although the feudal right is not transferred. Lord Gifford seems inclined to hold that the right of the servitude holders is an actual right of property in the *opus manufactum*, embankments, walls, sluices, &c. As far as the moveable machines are concerned I think that this is the case, but I doubt whether the earthen embankment can be said to belong in property to the servitude holders. Still their right in the embankment may be of such a character as to entitle them to prevent any alteration in the structure, and to prevent perforation or other operations on the embankment.

THIS interlocutor was pronounced:—"Adhere to the interlocutor reclaimed against, with the following addition and alteration, namely, that the defender, the said James Reid, shall be bound and obliged to restore the surplus water not used by him for primary purposes, either at the place mentioned in the interlocutor reclaimed against, or, in his option, at any point of the covered lade mentioned therein, from the intake thereof to where it leaves the farm of Meethill, reserving to Provost Alexander, as proprietor of the *solum* in which the dam and dam-dykes are constructed, and to his assigns, or to the said James Reid, with his authority and consent, all right competent to them to take the surplus water flowing over the said dam, by any means not injuriously affecting the said dam or dam-dykes, and not prejudicial to the Scottish Highland Distillery Company, or to the pursuer, George Whyte: Find the said James Reid liable in additional expenses since the date of the Lord Ordinary's interlocutor, but subject to modification: Remit to the Lord Ordinary to proceed with the cause," &c.

ALEXANDER MORISON, S.S.C.—WILLIAM OFFICER, S.S.C.—Agents.

No. 174. SIR ROBERT CHARLES SINCLAIR AND ANOTHER (Sinclair's Executors),
First Parties.—*Asher—Mackintosh.*
July 18, 1877. JOHN GIBSON AND OTHERS (Campbell's Trustees), Second Parties.—
Sinclair's Trustees v. Campbell's Trustees, *et al.* *Kinnear—Pearson.*
ANDREW FLETCHER, Third Party.—*Kinnear—Pearson.*

Teinds—Interim Locality—Bona fide Perception—Prescription.—Held in conformity with *Weatherstone v. Marquis of Tweeddale* (12 S. p. 1), that when payments of stipend are made under an interim decret of locality there is an implied judicial contract that when the legal obligations of the heritors are determined by final decret their several interests shall be adjusted from the commencement of the process according to the true state of their rights, and therefore that claims of relief thus arising cannot be affected by the length of time during which the settlement of a final scheme and decret may have been delayed, and that the defence of *bona fide* consumption cannot be sustained.

THE ministers of Haddington obtained decrees of augmentation in 1797, 1807, and 1826. These augmentations were paid under interim schemes of locality till 1861, when a final scheme was approved of. By interim localities in 1800, 1816, and 1826, no part of the stipend was allocated on the lands of Wester Monkrigg.

These lands were purchased in 1808 by General Campbell's trustees. They conveyed them in 1825, by disposition and deed of entail, to Andrew Fletcher of Salton, who sold them under a private Act of Parliament in 1833. Between 1808 and 1833 an amount of stipend was allocated upon the lands of Stevenson in the parish belonging to Sir John G. Sinclair in excess of what would have been allocated had the lands of Wester Monkrigg been localled upon.

The liability of the lands of Wester Monkrigg for stipend was the subject of litigation in a process of locality in which final decree was pronounced in 1710. The proprietor craved absolutor, in respect his lands were kirk lands feued out *cum decimis inclusis* before the Act of Annexation, and that they were never in use of paying any part of the stipend; and Lord Fountainhall (Ordinary) found that "the said lands, in respect of the writs produced, and that they were never in use of payment, could not be liable in any part of the stipend." This finding was not brought under review, and effect was given to it in the decret of locality finally pronounced, by which no part of the stipend was allocated upon the lands. The proceedings shewed that at this time there was sufficient free teind without localing on heritors who had heritable rights.

The leading title then produced by the proprietor was a charter in 1545 by the Abbot of Newbattle, by which the lands are feued out *cum decimis inclusis*, but without the words *et nunquam antea separatim*; and in all the subsequent titles, including the disposition to Campbell's trustees, the lands were conveyed in the same terms.

In 1835 some of the other heritors objected, for the first time, to the exemption of Monkrigg. The proprietor founded on the proceedings in 710 as *res judicata*. But this plea was overruled by the House of Lords, and the exemption was no longer insisted in. The lands were localled on for stipend in an interim locality in 1853, and in the final scheme.

In these circumstances a special case was presented to the Court, in which Sir J. Sinclair's trustees, first parties, claimed payment in relief of the overpayments made by their author. For the period between 1808 and 1825 they claimed such payment from Campbell's trustees (second parties) so far as they had trust-funds in their hands, and from Mr Fletcher (third party) so far as there was a deficiency of funds. For the period between 1825 and 1833 they claimed relief from the third party.


The second and third parties maintained that they were not liable, in respect—(1) That during the period of their possession the said lands were exempt from liability for stipend by a subsisting judgment of the Court; (2) that the whole rents of the said lands, stock and teind, were received and consumed *in bona fide*; (3) that as they have ceased to be heritors in the parish of Haddington for more than forty years all claims against them in that capacity were prescribed.

The questions submitted to the Court were—“(1) Are the second or third parties, or either and which of them, bound to recoup to the first parties the sum of stipend overpaid by the predecessor of the first parties, and unpaid by the second and third parties during the period between 1808 and 1825? (2) Is the third party bound to recoup to the first parties the sums of stipend overpaid and unpaid as aforesaid during the period between 1825 and 1833?”

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No. 174. Argued for the second and third parties ;—An overpaying heritor, though entitled to have matters put right for the future, cannot recover back payments, if the underpaying heritor can plead a probable title. Here there was a final judgment,—the interlocutor of Lord Fountainhall adhered to by the Court.¹ There had been *bona fide* possession.² That might not be a good defence against a minister claiming arrears of stipend, but it was good against a titular or another heritor.³

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Argued for the first party ;—The decree of locality in 1710 did not proceed on the footing that these lands had a *decimæ inclusæ* right. It appeared that there was enough of free teind without localising on heritors having heritable rights, and the effect of the locality was only to give the proprietor the benefit of a heritable right. There was no room for the plea of *bona fide* consumption, as in every interim locality there was an implied contract that the heritors should account to each other after the final scheme had determined their rights.⁴ 

LORD PRESIDENT.—The second parties to this case, the trustees of the late General Fletcher Campbell of Salton, bought the lands of Wester Monkkrigg, and obtained a conveyance, with entry to the lands at Martinmas 1808. They were infeft in these lands, and they held them as part of the trust-estate down to the year 1825. But in that year, in compliance with the directions of the trust-deed, they conveyed them along with other lands, under the fetters of an entail, to the present Mr Fletcher of Salton. From that time he was the owner of the lands of Wester Monkkrigg, as heir of entail in possession, until 1833, when Wester Monkkrigg was again sold under the powers of a private Act of Parliament.

The question we have to determine regards the liability of the owners of these lands to account for certain under-payments, or rather non-payments, under interim decrees of locality in subsistence during the whole of the period from 1808 to 1833. It appears that the first of the processes of augmentation to which those localities had reference was pronounced upon the 25th February 1797. There were two other augmentations that followed upon that, and interim schemes of locality were approved of first of all under the first decree of augmentation, and afterwards under the joint processes. There is no doubt that these interim localities were the subsisting rule of payment of the minister's stipend during the whole of the period from 1808 to 1833. It was not till a considerably later date that the final scheme of locality was approved of by the Court. Now under these interim schemes the proprietor of Monkkrigg paid no stipend at all, and the consequence of course was that the burden of paying the stipend fell upon the other heritors in the parish ; and it is matter of admission in this case that the first parties or their predecessors, in consequence of the lands of Wester Monkkrigg paying no stipend, had to pay more than their own shares, as the matter was finally adjusted, by £81, 9s. 3d., being £44, 3s. for the period between 1808 and 1825, and £37, 6s. 3d. for the period between 1825 and 1833.

¹ Lord Blantyre v. Earl of Wemyss, May 22, 1838, 16 S. 1009, H. of L. April 22, 1844, 3 Bell's App. 34 ; Cuthbert v. Waldie, Jan. 24, 1840, 2 P. 447, 12 Scot. Jur. 296 ; Mag. of Montrose v. King's College of Aberdeen, Nov. 12, 1834, 2 D. 457, note.

² Begg v. Rigg, July 3, 1751, Elchies, *Bona et Mala Fides*, No. 7, M. 1719. Elder v. Fotheringham, Jan. 8, 1869, 7 Macph. 341, 41 Scot. Jur. 199.

³ Haldane v. Ogilvy, Nov. 8, 1871, 10 Macph. 62.

⁴ Weatherstone v. Marquis of Tweeddale, Nov. 12, 1833, 12 S. 1, 6 Scot. Jur. 89.

Of course these sums will bear interest, but we need not trouble ourselves with details in answering the questions put to us in this case. No. 174.

Now, the reason why the proprietors of Wester Monkrigg paid no stipend was that there was an erroneous impression that the proprietor of these lands held his lands upon a title *cum decimis inclusis et nunquam antea separatis*; but this was afterwards, in 1835, found to be an entire mistake. The title, as a *decimæ inclusæ* title, was clearly invalid in law; and the consequence is, as the first parties contend, that the proprietors of Monkrigg, for the period now in question, must reimburse the first parties of that portion of the stipend which they ought to have paid, and which the predecessors of the first parties paid in their place.

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Now, it appears to me that, apart from any speciality in the present case arising from subsequent proceedings in the beginning of the last century, which have been referred to, the application of the doctrine established in *Weatherstone v. The Marquis of Tweeddale* is very clear.¹ This is just a case where an interim locality has been adjusted as the immediate rule of payment. There is reserved to all parties to fix in the ultimate accounting, when the final decree of locality comes to be made up, what are their rights and liabilities. It is in vain to say that anybody who is underpaying or escaping from paying under an interim scheme of locality, when he ought to have paid, is in the meantime consuming his teinds *in bona fide*, so as to afford him a defence in the ultimate accounting. The principle of the case of *Weatherstone v. The Marquis of Tweeddale* is as clear as possible against that. The Lord Ordinary in that case was Lord Moncreiff, a great authority in teind law, and he found distinctly in his interlocutor, "that where payments of stipend are made under interim decreets of locality there is an implied judicial contract among all the parties that when the legal obligations of the heritors shall be determined by decret their several interests shall be adjusted from the commencement of the process or processes, according to the true state of their rights and obligations, and that the claims of relief thus arising cannot be affected by the length of time during which the settlement of a final locality may have been delayed." That judgment was adhered to by the Inner-house; and Lord Balgray, who was also a great authority in teind questions, takes his opinion of the nature of an interim scheme of locality thus:—"As to the nature of an interim locality, it is a temporary arrangement introduced, *inter alia*, for the convenience of the minister. It fixes nothing irrevocably as to questions of accounting among the heritors themselves. A heritor paying in virtue of an interim locality does so under the legal warrant of this Court, whereby he is authorised to look forward to redress if he overpays."

Now, to say that it is a sufficient foundation for *bona fide* perception and consumption during the subsistence of an interim scheme of locality that the heritor believes he has a good title to the teinds which exempts him from payment is to set aside that doctrine altogether.

It follows of absolute necessity, from the doctrine thus announced by those eminent Judges, that there can, under an interim scheme of locality, be no *bona fide* perception or consumption of that portion of the teinds which ought to have gone to the minister.

The second and third parties here have founded very much on the doctrine of *bona fide* perception under a final decret of locality, and have cited the cases of

¹ Nov. 12, 1833, 12 S. 1, 6 Scot. Jur. 89.

No. 174. The Magistrates of Montrose v. King's College, Aberdeen, and Cuthbert v. Waldie; but the best answer to that argument is to be found in the note of the Lord Ordinary in the first of these cases. He fortunately happens to be the same Lord Ordinary who decided *Weatherstone v. The Marquis of Tweeddale*, and the distinction which he draws between *bona fides* as applicable to the payments or non-payments under a final and interim scheme is well worthy of attention, for it is stated in a very few words. He says:—"In the debate the pursuers relied mainly on the late decision in the case of *Weatherstone v. The Marquis of Tweeddale*. But it is clear from the reports of that case that it depended in the material point" (that is, the point in question) "entirely on the fact that the payments had all been made under interim decrees of locality. In the rubrics given in both reports it is precisely so stated. It is so, expressly, in the Lord Ordinary's interlocutor and note; and in the opinions of all the Judges, as reported by Messrs Shaw, &c., the point is laid expressly on the peculiarity of an *interim* decree, as implying that an ultimate adjustment is to take place, in contrast with the nature and effect of a *final* decree."

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It appears to me, therefore, that it is quite settled law that under-payments made under an interim scheme of locality will, when the final adjustment comes to be made, subject the under-paying heritor to a claim at the instance of the over-paying heritor, and that he cannot defend himself on the principle of *bona fide* consumption.

But then it is said that there is more in this case, and that the peculiarities of this parish and of the lands of Wester Monkrigg are such as to take it out of the rule of the case of *Weatherstone v. The Marquis of Tweeddale*. Now, what is the history of this parish as regards localities? There was a locality in dependence at the commencement of last century, and in that locality the proprietor of Wester Monkrigg brought forward what he called a *decimæ inclusæ* right, and insisted that upon that ground he should be exempt from payment of any stipend; and we find that Lord Fountainhall pronounced an interlocutor whereby he found that "the said lands, in respect of the writs produced, and that they were never in use of payment, could not be liable in any part of the stipend."

Now, the first observation to be made on that interlocutor, as it is called, is that it is not a judgment of the Lord Ordinary in any proper sense of the term. It is merely a finding pronounced in the course of the preparation of the final scheme of locality. It is an intimation of the opinion of the Lord Ordinary, but it has no judicial force or effect, according to the forms of process then in existence, until it comes to be brought before the Court when the final scheme of locality is approved of. Under our present forms of process a judgment pronounced by the Lord Ordinary in the course of preparing a locality may be brought under review, because it is a proper interlocutor, and accordingly it is constantly the subject of a reclaiming note to one of the Divisions. But at the time we are dealing with—the commencement of last century, and for more than a century after that—all that a Lord Ordinary could do in a process of locality was to express his opinion *ad interim*, and then in the end to make a report to the Teind Court. The Commissioners for Plantation of Kirks and Valuation of Teinds then for the first time pronounced any judgment when they approved of the scheme of locality adjusted as a final scheme.

Well, then, in the second place, observe what is the opinion that Lord Fountainhall intimates here. It is, that in respect of the writs produced, Wester

Monkrigg could not be liable for any part of the stipend. Is that sustaining a plea to the effect that the proprietor of Wester Monkrigg has a title to his teind of the nature of a title *cum decimis inclusis et nunquam antea separatis*? I certainly do not so believe. A heritable right to his teinds was quite sufficient to justify that opinion of Lord Fountainhall, because, as it is shewn, it was not necessary in allocating the stipend at that time to go against heritors having heritable rights at all. There was sufficient teind in the hand of the titular without going against the heritors possessing heritable rights; and the mere possession of a heritable right to his teind, which the proprietor of Wester Monkrigg had, was quite sufficient to justify this opinion of Lord Fountainhall. Then, when the Court in approving of the final scheme of locality in 1710 gave effect to this opinion of Lord Fountainhall, how can they possibly be supposed to have been sustaining a title *cum decimis inclusis et nunquam antea separatis*? They had no occasion to direct their attention to any such question, and they do not find in this opinion of Lord Fountainhall that such a question was raised, and therefore the only judicial act in the matter—the only proper judgment—namely, that approving the final scheme of locality, had it not in contemplation to determine any question as to a *decimæ inclusæ* right at all.

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Then it is said that under this first decret, which is assumed to have determined that the proprietor of Wester Monkrigg had a *decimæ inclusæ* right, there has been *bona fide* possession ever since. There is no doubt there was possession *in bona fide* of the entire teinds of the lands of Wester Monkrigg by the proprietor of these lands for ninety years after this final locality was approved of. There is no doubt about that, and nobody is seeking to disturb that possession. It is possession under a final decret of locality, and it is not brought in question in this case in any form. But, then, when the new augmentation came to be awarded in 1797, and when under that and subsequent decreets of augmentation interim schemes of locality came to be prepared, these were attended with the usual consequences. Whatever your rights may be, you, the heritors of this parish, are not to be prejudiced by paying under these interim schemes, because it remains to be subsequently adjusted and settled who are the heritors truly liable for the stipends, and in what proportions. That is the condition on which every interim scheme of locality is approved of, and made a rule for interim payment of stipend, and that is just what has been done in this case. These interim schemes have come to an end, and a final locality has been approved of; and it is now found that this gentleman, who was the proprietor of Wester Monkrigg in 1710, had no right to his teinds beyond the mere ordinary heritable right, and that none of the proprietors of Wester Monkrigg from that time forward have ever had any higher right than that, and accordingly they fall to be localled upon for the future, as the proprietor himself admits.

Well, if that is to be so for the future, why is it not to be for the past, while the interim schemes have been in subsistence. Oh! because I have possessed *in bona fide*. But that is distinctly overruled in the case of *Weatherstone v. The Marquis of Tweeddale*, and the circumstance that the party advances this *decimæ inclusæ* right more than half a century ago, will not in the slightest degree prevent the application of that rule, because nobody ever admitted his right, and, above all, nobody ever admitted his right of a *decimæ inclusæ* title when there came to be any question as to whether or not he should pay any part of the stipend.

It seems to me, therefore, that the specialties of this case do not in the

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I am therefore for answering the first question by finding that the second parties, who were proprietors of the estate of *Wester Monkrigg* in the period from 1808 to 1825, are bound to reimburse the first parties all the sums of stipend admittedly overpaid by them during that time; and in answer to the second question, that the third party (*Mr Fletcher*), who was owner of the estate from 1825 to 1833, is also bound to reimburse the first parties.

LORD DEAS.—I am entirely of the same opinion. It is quite fixed in our law and practice that in order that the minister may have the means of livelihood while the process of locality is going on, and which often lasts for a great number of years, he is entitled to demand an interim scheme; and it is equally well settled in our law and practice that the result is, that when the final locality comes to be adjusted those heritors who have been overpaying under that interim scheme are entitled to be reimbursed by those heritors who have been underpaying under it. No doubt when the process lasts for a long period of years there may be a hardship felt by the underpaying heritors when the demand comes to be made upon them at the end of that period by the overpaying heritors. But I am not aware that it makes any difference, as regards that claim for relief, whether interim schemes have been allowed to be acted on, by all concerned, for a short period of years or for a long period; and no case has been referred to in the very able and elaborate pleadings at the bar in which that relief was refused. As regards any specialties in this case, I think there are none to prevent the application of that general rule. Looking to the exposition which your Lordship has given, both of the law and of the facts of this case, I think it would be quite superfluous in me to say more than I have done. I entirely concur with the views stated by your Lordship.

LORD MURE.—I am of the same opinion. I think it is perfectly settled by the decision in the case of *Weatherstone v. The Marquis of Tweeddale*, and by the same eminent Judge in the other case mentioned in the course of the argument, that payments of this sort, made under the interim scheme, are to be adjusted by the final scheme, and that when there is an under-payment it must be paid, and when an over-payment it must be reimbursed. On the other hand, where over-payments have been made under final decreets they do not admit of being adjusted in the same way. I do not think that in this case there can be any application of the doctrine of *bona fide* perception and consumption.

LORD SHAND.—I am of the same opinion. One cannot help feeling, as objections of this kind present themselves, that cases of hardship frequently arise from the long interval of time that elapses between the granting of interim and final decreets of locality, and the omission, it may be, on the part of the heritor who is underpaying, to keep that in view and provide funds for liabilities—cases in which, as we find here, the interest on the over-payments almost three times the amount of the principal sum itself. At the same time, it is not to be forgotten that the remedy against such evils lies in the hands of the heritors themselves; for the parties who are interested in such questions, or those who represent them in the profession, have the means of avoiding the evils by

making steps to have the final locality adjusted on its proper basis and according to the true legal rights of the parties without undue delay. It is well that, the rule being fixed, the profession should see that this is the only way by which wardships of this kind can be avoided, and that the remedy is within their own power.

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THIS interlocutor was pronounced:—"Find and declare, in answer to the first question, that the second parties are bound to reimburse the first parties the sum of stipend overpaid by the predecessor of the first parties and unpaid by the second parties during the period between 1808 and 1825; and, in answer to the second question, that the third party is bound to reimburse the first parties the sum of stipend overpaid by the predecessor of the first parties and unpaid by the third party during the period between 1825 and 1833, and decern: Find the first parties entitled to expenses."

MACKENZIE & KERMACK, W.S.—GIBSON & STRATHERN, W.S.—Agents.

WILLIAM BURRELL, Petitioner.—*Balfour*—*R. V. Campbell*.
SIMPSON AND COMPANY, Respondents and Claimants.—*Trayner*—*Jameson*.

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THOMAS THOMSON AND OTHERS, Claimants.—*Asher*—*Alison*.
DAVID LEITH AND OTHERS, Claimants.—*M'Kechie*.

Process—Expenses—Merchant Shipping Amendment Act, 1854 (17 and 18 Vict. c. 104), sec. 514—Merchant Shipping Amendment Act, 1862 (25 and 26 Vict. c. 63), sec. 54.—A petitioner for limitation of liability under the 54th section of the Merchant Shipping Amendment Act, 1862, having been found liable to the claimants in expenses, *held* (1) that several claimants having the same interest and ground of claim should not be allowed the expense of separate sittings or appearances; (2) that claimants whose claims are unopposed should be allowed only the expense of preparing and lodging their claims, and of one appearance by counsel to take decree.

SEE *supra*, p. 177.

In this petition by Burrell, a shipowner, for limitation of his liability for damage caused by a collision, under the 54th section of the Merchant Shipping Amendment Act, 1862, the Court found the petitioner liable to the claimants in the expenses of process.

The claimants were numerous, and separate accounts of expenses were lodged for several owners of cargo separately, for the underwriters, for the insurers, and for the master; but the petitioner maintained that only a single claim for each class of claimants should have been lodged.¹ The Auditor in his report brought this point under the notice of the Court.²

1ST DIVISION.
B.

LORD PRESIDENT.—The object of these reports is to obtain from the Court a general rule for the guidance of the Auditor. I sympathise with the observation made upon section 514 of the Act, that it was contemplated that where there were a variety of claimants against the owner of a delinquent ship that their claims should all be heard together as in a multipointing. For that purpose all the parties are brought into Court by the petition, and the money is

¹ *Edinburgh and Glasgow Railway Co. v. Arthur, &c.*, Feb. 24, 1858, 20 D. 7, 30 Scot. Jur. 344.

² The Merchant Shipping Act, 1854 (17 and 18 Vict. c. 104), sec. 514, provides that the proceedings are to be subject to such regulations as to payment of costs as the Court thinks just.

No. 175. consigned. One object of the procedure is to save expense. But if we were to sanction what is contended for by some of the parties that object would be defeated. It is necessary to lay down some general rule for the guidance of the Auditor, and our aim must be to diminish expense without unreasonable denial of costs truly and properly incurred.

In one suggestion of the Auditor I concur,—that when claimants all belong to the same class, as, for instance, owners of cargo, their claims ought all to be in one paper, and they ought to be represented by the same counsel and agent. Where all are in the same position as regards their interest and ground of claim there ought to be no separate expenses to individuals.

There is another matter on which the Auditor has not reported or made any suggestion,—what expenses are to be allowed to claimants whose claims are unopposed? That matter may fall to be regulated hereafter more precisely. But it is clear, to this extent, that they are all entitled, first, to the cost of preparing and lodging their claims; and, secondly, to one appearance by counsel and agent to take decree.

Then there is still one other question with regard to the mariners, whether the master should not have joined with the mariners in their claim. I can see no reason why he should not. It can hardly be said that it would have been inconsistent with his dignity, and I know of no other reason.

LORD DEAS concurred.

LORD MURE.—I am of the same opinion. As to the mariners, it is perhaps right to say that they put in a note after the master's claim had been lodged, they having been on a voyage, and knowing nothing about the proceedings.

LORD PRESIDENT.—That may be; but it occurs to me that the master might have embraced their claim in his.

LORD SHAND.—I concur in the general rule, and I think it should be applied in the present case.

THIS interlocutor was pronounced :—"Of new remit the accounts of expenses to the Auditor, with the following instructions—(1) That where several claimants have the same interest and ground of claim they ought all to concur in lodging one claim, and appear by the same counsel and agents, and cannot be allowed any expenses for separate claims or appearances; (2) that claimants whose claims are unopposed are to be allowed only the expense of preparing and lodging their claims, and of one appearance by counsel to take decree."

WEBSTER & WILL, S.S.C.—SCOTT MONCRIEFF & WOOD, W.S.—FRASERS, STODART, & MACKENZIE, W.S.—Agents.

No. 176.

JOHN M'ARTHUR, Pursuer.—*Guthrie Smith.*

JOHN LAWSON, Defender.—*Fraser.*

July 19, 1877.
M'Arthur v.
Lawson.

Contract—Reparation—Relevancy.—The pursuer of an action of damages for breach of contract set forth a letter of employment, which, after an obligation by the defender to pay the pursuer a certain salary for the first two years, proceeded—"At the expiry of the second year I engage to give you a substantial interest by way of partnership in my business, so that your annual income may be considerably increased." The pursuer averred that at the end of the two years the defender refused to implement the remainder of the contract

Held (rev. judgment of Lord Craighill, *diss.* Lord Shand) that the action was irrelevant, in respect that there were in the letter no *termini habiles* out of which a contract of copartnery could have been formed. No. 176.

Observed (*per* Lord President)—A contract which cannot be enforced by specific implement, in so far as regards its form and substance, is no contract at all, and cannot form the ground of an action of damages.

July 19, 1877.
M'Arthur v.
Lawson.

THIS was an action of damages by John M'Arthur against John Lawson, metal merchant, Glasgow. The pursuer averred as follows:—He entered into the defender's service in 1875, under the following written agreement—"Glasgow, 12th Ap. 1875. Mr John M'Arthur. Dear Sir, —I hereby engage you to take the sole management under me of my business as a metal merchant. The engagement to be for two years from this date. The salary for the first year to be £180, and for the second year £210. At the expiry of the second year I engage to give you a substantial interest by way of partnership in my business, so that your annual income may be considerably increased.—I am, yours truly, JOHN LAWSON." "Glasgow, 13th January 1876. The above arrangement is now and hereby confirmed.—JOHN LAWSON." "Glasgow, 12th April 1875. John Lawson, Esq. I accept of the above engagement on the terms stated. JOHN M'ARTHUR. JOHN LAWSON."

1st Division.
Ld. Craighill.
M.

At the end of the two years' engagement the pursuer required the defender to give him a substantial interest in the business, in terms of the agreement, but the defender refused to do so. The pursuer averred that at that time the business was yielding a clear profit of £2800. The defender pleaded;—(1) The pursuer's averments are not relevant or sufficient to support the conclusions of the action. (2) The writings founded on by the pursuer do not contain any *termini habiles* out of which a contract of copartnery could have been formed, and there having been no binding agreement upon either pursuer or defender to enter into such a contract the present action of damages for alleged breach of contract is untenable.

The Lord Ordinary repelled these two pleas, and ordered a proof.

The defender reclaimed.¹

At advising,—

LORD PRESIDENT.—I think the Lord Ordinary has gone wrong in repelling the first two pleas for the defender. The writing on which the action is founded is a contract of employment, by which the defender engaged the pursuer to take the sole management of his business as a metal merchant. The engagement was for two years, the salary for the first year being £180, and for the second year £210. Now, that contract is quite complete in all its parts. The nature of the engagement and its endurance, the duties, and the remuneration, are all specified. But then, it is added, "at the expiry of the second year I engage to give you a substantial interest by way of partnership in my business, so that your annual income may be considerably increased." It is impossible to read that clause without seeing that it is a promise or expectation which is liable to be frustrated in many events. It is liable to a great many contingencies. If the business did not continue to prosper is it to be supposed that the manager was sound, nevertheless, to go into a sinking concern? Or, if the business continued out with diminished profits, so that nothing short of the whole or more than

¹ *Defender's Authorities.*—Goldston v. Young, Dec. 8, 1868, 7 Macph. 188, 41 Scot. Jur. 122; Sproul v. Wilson and Wallace, Jan. 24, 1809, Hume's Dec. 920; Lindley on Partnership, i. 89; Figs v. Cutler, 1822, 3 Starkie, 139.

Pursuer's Authorities.—Lindley on Partnership, i. 991; M'Neill v. Reid, June 1, 1832, 9 Bingham, 68.

No. 176. the half of the profits would give the pursuer a substantial increase on his income, does it mean that the defender must sink into a partner to the extent of perhaps one-fourth of the profits of his own business?

July 19, 1877. *M'Arthur v. Lawson.*

In short, we have no means of making out the *termini* of a contract of copartnery. There is no endurance specified; no declaration of what the shares are to be. None of the essentials of such a contract are settled in this short sentence. If any man of business were set down to prepare a contract of copartnery from these materials he would decline the employment, because the task would be impossible. The undertaking resolves into a vague and indefinite promise of a kind which, I take it, is by no means uncommon, but which cannot, in my opinion, be enforced as a contract.

It is not contended by the pursuer that the contract can be enforced to the effect of obtaining specific implement. But he does not see that that concession is destructive of his case. A contract which cannot be enforced by specific implement, in so far as regards its form and substance, is no contract at all, and cannot form the ground of an action of damages. There are cases of contracts which give ground for actions of damages, though not of implement, but that is not from defect of form but from considerations outside of the written instrument. For example, the Court will not decree implement of a contract which the party cannot possibly perform, because that would be to condemn the party to perpetual imprisonment—"Loco facti imprestabilis subest damnum et interesse." There are other cases. An engagement to marry or to enter into a partnership will not be enforced, not because of defect in the *termini* of the contract, but because it would be inequitable or contrary to policy to enforce specific implement. But a contract, in order to found an action, must be complete, and as much so to found an action of damages as an action of specific implement. This is confessedly not a complete contract, and therefore it is no contract at all.

LORD DEAS.—I am of the same opinion. In order to found an action of damages for breach of contract there must be a contract. There are some contracts, such, for instance, as a contract of marriage, of which, for reasons of policy, the law will not enforce specific implement, and which will nevertheless found an action of damages. But these are exceptional, and even in such cases there must be a contract.

Now, the objection to an action of damages, on this document, is that there is not only no contract of copartnery, but there are no particulars agreed on which could possibly enable the Court to say what ought to be the terms of such a contract. If the action of damages were to go on, on what footing could damages be given? We had a similar point the other day in the case of the Waverley Hydropathic Company.¹ A sale on conditions to be afterwards agreed on was held to be no sale.

There have, indeed, been special cases in which a party who had induced another to expend money on the faith that an informal transaction between them was to be carried out in due and legal form, such as the granting of a lease, or a disposition in terms substantially arranged, and who afterwards fraudulently or in bad faith refused so to bind himself as to be liable in specific implement, has been found liable to recoup the other in the specific expenditure and loss thus occasioned to him. We had occasion to review the cases which have occurred of that kind and the principle involved in them in the recent case of *Allan v.*

¹ *Heiton v Waverley Hydropathic Co.*, June 6, 1877, *supra*, p. 830.

Gilchrist, March 10, 1875,¹ to which it is sufficient to refer. Cases of that limited class, for reimbursement of specific loss, depend upon a different principle altogether from cases like this, which is an action for general damages for alleged breach of contract where there is really no contract, nor any materials for framing a contract.

No. 176.
July 19, 1877.
M'Arthur v.
Lawson.

LORD MURE.—I concur in thinking that there is here no contract or agreement which admits of being enforced as a contract of copartnery. There is no specification of the share the pursuer was to have, or of the time for which the partnership was to endure. I was at first struck by the observation that the pursuer had entered into possession, as it were, by continuing in the defender's employment on the faith of the agreement, and if he had done so, and if the obligation at the end of the letter of 12th April 1875 had been so framed as to afford materials for framing a contract of copartnery possession for a certain time would probably have entitled the pursuer to enforcement. But there are no such materials.

We were referred to English authorities, and particularly the case of M'Neill (June 1832, 9 Bing. p. 68) for the doctrine that though a contract cannot be enforced there may be damages for breach of it. I agree, however, with your Lordships in the general proposition that when a contract cannot be enforced it cannot in the ordinary case be made the foundation for a claim of damages. And as I read that English case it is not an authority against that rule, for there was there an averment of specific loss. The plaintiff was captain of an East Indiaman, and gave up his employment on the faith of the agreement, so that the case falls within the principle of the rule applied in Walker v. Milne, 10th June 1823, 2 S. 361, and Bell v. Bell, July 9, 1841, 3 D. 1201, in both of which there was specific loss, for which it was held competent to insist, although the agreement did not admit of being enforced. In this case of M'Neill, moreover, there was an obligation to give a fixed share, namely, a fourth of the profits. Here we have nothing to bring the present case up to that; and I do not think that anything is stated in the record which can be properly sent to a jury to dispose of.

LORD SHAND.—I am unable to concur with your Lordships. I think the Lord Ordinary has rightly repelled the first and second pleas for the defender and allowed inquiry for the purpose of assessing damages, of course leaving it open to the defender to prove his averment of justifiable cause for the alleged breach.

The nature of the agreement was plainly this: The pursuer agreed to enter into the defender's service at a certain salary for one year, with an advance the second year. But the salary is only part of the consideration. Probably the most material consideration—the most material pecuniary consideration—is that part of the agreement in which the defender gives the pursuer an absolute undertaking to give him a substantial interest as a partner. I cannot regard that clause as merely holding out a hope or expectation. The well-known language of obligation is used. It may be that the Court unfortunately cannot tie down the defender to any obligation, because the deed is too loosely expressed. But it is clear that the undertaking was given as an obligation, and I think it must be taken to have been the leading consideration which induced the pursuer to enter into the contract. This being so, the pursuer suffers in-

¹ *Ante*, vol. ii. p. 587.

No. 176. justice if he has given his service for two years at a low remuneration, and is now to find that the remaining stipulations are not binding.

July 19, 1877.
M'Arthur v.
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I agree in thinking that the Court could not enforce specific implement of this contract, but I do not agree that this is because of any imperfection in the terms of the contract. It was conceded that specific implement could not be enforced. But I did not understand that the concession was made on any other ground than that this was one of a class of contracts which the Court will not enforce in that way. The law will not compel parties to enter upon, or in some cases to keep up, a close and intimate relation against their will, but will give damages for breach of contract. The most common example is an engagement to marry, and the contract of service is another. So also in partnership. The law will not compel specific implement where the copartnership has not begun, but damages will be given in lieu of implement.

So the only question that remains is whether we are unable to find enough in this document to sustain it as the ground of an action for breach of contract, and I think the leaning of the Court ought to be to give the pursuer that justice which the defender by force of his pleading refuses. Now, it is said the clause is too vague, as not expressing the period of commencement, the amount of interest, or the endurance of the partnership. As to the commencement it is clear that it was provided to be at the expiry of the second year. As to the endurance, it must be taken to have been at least a year, and on the other hand the pursuer probably cannot demand more. As to the interest, it is true there is a certain vagueness. But terms are used which would enable the Court to fix what it might be. We have the salary £180, increasing to £210. Then the defender is to get a substantial interest, so that the return to him will be a considerable increase on his income. There is thus to be a considerable increase on £210, and assuming that the pursuer can shew that the business had been yielding the profit he alleges I think there are materials for fixing the interest at such a rate as would produce certainly £300 to £400, and that the sum may be fixed on the ordinary principles on which damages are assessed. Suppose such an interest would be equal to, say, a tenth share, and that it had been expressed in that way as a tenth share, that would bring the present case directly under the authority of the case of M'Neill, and that is substantially the way in which I construe this document.

It was said, suppose the business had gone wrong during the years of service would the pursuer be bound to enter a losing concern and proceed with the contract? I reply certainly not, because the stipulation was his privilege.

The English case of Figes is plainly inapplicable, because there, though there was some agreement, it did not appear what its terms were. Chief-Justice Abbott was of opinion "that the action was not maintainable in the absence of evidence to shew the terms upon which the parties had agreed to become partners, and said that he had never known any instance in which such an action had been supported without proof of the terms." The Court had no materials from which to spell out a contract. In the case of M'Neill, decided on the high authority of Chief-Justice Tindal, there was a clause similar to the present. The only difference was that while here the interest is expressed as a substantial increase on £210, there it was fixed at one-fourth. But, for the reasons I have explained, I do not think that difference material. In my opinion the interlocutor of the Lord Ordinary is right, and the case ought to be allowed to proceed to proof.

THIS interlocutor was pronounced :—" Recall the said interlocutor: No. 176.
Sustain the first and second pleas in law for the defender:
Assoilzie the defender, and decern," &c.

July 19, 1877.
M^r Arthur v.
Lawson.

MACRAE & FLETT, W.S.—R. P. STEVENSON, S.S.C.—Agents.

FLORENCE MUIRHEAD, Appellant.—*Fraser—Rhind.*

No. 177.

JOHN MILLER (Lewis Muirhead's Trustee), Respondent.—*Gloag.*

July 19, 1877.
Muirhead v.
Miller.

Husband and Wife—Alimentary Provision—Arrears.—By antenuptial contract of marriage a husband bound himself to pay his wife an annuity of £100 during her life, which was declared to be alimentary. The wife lived for some years in family with her husband, who then became bankrupt. *Held* that the wife was not entitled to claim as a creditor for arrears of the annuity, the existence of alimentary debts not being alleged.

IN the sequestration of Lewis Muirhead, jeweller, Glasgow, his wife lodged a claim for £475, payable to her under an antenuptial marriage-^{1ST DIVISION.} contract, whereby the bankrupt bound himself to make payment to her, during her life, "exclusive of the *jus mariti* and right of administration of the said first party, and of any other husband she may marry, of a free yearly annuity of £100 sterling, declaring that as the provisions under these presents are purely alimentary they shall not be to any extent assignable or arrestable," &c. ^{Ld. Curriehill.}

The trustee rejected the claim, "in respect the instalments of annuity and interest claimed are satisfied and extinguished by the maintenance and alimentary payments which the claimant has received since her marriage from her husband."

Mrs Muirhead appealed to the Sheriff, and averred ;—" In fact, the claimant has not received aliment from the bankrupt to the extent of this annuity. Her weekly allowance was about £3 per week for the maintenance of the house, consisting of herself, her husband, two servants, and in succession one, two, and three children. She was supplied with dress, &c. partly by her own small means and partly by her relatives, to the extent of more than £70 a-year."

She pleaded ;—(2) The obligation is not extinguished by the bankrupt supplying his wife with aliment, because the annuity is not for this purpose ; he is bound at common law to maintain her, and this provision as an obligation is over and above the common law obligation, and because she is entitled to the disposal of the annuity as she pleases, for all the ordinary purposes of a woman.

The Sheriff-substitute (Spens) refused the appeal.*

This deliverance was affirmed on appeal by the Lord Ordinary.

The appellant reclaimed, and argued ;—This provision was something different from the ordinary obligation to support a wife.¹

Argued for the respondent ;—This was a contract which could only be enforced if the wife was not otherwise alimented. The sum was expended

* "NOTE.— I observe it is pleaded that this annuity is in no way alimentary. This I cannot hold under the clause in the marriage-contract, declaring that the provisions thereunder are purely alimentary. I am of opinion that the trustee, in holding that this provision has been extinguished by the aliment and maintenance afforded by the bankrupt to his wife up to the date of sequestration has arrived at a sound conclusion."

¹ Buie v. Gordon, Feb. 23, 1827, 5 S. 437 (N. E.), July 9, 1831, 9 S. 923 ; Rennie v. Ritchie, April 25, 1845, 4 Bell's App. 221, Lord Campbell's opinion, p. 242.

No. 177. for family purposes with the wife's consent. There was no claim for arrears of alimentary allowances except for alimentary debt.¹

July 19, 1877.
Muirhead v.
Miller.

At advising,—

LORD PRESIDENT.—I think the ground of judgment adopted by the Sheriff substitute is quite sound. This provision in a marriage-contract is certainly not of an ordinary kind. But I cannot doubt that on the face of the contract it is declared to be alimentary, and that in a question between the lady and her husband's creditors it must have been treated as alimentary if it had been paid yearly, and truly for the purpose of aliment. But when such a provision falls into arrears the presumption is that the requisite aliment is afforded otherwise, and that the claim is satisfied. And when a lady claims arrears of an alimentary annuity, the arrears when they come into her hands must be applied to alimentary purposes of the past, because the annuity goes on. Now, alimentary purposes of the past are the satisfaction of alimentary debts, and as the wife has been alimented in the past, and no alimentary debts are said to be outstanding, I do not see, if the wife got the money, what she could do with it consistently with the marriage-contract.

LORD DEAS.—I do not differ from your Lordship's ground of judgment. Or rather I concur with it so far as it goes. But I do not wish to be held as lying down that if the aliment had been demanded by the wife termly she would not have been entitled to it. That might depend on circumstances. If the husband was able to maintain the family from his own funds, she would, in my opinion, have been entitled to it, but not if he was unable to do so. The fact that it was not demanded in the present case goes to shew not only that it was not required for the purpose of aliment, but also that the wife refrained from asking it on the footing that she was to have no claim for arrears.

LORD MURE.—When a provision in a marriage-contract is declared to be alimentary it must, I think, be held to be subject to the ordinary rule of alimentary provisions. And the decision in the case of Donald, 26th May 1860, shews that arrears of aliment are not actionable, unless perhaps where debt has been incurred on the faith of the aliment.

LORD SHAND concurred.

THE COURT adhered.

WM. OFFICER, S.S.C.—RONALD & RITCHIE, S.S.C.—Agents.

No. 178.

July 20, 1877.
Graham, &c. v.
Edinburgh
Theatre Co.

ROBERT GRAHAM and OTHERS, Petitioners.—*Mackintosh*.
THE LIQUIDATOR OF THE EDINBURGH THEATRE COMPANY, Respondent.—*Pearson*.

Companies Acts, 1862 and 1867—*Winding up—Expenses*.—The expenses of a second petition for winding up a company pending the first, will, in general, not be allowed.

Circumstances in which they were allowed, the petitioners being under a reasonable apprehension that the first petition might be withdrawn.

1ST DIVISION.
B.

MOXON AND SON and others, creditors of the Edinburgh Theatre, Winter Garden, and Aquarium Company to the extent of £300, presented a petition on 5th April for winding up the company on the ground of insolvency.

¹ Dunlop's Trustee v. Dunlop, March 24, 1865, 3 Macph. 758, 37 Scot. Jur. 390; Donald v. Donald, May 26, 1860, 22 D. 1118, 32 Scot. Jur. 496.

They suggested that the secretary of the company should be appointed liquidator. A meeting of creditors to a much larger amount was then held, and they proposed that other creditors should be sisted as parties to Moxon's petition, and that the name of the secretary should be withdrawn. This proposal was not acceded to, and Robert Graham and others, representing a majority in number and value of the creditors presented a second petition for winding up on 11th April, and praying that the wishes of the creditors might be ascertained with regard to the name of the liquidator.

The Court appointed a liquidator who was not the secretary.

Graham and others then applied for the expenses of their petition.

The motion was opposed by the liquidator, who maintained that the second petition was unnecessary, and that they were only entitled to the expense of an appearance to oppose the appointment of the secretary.

Graham and others stated that they were apprehensive that the first petition would be withdrawn.

LORD PRESIDENT.—I should regret if the expenses of more than one petition in a winding up were allowed as a general rule. But there may be circumstances which justify a second application. Moxon's petition represented only a small liability. That would not be sufficient in itself to justify a second petition. But then there was a meeting of creditors to a large amount, from which a proposal came that some other creditors should be sisted in the original petition, and that the name of the secretary of the company as liquidator should be withdrawn. The latter point might only have justified an appearance as in the Highland Peat Fuel Company.¹ But the proposal to sist some of the other creditors was declined for no good reason, and there was some reasonable apprehension that the first application might be withdrawn.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

DAVIDSON & SYME, W.S.—DALMAHOY & COWAN, W.S.—Agents.

JAMES FORBES, Pursuer and Respondent.—Brand.

No. 179.

JAMES CAIRD, Respondent and Appellant.—Asher—Mackintosh.

July 20, 1877.

Proof—Innominate Contract.—The proof of an innominate contract is not restricted to writ or oath unless the stipulations are of an unusual and extraordinary character.

In defence to an action for payment of an account for stabling horses for an omnibus for several years the defender alleged that the pursuer had agreed to stable the horses free of charge in consideration of the omnibus departing from and arriving at the stabler's inn on its way to and from a railway station. *Held* that the contract alleged might be proved *prout de jure*.

THIS was an action in the Sheriff Court of Banff by James Forbes, innkeeper and stabler, Portsoy, against James Caird, innkeeper, Cullen, for payment of £98 due to the pursuer for stabling the defender's horses from May 1867 to October 1876. It was admitted, with regard to the whole period except the first year, that the defender ran an omnibus daily from Cullen to Portsoy and back, and that the horses were stabled at the pursuer's inn. But the defender averred that it was stipulated from the first that he was to get stable accommodation free of charge in consideration of the omnibus going to the pursuer's inn after calling at the railway

¹ *Hume v. Directors of Highland Peat Fuel Co.*, June 27, 1876, *ante*, vol. ii. 881.

No. 178.
July 20, 1877.
Graham, &c. v.
Edinburgh
Theatre Co.

Forbes v.
Caird.

1ST DIVISION.
Sheriff of
Banffshire.
M.

No. 179. station at Portsoy, and starting from his inn before calling at the railway station on the return journey.

July 20, 1877.
Forbes v.
Caird.

The Sheriff-substitute allowed a proof to both parties and to each a conjunct probation.

The Sheriff adhered, "with the following addition, viz., that the proof of the agreement alleged by the defender is restricted to writ or oath."¹

The defender appealed to the Court of Session, and argued;—In the cases referred to by the Sheriff the agreements were all of a very unusual character. There was no rule that innominate contracts could not be proved *prout de jure*. It was only in cases of contract of an extraordinary character that proof was limited to writ or oath.²

The pursuer argued that an innominate contract could only be proved by writ or oath.

At advising,—

LORD PRESIDENT.—I see no legal difficulty in this case at all. I am very unwilling to go back on that not very well fixed and somewhat abstruse doctrine about the difficulty of enforcing innominate contracts. It is not easy to reconcile all the *dicta*. But, going back to the passage in Erskine I do not find anything at all applicable to this case.

The claim goes back for nine or ten years. The pursuer is the proprietor of a hotel, and the defender is an omnibus proprietor. The pursuer says, You are to pay me the ordinary rates for stabling your horses. The defender says No, the consideration was the advantage given to your hotel over the rival hotel by running the omnibus to and from it. That is one of the most simple and everyday contracts, and just a case for a proof at large. The case contemplated by Erskine was a contract in which the material stipulations are not of a usual kind, and do not flow naturally from the contract. When the contract is innominate and the stipulations unusual, it is not desirable to allow a proof at large because of the lubricity of testimony in such cases.

LORD DEAS.—There is no such rule as that no innominate contract can be proved except by writ or oath. But it may be stated to be a rule that a contract of an unusual or anomalous nature can be proved only by writ or oath. For instance, it is so unusual and out of the ordinary course of business for a law agent to work for nothing that a contract to do so will only be allowed to be proved by his writ or oath. But I see nothing to come up to a case of that kind here. It was an important object for the pursuer to have the passengers by the coach brought as customers to his hotel, and there was nothing remarkable or anomalous in the arrangement averred by the defender to have been made. The first thing to have been done was to require the pursuer to prove his case. He could not have done so without proving the facts and circumstances connected with it, and it follows that the other party must then naturally have been allowed to do the same.

The fact that this arrangement went on so long without any charge being made on it is an important element as shewing the understanding between the parties, and the question is really one on the whole facts averred.

¹ The Sheriff referred to Ersk. Inst. 4, 2, 20; Johnston v. Goodlet, July 1868, 6 Macph. 1067, 40 Scot. Jur. 612; Edmonston v. Edmonston, June 1861, 23 D. 995, 33 Scot. Jur. 514, Taylor v. Forbes, Jan. 13, 1853, 24 D. 19.

² Thomson v. Fraser, Oct. 30, 1868, 7 Macph. 39, 41 Scot. Jur. 28.

LORD MURE and LORD SHAND concurred.

No. 179.

THIS interlocutor was pronounced:—"Recall the interlocutor of the Sheriff of date 12th May 1877, and remit to the Sheriff to proceed with the proof allowed by the Sheriff-substitute's interlocutor of date 14th March 1877: Find the appellant entitled to expenses in this Court," &c.

Forbes v.
Caird.

THOS. CARMICHAEL, S.S.C.—ALEX. MORISON, S.S.C.—Agents.

EXCHEQUER CASE *

(14 & 15 VICT. c. 36, 48 GEO. III. c. 55).

WILLIAM RUSSELL.

No. 180.

Inhabited House Duty—*Dwelling-house and business premises under one roof, but without internal communication between them, liable as one house.* Mar. 6, 1877.
Russell.

—Mr William Russell, draper, Leslie, was assessed for inhabited house duties for the year ending 24th May 1877, at 6d. per £1 on £52, the annual value of premises occupied by him at Leslie. EXCHEQUER.
Ld. Curriehill.

Against that assessment he appealed at a meeting of the commissioners held at Kirkcaldy. Case 22.

The appellant stated that the amount on which the assessment is laid consists of £35 rent of shop and £17 rent of dwelling-house, and there being no internal communication whatever, and the house being under £20, no duty was payable. The house was entered by a roofed staircase of eighteen steps, built within the yard after referred to, but outside all the other premises. The dwelling-house was let some years ago as such, separately from the other premises, and there had been no structural alteration since. The nearest shop door was nine feet in the open air from the foot of the covered staircase. None of Mr Russell's workers boarded or lodged on either of the premises.

The surveyor stated that he had viewed the premises, which consisted of a shop on the ground-floor and house above, with yard and offices behind. The entrance to the house was from the yard, to which access was had by a "close" between this and the adjoining property, but the shop had two back doors entering upon same yard, so that the appellant went from shop to house without coming into the street or the "close." In support of the assessment the surveyor referred to rule 3, schedule B, 3 Geo. III. c. 55, which enacts that "all shops and warehouses which are attached to the dwelling-house or have any communication therewith shall in charging the said duties be valued together with the dwelling-house," and to the case decided by the English Judges, No. 2781, and intended that as the house and shop were under one roof, and as the whole premises are in the occupation of the appellant, and there was communication throughout by the private yard, which was a portion of the premises, the appellant was liable to the assessment appealed against. The Commissioners considering the question as being attended with

* From Reports of Exchequer Cases in Great Britain, relating to Income-tax and Inhabited House Duties, printed for the Commissioners of Inland Revenue.

No. 180. difficulty decided to relieve the appellant, with which decision the surveyor expressed himself dissatisfied, and requested that this case might be stated for the opinion of the Court.

Mar. 6, 1877.
Russell.

The Lord Ordinary (Curriehill) pronounced an interlocutor finding "that the determination of the Commissioners is wrong."*

CASES ON APPEALS UNDER THE LANDS VALUATION ACTS
(17 & 18 VICT., c. 91, 20 & 21 VICT., c. 58, 30 & 31 VICT. c. 80, sec. 5).

For previous cases see 11 Macph. p. 976, *et seq.*

No. 181.

DUNCAN M'GREGOR AND OTHERS, Appellants.
SIR ROBERT MENZIES.

June 3, 1874.
M'Gregor, &c.
v. Menzies.

Lord Mure.
Lord Gifford.

Case 105.†

Overvaluation—Objections by third parties not on valuation-roll.—Certain villagers in Aberfeldy whose names were not on the valuation-roll appealed against the entry in the roll of Joseph Ewing, Sir Robert Menzies' gardener, as tenant of a house at a rent of £14. They produced witnesses to prove that the value was under this sum, and also, that while the gardener's wages were formerly £50, with a free house, they were now £64, £14 being retained by Sir Robert for the rent, the rent being fixed in order to give the gardener a vote. The house was within Castle Menzies grounds. Sir Robert and Ewing produced a lease for a year, and thereafter until either party gave six months' written notice, at the rent of £14, and adduced two witnesses who valued the subjects at £16.

The Commissioners repelled the objection to the *locus standi* of the complainers, and, by a majority, sustained the complaint, and fixed the annual value at £10. Held that the Commissioners were right.‡

No. 182.

TOWN OF INVERNESS.

June 3, 1874.
Town of
Inverness.

Lord Mure.
Lord Gifford.

Case 110.

Rent of market dues—Value of area of market.—The right of levying the market dues of the town of Inverness is let to a tenant for the sum of £134, and this sum was entered in the roll, and under the head "description of subject" the entry was "shop, stalls," &c. The shops and stalls are let by the year, and are separately entered. The town chamberlain appealed, and maintained that market dues were more of the

* "NOTE.—The business premises are under the same roof as the dwelling-house and are undoubtedly attached thereto, although there is no internal communication between them, and as both are occupied by the same person they must be valued in *cumulo* under the statute."

† These cases are quoted from the Abstract printed by the Commissioners of Inland Revenue. Cases of no general interest have been omitted.

‡ NOTE.—The Judges are of opinion that the lease in this case is not such a lease as is conclusive of value under the 6th section of the statute; and, upon the evidence, they see no sufficient reason for differing from the result which the Commissioners have arrived at.

nature of customs than rent ; all that could be entered was a fair estimated value of the area of the market, which he stated at £40. No. 182.

The Commissioners, being of opinion that £40 was a fair estimate of the annual value of the area of the market, so far as not separately let by the year, ordered the entry to be altered to 'area of market, £40.' Held that the Commissioners were wrong. June 3, 1874.
Town of
Inverness.

COLONEL D. C. R. C. BUCHANAN.

No. 183.

Lease—Rent—Fair annual value—Sub-letting—Whether rent paid by principal tenant or sub-tenant should be entered.—Colonel Buchanan let workmen's houses to Dr Adam for ten years at the rent of £265. Dr Adam sub-let them to 110 tenants, and the assessor inserted in the roll the names of the sub-tenants and their rents where the rent was £4 and upwards, and the total of the rents without names where the sub-tenants paid less than £4,—the whole amounting, *in cumulo*, to £475, 8s. June 3, 1874.
Buchanan.
Lord Mure.
Lord Gifford.

Case 111.

The appellant stated that the amount realised by Dr Adam depended on a variety of circumstances, such as the assumption that the fortnightly and monthly sub-tenants occupied the houses for the whole year. He also stated that the rent drawn included water and other taxes.

The assessor stated that Colonel Buchanan was, by the lease, to put the houses in repair, make drains, &c., to the extent of £250, and thereafter tenant was to maintain the houses and insure them against loss by fire. He therefore maintained that the rent paid by Dr Adam was not the fair annual value of the subjects.

The assessor also stated that the Act authorised him to enter in the roll occupiers who are not also tenants, and the Commissioners of Supply had directed him to enter in one entry tenants who pay less than £4 yearly, and he also mentioned that the Education Act gave votes to those entered in the valuation-roll at the rent of £4 and upwards.

The Commissioners were of opinion that the actual rent conditioned to be paid by the lease should be entered, and sustained the appeal. Held that the Commissioners were right.

THE DIRECTORS OF MURRAY'S ROYAL LUNATIC ASYLUM.

No. 184.

Lunatic Asylum supported by private mortified funds.—Murray's Royal Lunatic Asylum, Perth, formerly entered at £400, was, in 1874, raised to £800. The directors appealed, and stated that the asylum was established by private mortified funds, and should be valued on a different basis from public works, and not with reference to a full return on capital invested. The institution was only intended to be self-supporting, and not a mercantile speculation. The receipts from patients were little more than the expenditure, and the surplus was applied to the extinction of £5000 of debt on the institution. For many years there was a deficiency. The County Lunatic Asylum at Murthly, and the Poorhouse of Perth, were each valued at £200, although containing as great or greater accommodation than Murray's Asylum. May 25, 1875.
Murray's
Royal Lunatic
Asylum.
Lord Shand.
Ld. Craighill.

Case 112.

The assessor, corroborated by Mr Blackadder, C.E., Dundee, stated that the sum was under the value put on similar institutions, and instanced the Lunatic Asylum of Dundee, valued at £1200. This asylum was not larger, and was old and condemned by the government inspector as un-

- No. 184. suitable, but the ground about it was more valuable than here. Mr Blackadder stated, but it was not admitted, that £800 would not be more than 3 per cent on the cost of the buildings.
- May 25, 1875. Murray's Royal Lunatic Asylum. The magistrates and council unanimously rejected the appeal. Held that they were right.

No. 185.

JOHN SHIELDS AND ANOTHER.

- May 25, 1875. Shields. *Manufactory erected and occupied since 1869—Previously entered at £450—in 1874 entered at £1700—Value of buildings and steam power—Percentage for annual value.*—The Wallace Works, Balhousie (Linen Manufactory), Perth, previously entered at £450, were, in 1874, entered at £1700. John Shields, the owner, and Messrs John Shields and Company, the occupiers, appealed, and craved the valuation to be reduced to £763. They stated that, previous to 1869, Messrs John Shields and Company, the occupiers, rented premises in Kinnoul Street, Perth, for £259, 10s. per annum. The Kinnoul Street premises accommodated 350 looms, the Wallace Works 572. At the same proportion, the rent of the Wallace Works would be £425. There were no similar works in Perthshire to compare with, but in Dunfermline, the centre of such works, the valuation was at the rate of 26s. 8d. per loom, and this included warehouse accommodation, which was wanting in the Wallace Works. The Dunfermline mode would give £762, 13s. 4d. for the Wallace Works. Messrs Laird's works in Forfar, with as many workers and looms as the Wallace Works, were valued at £773. Another work in Forfar, with 300 looms and a bleachfield in addition, was valued at £300.
- Case 113. The assessor was assisted by Mr Blackadder, C.E., Dundee, in fixing the valuation. Mr Blackadder stated that he estimated the value of the heritage at £19,350, made out by taking the estimates for the buildings, and adding 10 per cent for extras, then adding £3150, the value of the steam power, at £45 per horse-power. Taking $7\frac{1}{2}$ per cent on this sum, and adding the value of the ground, £42 (421 poles at 2s. per pole), the annual value, in even figures, £1700, entered in the roll, is brought out. The magistrates of Dundee, after evidence and investigation in 1866, had adopted this percentage. It was arrived at on the principle that money so invested should yield 5 per cent clear, the $2\frac{1}{2}$ per cent being for taxes, &c.

The magistrates and council unanimously dismissed the appeal. Held that they were wrong, and valuation reduced to £1200.*

No. 186.

SUMMERLEE IRON COMPANY.

- May 26, 1875. Summerlee Iron Co. *Mineral lease not more than thirty-one years—Pitmouth buildings and engine erected by tenants—Value of them entered in roll separate from rent by mineral lease.*—The appellants are tenants, under a thirty years' lease, of minerals at a rent of £2000. There is an entry of this in the valuation-roll.

Case 114. In addition, they are entered as proprietors of "pit-mouth buildings"

* NOTE.—The Judges, in arriving at £1200 as the annual value, modified the 10 per cent added to the estimates for erecting the buildings for extras, and also the $2\frac{1}{2}$ per cent in addition to the 5 per cent for taxes, &c.—supposing that the landlord's taxes, &c., in Perth might not be so high as in Dundee.

and engine," at an annual value of £150. They appealed against this entry. No. 186.

The buildings and engine were erected by the tenants at the commencement of the lease, and are indispensable in the working of the minerals. They are held by them under the lease, and so are part of the subjects entered in the roll, and covered by the entry of the rent of £2000. May 26, 1875.
Summerlee
Iron Co.

The assessor regarded the pit-mouth buildings and engine as erected on lands held under lease for longer than twenty-one years, and so to be valued independently of the mineral lease.

The Commissioners confirmed the entry. Held that the Commissioners were wrong.

ALEXANDER MITCHELL INNES.

No. 187.

Farm—By lease landlord had power to resume land for planting— May 26, 1875.
Mitchell
Innes.
Rent of farm £3 per acre—Allowance for land resumed £5 per acre—
Rent of farm—Value of land resumed.—The farm of Ayton Mains was let for £341, 6s. 8d., being £3 per acre. By the lease the landlord was to allow £5 for each acre he might resume for planting, &c. Last year he resumed rather more than 11 acres, which have been planted and added to the woodland on the estate. £56, 16s. 8d., being £5 per acre for the land resumed, was deducted from the rent, and the balance, £284, 10s., returned to the assessor as the rent now payable, but only £24 was returned as the annual value of the land resumed. The assessor added £56, 16s. 8d. to the woodland for the land resumed. Lord Shand.
Ld. Craighill.
Case 115.

The landlord appealed, and contended that only £3 per acre should be added to the woodland, that being the rent at which the land in its natural state would let for.

The assessor submitted that the rent of the farm should only have been reduced by £3 per acre for the land resumed, or the full sum of £56, 16s. 8d. should be given as the value of the woodland.

The Commissioners sustained the valuation. Held that the Commissioners were wrong; that the tenant's rent should be entered in the roll at the rent actually paid, and that the land which had been resumed by the landlord should be entered as woodland at £3 per acre.

BURGH OF INVERURIE.

No. 188.

Market stance—Market customs of burgh.—By charters from Queen Mary and King James VI. the burgesses and inhabitants of the burgh of Inverurie have right to erect a market cross, and to have and hold markets on certain days, and to levy tolls, customs, duties, and liberties pertaining to free markets. The right to levy the market customs was let to George Jamieson at the yearly rent of £24. "The market stance" is entered in the roll, the magistrates as proprietors, George Jamieson as tenant, and he yearly value, £24. The treasurer of the burgh appealed. May 26, 1875.
Burgh of
Inverurie.
Lord Shand.
Ld. Craighill.
Case 116.

The appellant stated that the full value of the stance was entered under tent, stances, and pasture, £9, 2s. 6d." The right of levying the market customs of the burgh was what was let to George Jamieson, and this was a source of income to the corporation, apart from their lands, and the customs were not pertinent of the market stance. They were levied not at the market stance, but at the burgh boundaries, upon all goods coming into the burgh for sale on market day, whether they went to the stance

- No. 188. or not. The interpretation-clause of the Lands Valuation Act explaining "lands and heritages" did not specify market customs or subjects akin to them.
 May 26, 1875. Burgh of Inverurie.
 The assessor maintained that the customs were pertinents of the burgh lands, and therefore came under the expression "lands and heritages."
 The Commissioners (the magistrates) directed the entry to be deleted.
 Held that the Commissioners were wrong.

No. 189.

MRS EMMA JERDAN.

May 25, 1876.
Jerdan.Lord Shand.
Ld. Craighill.

Case 118.

Rent of inn—Tenant bound to purchase her stock of ale and beer from proprietors, who are brewers.—The premises, consisting of the Yawl Inn, Eyemouth, are verbally let at a rent of £14, but the assessor entered the annual value as £20, the tenant being bound to purchase from the proprietors, who are brewers, all the beer and ales she required. She only received a discount of 4 per cent, while the usual trade discount is from 15 to 20 per cent. Her purchases amounted to about £130 yearly. The tenant appealed, and adduced evidence of tradesmen that £14 was the full value of the subjects.

The Commissioners sustained the valuation. Held that the Commissioners were right.

No. 190.

SIR DAVID KINLOCH.

June 1, 1876.
Kinloch.Lord Shand.
Ld. Craighill.

Case 119.

Rent by lease—Abatements first four years—Improvements.—The farm of Markle was let on a nineteen years' lease, at a rent of £700 in money, and the value of 280 quarters of wheat at the fairs prices. For the first four years there were to be abatements of £200, £150, £100, and £50 respectively. The lease did not state the reason of the abatements, nor that the farm was not in good condition. The assessor entered the rent at £1354, 4s., without giving effect to the abatement. The appellants, the landlord and tenant, desired the abatement to be deducted. The assessor said it was reasonable to assume, in absence of explanation in the lease, that the abatements were to be expended in improvements (having a permanent character), and were thus, to all intents and purposes, rent.

The Commissioners refused the appeal. Held that the Commissioners were right.

No. 191.

SIR THOMAS BUCHAN HEPBURN.

June 1, 1876.
Hepburn.Lord Shand.
Ld. Craighill.

Case 120.

Rent by lease—Farm not in good condition—Reduction first two years.—The farm of Gateside was let on a nineteen years' lease at £187, 17s. 6d. for the first two years of the lease, and £375, 15s. for the remaining seventeen years. It was stated that the farm was in bad order, and the rent was arranged to enable the tenant to put it in good condition. There was no stipulation in the lease as to repairs or improvements to be done by the tenant. The assessor entered the annual value at £375, 15s. in the second year. The landlord appealed, and contended that the rent should be entered at £187, 17s. 6d., as stated in the lease.

The Commissioners sustained the appeal. Held that the Commissioners were right.

BARONY PAROCHIAL BOARD.

No. 192.

Value—Basis of value—Accommodation or cost of erection—Lunatic Asylum.—Woodielee Lunatic Asylum for pauper lunatics of the Barony Parish, Glasgow, is situated in parish of Kirkintilloch, and is entered in the roll at £1600. The Barony Parochial Board appealed, and claimed to have it reduced to £1000. The Kirkintilloch Parochial Board claimed to have it increased to £2500.

April 2, 1877.

Barony
Parochial
Board.Ld. Craighill.
Ld. Curriehill.

The asylum is licenced for 400 patients, so that the valuation amounted to £4 per bed. The Barony Board contended that, as compared with other asylums and with poorhouses this valuation per bed was excessive, and referred to the valuation of Rosewell Asylum, Gartnavel Asylum, and poorhouses of Govan, &c. The inspector of Kirkintilloch stated that the valuation per bed of poorhouses did not form a criterion for the valuation of lunatic asylums, the accommodation per bed being greater in the latter. £2500 is not quite two per cent on the cost of erection, and this was a reasonable valuation, and referred in support of it to the Larbert Public Lunatic Asylum, Edinburgh Poorhouse, &c.

Case 122.

The assessor stated that, having regard to character and extent of accommodation and cost of erection, £1600 was a moderate and fair valuation.

The Commissioners confirmed. Held that the Commissioners were right.

HERITORS OF KINGOLDRUM AND HERITORS OF KIRRIEMUIR.

No. 193.

Parish Church—If all lands and heritages to be entered, or only such as can be let.—The parish churches of Kingoldrum and Kirriemuir were entered at £20 and £120 respectively. The heritors appealed. The Commissioners, having in view that section 6 of the Act provides that the value of lands and heritages is to be taken to be the rent at which, one year with another, they might, in their actual state, be reasonably expected to be let, and that parish churches, while such, cannot be the subject of a lease, were of opinion that parish churches do not fall fairly within the terms of the statute, and sustained the appeal. Held that the Commissioners were right.

April 2, 1877.

Heritors of
Kingoldrum
and Heritors
of Kirriemuir.Ld. Craighill.
Ld. Curriehill.

Case 123.

ABERDEEN CITY TREASURER AND ANOTHER.

No. 194.

Market stances—Magistrates let right to rents or dues for stands in public street of burgh on market days.—The public market in Aberdeen is held every Friday, and the space in Castle Street round the cross is occupied by hucksters with their stands and wares, and for each stand or stall, with a few exceptions, "casualty, mail, or rent" is payable to the town. The right to collect the stand rents is let to a tacksman. The assessor entered under the description "market stances" the stances for these stands, the treasurer of Aberdeen as proprietor, and the tacksman as tenant. The treasurer and tacksman appealed.

April 2, 1877.
Aberdeen City
Treasurer, &c.Ld. Craighill.
Ld. Curriehill.

Case 124.

The appellants maintained that subjects, to enter the roll, must be shown to form the actual or possible subject of a lease; there must also be a proprietor with a title to let, and a tenant possessing and paying rent. That Castle Street was the ancient highway through the burgh,

No. 194.

April 2, 1877.
Aberdeen City
Treasurer, &c.

and was different from a burgh having a field, its property, for a market stance. The treasurer was not proprietor of Castle Street, and there could be no legal private appropriation of it. The town-council formerly provided stands and charged for their use. The dealers now brought their own stands, but the fiction remained that they were using those supplied by the town-council, and paying hire for them. The tacksman maintained that the right let to him "the casualties, maills, or rents payable for stands set up at the market cross" was a moveable right, viz., the *jus exigendi* to collect burgh customs, and if burgh customs had been intended to be assessed they would have been entered in the interpretation-clause. The tacksman could not assign a particular stance to any person, or remove any person from Castle Street. All persons having stands did not pay rent.

The assessor stated that the sellers possessed the ground in Castle Street around the cross with their stands each market day until removed at night, and, excepting a few, all paid rent. It was not the *solum* of the whole of Castle Street, but the *solum* of each stand, which was let, and it was the ground forming the stances of the stands which he had entered. These stances formed an assessable subject, and the landlord was the town-council, and the tacksman the tenant.

The Commissioners sustained the appeal. Held that the Commissioners were right.

No. 195.

LORD BLANTYRE.

April 2, 1877.
Lord Blantyre.

Ld. Craighill.
Ld. Curriehill.

Case 125.

Ferry—*A ferry between two counties entered in roll of both counties*.—The ferry of Erskine, on the river Clyde, is a pertinent of the barony of Erskine, situated in Renfrewshire. The Clyde, at this point, divides the counties of Renfrew and Dumbarton, and the ferry in fact extends into both counties. There is a pier or landing-place on both sides. The ferry and appurtenances, with a hotel, on Renfrewshire side, are let for £100. This year, for the first time, an entry was made of £40 as the proportion applicable to the county of Dumbarton. Lord Blantyre appealed, on the ground that the barony of which the ferry is a pertinent is situated wholly in Renfrewshire.

The Commissioners sustained the entry, but fixed the proportion of annual value applicable to Dumbartonshire at £20. Held that the Commissioners were right.*

* "NOTE.—On the assumption that the full £100, which is the actual rent of the ferry, &c., &c., has been entered as the value in the valuation-roll of Renfrewshire for the current year, we take for granted that to the extent of the £20, which has now been allocated to the county of Dumbarton, there will be an abatement from the Renfrewshire valuation."

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AGENT AND CLIENT.

1. The law-agent employed by the trustee in a sequestration is not, as such,
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4, 1876, p. 77.

Purchase by Agent.

2. W, a law-agent, bought for his brother, Dr W, four dwelling-houses from
two ladies, the Misses M, as trustees of their late father. The missives of
sale were signed for the sisters by H M, their brother. In answer to an
action for implement brought by Dr W, the trustees brought an action of
reduction of the missives, on the ground that W, though acting for the pur-
chaser, was also the trustees' agent in and for the sale, and that while
ostensibly buying for Dr W, he was in reality, unknown to them, buying
in fact for himself. *Held*, in the circumstances (*rev.* judgment of Lord
Curriehill, *diss.* Lord Shand), that the Misses M had failed to prove either
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3. Persons in prosecuting a claim to an estate obtained an advance of £2000, on
granting in return a personal bond binding themselves to pay £10,000 in
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960.

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AGENT AND PRINCIPAL. See *Fraud*, 1—*Proof*, 2—*Public Company*, 1.

ALIMENT. *Of Parent by Child.*

A father brought an action for aliment against one of his four children. The defender pleaded that the other children should have been called. *Plea repelled*, on the ground that it was not supported by an allegation that the other children had a superfluity of means after providing for themselves and their families. *Hamilton v. Hamilton*, March 20, 1877, p. 688.

ALIMENTARY PROVISION. *Husband and Wife.*

1. By antenuptial contract of marriage a husband bound himself to pay his wife an annuity of £100 during her life, which was declared to be alimentary. The wife lived for some years in family with her husband, who then became bankrupt. *Held* that the wife was not entitled to claim as a creditor for arrears of the annuity, the existence of alimentary debts not being alleged. *Muirhead v. Miller*, July 19, 1877, p. 1139.

Discharge.

2. In a trust-settlement the trustees were directed to pay an annuity, which was declared to be an alimentary provision and not arrestable nor assignable by the annuitant onerously or gratuitously. After the whole purposes of the trust had been fulfilled except payment of the annuity the heir-at-law of the trustor, who was entitled to the residue of the trust-estate, called upon the trustees to denude, and proposed to grant a bond of annuity over the heritable property, which formed the residue of the trust-estate, in favour of the annuitant, in precisely the same terms as provided in the trust-deed. The annuitant was willing to accept of the security offered in place of the provision in the trust-deed, and to concur in granting a discharge to the trustees. *Held* that the annuitant had not power to grant a discharge of the alimentary provision, and that the trustees were not entitled to denude. *White's Trustees v. Whyte*, June 1, 1877, p. 786.

See *Succession*, 4—*Trust*, 1.

APPEAL TO HOUSE OF LORDS. *Leave to Appeal.*

In an action raised by a landlord for reduction of a lease of a quarry on the ground that it had been obtained by fraud, and for removal and accounting, the tenant pleaded that in the event of his lease being reduced he was entitled to retain possession of the quarry under a separate agreement with the landlord. A jury found that the landlord had been induced to grant the lease by fraud, and thereafter the Court reduced the lease and repelled the tenant's plea that he was entitled to retain possession, and remitted the case to the Lord Ordinary to proceed with the conclusions for accounting. On the defender applying for leave to appeal it was granted, on condition that he found caution for violent profits, and that the petition of appeal was presented and an order of service obtained thereon within eight days. *Gardner v. Beresford's Trustees*, July 17, 1877, p. 1091.

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1. *Held* that when a *mortis causa* settlement disposes of the whole estate of the granter his widow is not entitled to take provisions under it and at the same time claim her legal rights. *Caithness' Trustees v. Caithness*, July 20, 1877, p. 937.

Implied Condition—Entailer's Debts.

2. An institute of entail *held* entitled to remain in possession of the entailed estate, and also to keep up as a charge against the estate a sum secured over the same to which he had acquired right, in virtue of what had been found by a previous decision to be the legal effect of a deed executed by the entailer *unico contextu* with the entail, although in that deed the entailer expressed his desire that the estate should be disburdened of the debt. *M'Donald v. M'Donald*, Nov. 1, 1876, p. 45.

ARBITRATION. See *Process*, 10.

ARRESTMENT. *Ad fundandam jurisdictionem.*

Arrestments *ad fund. jur.* were used by a pursuer in the hands of the trustee on the bankrupt estate of a person against whom the defenders had a contingent claim. Plea of no jurisdiction sustained, in respect that it was proved that there were no assets in the hands of the trustee. *Wyper v. Carr and Co.*, Feb. 2, 1877, p. 444.

ASSIGNATION.

A partner of a building association, with unlimited liability, assigned to a third party a debt due to him by the company. *Held*, after proof, that the association was insolvent at the date of the assignment, (1) that calls or contributions leviable by the association from the cedent as a partner for payment of the debts of the association might be set off against the debt due to him by the association, and (2) that the assignee was in no better position than the cedent. *Shiells v. Ferguson, Davidson, and Co.*, Dec. 22, 1876, p. 250.

See *Insurance—Personal or Transmissible.*

BANK. See *Fraud*, 2.

BANKRUPTCY. *Bankrupt's Title to Sue—Bankruptcy Act, 1856, sec. 99.*

1. At a meeting of the creditors of a bankrupt called for the purpose of discharging the trustee a resolution was passed and intimated by the trustee to the bankrupt abandoning a claim to certain property. In an action by the bankrupt prosecuting the claim the preliminary plea, that as he had not been reinvested in his estates he had no title to sue, was stated for the defenders, and *repelled*. *Fleming v. Walker's Trustees*, Nov. 16, 1876, p. 112.

Election of Trustee, meeting for.

2. The hour of meeting for the election of a trustee and commissioners having been omitted *per incuriam* in the Gazette notice, the Court, on the petition of the bankrupt, appointed new intimation in the Gazette. *Von Rotberg*, Dec. 22, 1876, p. 263.
3. By the deliverance awarding sequestration, the Sheriff, *per incuriam*, appointed the meeting of creditors for the election of a trustee to be held on an earlier day than was consistent with the 67th section of the Bankruptcy Act, 1856. On the petition of the bankrupts and of the concurring creditor the Court fixed another day of meeting, and appointed intimation thereof in the Gazette. *Watt, Philp, and Co.*, March 10, 1877, p. 641.

Trustee's Law Agent.

4. An agent employed by the trustee in a sequestration became the purchaser of a decree for payment belonging to the bankrupt estate, which he assigned to a third party. The assignee having charged upon the decree, the debtor presented a note of suspension, on the ground that the sale by the trustee was null, the purchaser being the agent employed by the trustee in the sequestration. Suspension *refused*. *Noble v. Campbell*, Nov. 4, 1876, p. 77.

Estate attachable.

5. Terms of a trust-disposition which was *held* not to be in itself valid against creditors of the grantor, nor to be rendered so by a reference to it in an antenuptial contract executed a few days after by the grantor, followed by marriage and the birth of a son. *Forrest v. Robertson's Trustees*, Oct. 27, 1876, p. 22.

Heritable Creditor—Poining of the ground—19 and 20 Vict. c. 79, sec. 102 and sec. 118—37 and 38 Vict. c. 94, sec. 55.

6. In a question between the trustee in a sequestration and a creditor having a real security prior to the date of sequestration who had executed a poining of the ground after that date but before the confirmation of the trustee, *held* that the repeal (by the 55th section of the Conveyancing Act, 1874) of section 118 of the Bankruptcy Act of 1856 left the right of the poining creditor to be regulated by section 102 and the common law, and

BANKRUPTCY—Continued.

that he had right to the moveables attached, his heritable right being prior to that of the trustee. *Royal Bank v. Bain*, July 6, 1877, p. 985.

Transaction of claims—Bankruptcy Act, 1856, secs. 115 and 176—Transaction.

7. Held that a transaction by which the trustee and commissioners in a sequestration gave up a portion of the bankrupt's heritable estate to a heritable creditor in lieu of his claims against the estate was not subject to challenge on the ground that the statutory conditions attaching to a private sale of heritage had not been complied with—the transaction being a *bona fide* compromise, and not a sale. *Dalzell v. Denniston, &c.*, Dec. 12, 1876, p. 222.

Ranking—Valuation and deduction of security.

8. A, a manufacturer, shipped a cargo of goods to a foreign port, and made out the bills of lading in the name of B. He then handed the bills of lading to B and authorised him by letter to hypothecate the goods, with liability to account for any surplus realised, and in return obtained an advance for which he granted bills. B discounted the bills with a bank, handing them the bills of lading and letter of authority. The bank sent the bills of lading to a merchant at the port of delivery with instructions to realise the goods and remit the proceeds to them. When the goods were only partially realised, and the remainder was insufficient to meet the claim of the bank, A became bankrupt, and B also became insolvent. The bank having claimed to rank upon A's estate for the balance due on the bills the trustee called upon them to value and deduct the security they held in the goods unrealised, as being part of the bankrupt's property. Held, on appeal, that the bank was not bound to value and deduct the goods, as, in a question with the bank, the goods must be held to be the property of B. *British Linen Co. v. Gourlay*, March 13, 1877, p. 651.

Ranking—Claim of wife to rank for alimentary provision.

9. By antenuptial contract of marriage a husband bound himself to pay his wife an annuity of £100 during her life, which was declared to be alimentary. The wife lived for some years in family with her husband, who then became bankrupt. Held that the wife was not entitled to claim as a creditor for arrears of the annuity. *Muirhead v. Miller*, July 19, 1877, p. 1137.

Compensation.

10. Where certain bills were discounted by A, an indorsee, for value, and subsequently retired by him at maturity after the bankruptcy of the acceptor, partly with funds supplied by C, a person who had guaranteed B, a prior indorser, against loss upon the bills, held (aff. judgment of the Second Division) that A, the holder of the bills, was entitled to plead compensation against them against a debt due by him to the bankrupt, and that the special objections (1) that A, the holder, was not the holder at the date of sequestration, nor the drawer, but only an intermediate indorsee, and (2) that the plea of compensation was really stated for behoof of C, the guarantor, who had no debt to compensate, had been rightly repelled. *Hannay and Sons' Trustees v. Armstrong Brothers and Company*, March 22, 1877, H. L., p. 43.

See *Expenses*, 1.

BILL. Proof.

1. In a suspension of a charge at the instance of the drawer of a bill the Court allowed a proof before answer *prout de jure*, in respect that the charger admitted that the bill had been obtained by him in circumstances out of the ordinary course of business. *Alexander v. Stuart*, Jan. 27, 1877, p. 366.
2. Proof *prout de jure* allowed of averments that a sum had been paid in error by a bill which had been duly retired. *Balfour v. Smith and Logan*, Feb. 9, 1877, p. 454.

See *Bankruptcy*, 10.

BONA FIDES.

1. Private knowledge by purchaser of heritage of a prior right. *Stodart v. Dalzell*, Dec. 16, 1876, p. 236.
2. In a question of trespass. *Hay's Trustees v. Young*, Jan. 31, 1877, p. 398. See *Personal objection—Teinds*, 2.

BURGH. See *Police*.CARRIER. *Reasonable Precautions for Safety of Public—Contributory Negligence—Carriage of Persons by Railway Companies.*

Passenger run over and killed by a train while crossing from one platform to the other at a station where there was no bridge over the rails. The Court refused to disturb the verdict of a jury finding the railway company liable in damages. *Thomson v. North British Railway Co.*, Nov. 16, 1876, p. 115.

CHARITY. See *Trust*, 8, 9.CHURCH. *Churchyard.*

1. *Circumstances in which* held (aff. judgment of Court of Session) that a heritor whose land had been compulsorily taken as an addition to the churchyard, was not entitled to have the proceedings set aside on the ground of want of notice. *Walker v. Presbytery of Arbroath*, Nov. 24, 1876, H. L., p. 1.

Allocation of Area—Excambion—Quoad Sacra Parish.

2. Where the original parish church, in a parish from which a part had been disjoined and erected into a parish quoad sacra, was excambied for a new church voluntarily erected by one of the heritors, held (rev. judgment of the Court of Session) that in the absence of stipulation in the contract of excambion the sittings fell to be allocated as in the old church. *Duke of Roxburgh and Others v. Millar*, June 29, 1877, H. L., p. 76.

Glebe.

3. Held that the 4th section of the United Parishes Act, 1876, did not apply to the case of a quoad sacra parish a small portion of which only had been disjoined from a united parish and the rest from adjoining parishes. *Minister of Bridekirk v. Minister and Heritors of Hoddam*, June 4, 1877, p. 798.

COLLATION INTER LIBEROS. See *Parent and Child*, 4.COMPANY. See *Partnership—Public Company*.COMPENSATION. See *Bankruptcy*, 10—*Expenses*, 2—*Master and Servant*, 2.CONDUCTIO INDEBITI. See *Error*.CONTRACT. See *Proof*, 3.CONTRACT, BREACH OF. See *Reparation*, 7, 8, 9.CONVERSION. See *Succession*, 3, 4.CRIME. See *Index of Justiciary Cases*, p. 1197.CUSTODY OF CHILD. See *Parent and Child*, 2.DEAN OF GUILD. See *Jurisdiction*, 1.DILIGENCE. *Act Abolishing Imprisonment for Civil Debts of Small Amount*, 1835 (5 and 6 Will. IV. c. 70), sec. 1—*Interest*.

A person who had borrowed £10, from which 15s. was deducted by the lender as interest in advance, granted a promissory-note for the £10, and by a separate writing bound himself to repay that sum in weekly instalments of 10s., and in the event of failing for two successive weeks to pay these instalments then to pay to the lender "an additional sum of 2d. for each pound, or part of a pound, of the total amount of said bill, and that for every week's failure, till such time as" the lender proceeded to recover as otherwise provided for. Held that these additional payments were to be regarded as interest in the sense of the "Act abolishing, in Scotland, imprisonment for civil debts of small amount," 1835, which enacts, "that it shall not be lawful to imprison any person or persons on account of any civil debt which shall not exceed the sum of £8, 6s. 8d. sterling, exclusive of interest and expenses thereon." *Shaw v. Morison*, March 9, 1877, p. 637.

See *Sheriff*, 5.

DISCHARGE. See *Alimentary Provision*, 2.

DOMICILE. *Indian Service*.

A Scotchman entered the civil service of the East India Company in 1841, and remained in it until his death in 1875, when he was on a two years' furlough in Europe. The servants of the East India Company were transferred to the Crown in 1858 by 21 and 22 Vict., cap. 106. The Succession Act, 1865, of the Indian Council, sets forth, in an "Explanation," "A man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in her Majesty's civil or military service, or in the exercise of any profession or calling." Held that neither the Act of 1858 nor the Act of Council of 1865 affected the domicile the deceased had acquired before they were passed in British India, and that his domicile was there at the date of his death. *Wauchope v. Wauchope*, June 23, 1877, p. 945.

DONATION INTER VIRUM ET UXOREM. See *Husband and Wife*, 3, 4, 5.

ELECTION LAW. See *Index of Registration Appeal Court Cases*, p. 1195.

ENTAIL. *Moveables*.

1. Held, by Lord Shand (Ordinary), that an entail of moveables is ineffectual even *inter heredes*. *Kinnear v. Kinnear, &c.*, March 20, 1877, p. 705.
2. Entail executed under reserved power contained in an antenuptial contract challenged on the ground that the destination was not in conformity with the power. *M'Donald v. M'Donalds*, Jan. 11, 1877, p. 271.
3. A testator instructed his trustees to execute a strict entail. The trustees having executed an entail which was discovered to be invalid, held that the institute was not entitled to avail himself of the mistake to the prejudice of the subsequent heirs. *Ochterlony v. Ochterlony and Others*, Feb. 24, 1877, p. 587.

Feuing—Power to Feu with right to Water Supply from remainder of Entailed Estate—Estates afterwards separated—Servitude aqueductus.

4. An heir of entail in possession obtained power to feu a part of the entailed estate in terms of a form of feu-charter approved by the Court, whereby the feuars were taken bound to "take and pay for," by way of annual assessment, a water supply provided from another portion of the entailed estate not within the limits of the feuing ground. The feuing ground was afterwards excambied for other lands held by the heir of entail in fee-simple, and thus became vested in the heir of entail as a fee-simple proprietor. In a question between a succeeding heir of entail and the successor in the fee-simple estate of superiority of the feus, held (1) that the feu-charters granted before the excambion had created servitudes of *aqueductus* over the entailed estate in return for annual payments which were due to the heir of entail in possession as owner of the servient tenement, and not to the superior of the feus; (2) the feu-charters granted after the excambion were ineffectual to create such servitude. *Stewart v. Stewart*, July 5, 1877, p. 981.

Improvements—27 and 28 Vict. c. 114, secs. 78 and 80.

5. In a petition presented by an heir of entail in possession, in terms of sect. 21 of the Improvement of Land Act, 1864, craving the Court to authorize the Inclosure Commissioners to sanction as a charge upon the estate a sum which he proposed to subscribe towards the stock of a branch railway to be made through the estate, by virtue of sections 78 and 80 of the Act, held that it was not indispensable that the petitioner should shew that the making of the railway and consequent benefit to the estate were contingent on his proposed subscription. *Edmonstone*, Feb. 24, 1877, p. 585.

Improvement Expenditure—11 and 12 Vict. c. 36, secs. 15 and 18.

6. Where an heir of entail in possession has made improvements on the estate prior to 1848, and constituted three-fourths of the expenditure a debt against succeeding heirs, but has died without creating over the estate a security, either by bond of annualrent for such three-fourths or by bond

ENTAIL—*Continued.*

and disposition in security for two-thirds of such three-fourths of the improvement expenditure, *held* that his executors were entitled under the 15th section of the Entail Amendment Act, 1848, to require the succeeding heir of entail to execute in their favour a bond of annualrent for such three-fourths of the improvement expenditure, and that the heir had not under the 18th section of the statute the option of substituting therefor a bond and disposition in security over the estate for two-thirds of such three-fourths. *Nasmyth's Executors v. Nasmyth, et c contra*, June 30, 1877, p. 973.

38 and 39 Vict. cap. 61, sec. 12—*Death of heir.*

7. Section 12, sub-section 3, of the Entail Amendment Act, 1875, provides for applications under the Act being carried on by personal representatives and others "according to their respective rights and interests" should the heir of entail die before decree had been obtained. *Held* that the object of the section was to regulate procedure only, and this provision did not of itself confer a right upon the representatives of a deceased heir of entail to be sisted in a petition at his instance to charge improvement debt. *Maxwell*, July 17, 1877, p. 1112.

38 and 39 Vict. cap. 61, sec. 11—*Express Conveyance.*

8. *Opinions* (per Lord Justice-Clerk and Lord President), that a general disponee of an heir of entail is not in the position of having "expressly" conveyed to him, in the sense of the 11th section of the "Entail Amendment Act, 1875," a sum of money which the heir of entail was, before his death, in course of charging against the estate as an improvement debt. *Maxwell*, July 17, 1877, p. 1112.

Disentailing—Date of Entail in sense of sec. 2 of 11 and 12 Vict. c. 36.

9. By deed of entail dated prior to 1st August 1848 the entailor reserved power to alter the destination, and he executed, subsequent to 1st August a deed of alteration by which he merely struck out of the entail the series of heirs called in the second branch of the destination. *Held* that the entail was an entail dated prior to 1st August 1848 in the sense of section 2 of the Entail Amendment Act, 1848. *Blair*, Jan. 24, 1877, p. 308.

Munston-House—Obligation to Rebuild.

10. An heir of entail in possession pulled down the greater part of the mansion-house, which was in good repair, and proceeded to rebuild it on a more extensive scale. Before the new house was finished or made habitable he died. In an action by a succeeding heir of entail against the executors, concluding that they were bound to complete the house according to the plans, or alternatively to make it as good as it was originally, the defenders were *assoluted*, on the ground that the demolition of the house, with a view to rebuilding it, having been in good faith, was a lawful act of the heir, and that no obligation to rebuild transmitted against his executors. *Earl of Breadalbane v. Jamieson*, March 16, 1877, p. 667.

Obligation on Heirs and Successors to Relieve Estate of Debt.

11. The maker of a deed of entail inserted a clause, binding himself, his heirs-at-law, executors, and successors whomsoever, to free and relieve the entailed lands, and the heirs to succeed thereto, of all debts and obligations whereby they might be evicted. He afterwards purchased another estate, and entailed it on the same series of heirs as were called in the former entail, binding himself, his heirs, executors, and representatives to relieve the estate of the granter's debts, but reserving a power of revocation. At his death the estates under the first entail were burdened with certain entailor's debts. The institute under the two entails succeeded. In an action against the institute in possession of both estates, at the instance of the next heir, *held* that the defender was not, in respect of his having succeeded to the second estate, personally bound to relieve the first estate of the entailor's debts. *M'Donald v. M'Donald*, Jan. 11, 1877, p. 280.

Contravention.

12. The institute in possession of entailed estates came also to be in right of a

ENTAIL—*Continued.*

bond secured over them containing a power of sale, which he assigned to third parties. In an action at the instance of the next heir for declarator of irritancy, on the ground that the institute had contravened a prohibition against doing any act whereby the lands might be evicted, by assigning the bond to third parties, who might sell or adjudge, *held* (1) that the institute was entitled to keep up the bond as a charge against the estate, and (2) that no irritancy had been incurred by assigning it to third parties.

M'Donald v. M'Donald, Jan. 11, 1877, p. 280.

See *Appropriate and Reprobate*, 2—*Revenue*, 1.

ERROR.

Averments that a contractor's account had been overpaid to the extent of £100, owing to a mistake induced by the representations of the contractor, *held* relevant to support a *condictio indebiti*, and proof *proud de jure* allowed, although it was pleaded that, as the payment had been made by bill (which had been retired), proof must be restricted to writ or oath. Balfour v. Smith and Logan, Feb. 9, 1877, p. 454.

See *Issue*.

EXCAMBION. See *Church*, 2—*Entail*, 4.

EXCISE. See *Revenue*, 3.

EXECUTOR. *Confirmation of Mother.*

1. *Held* that the interest conferred by the Moveable Succession Act, 1855, upon a mother in the succession of her deceased child entitled her to be confirmed executrix *qua* mother in the absence of others having a preferable title. Muir, Nov. 3, 1876, p. 74.

Joint appointment.

2. There is no incompetency in the confirmation of two persons as joint executors though claiming the office in different characters. Muir, Nov. 3, 1876, p. 74.
3. *Held* that the right to repudiate conventional provisions made by a father in favour of a married daughter, and claim *legitim*, did not vest *ipso jure* in her husband, who had died without taking any steps to assert the right and that whether he could have claimed the *legitim* effectually or not his executor was not entitled to claim it. Millar v. Birrell, Nov. 8, 1876, p. 87.

Heir and Executor—Public Burdens.

4. The heir in possession of entailed estates, the rents of which were postponed, died one day after the term of Whitsunday. In a question between his executrix and the succeeding heir of entail, *held* that the executrix was not liable for burdens effeiring to the possession after Whitsunday. Maitland v. Maitland, Feb. 1, 1877, p. 422.

Heir and Executor.

5. *Held* that an assessment imposed by consent of heritors on 30th June, partly to meet debts incurred prior to Whitsunday, and partly to provide for the expenditure of the year following, could not be charged against the executor of a heritor who had died at Whitsunday. Maitland v. Maitland, Feb. 1, 1877, p. 422.

EXPENSES. *Caution for Expenses.*

1. In an accounting arising out of joint mercantile transactions between the pursuer and defender in an action, the result of the Lord Ordinary's judgment was to render the defender insolvent. He accordingly offered a caution to his creditors, which was refused, but he was not rendered notor bankrupt. In the event of the Lord Ordinary's judgment being reversed the defender was admittedly solvent. On his presenting a reclaiming note, *held* that the circumstances were not such as to entitle the pursuer to caution for expenses. Weir v. Buchanan, Oct. 18, 1876, p. 8.

Agent disburser—Compensation.

2. Where the respondent in a petition had obtained an award of expenses

EXPENSES—*Continued.*

against the petitioners, the Court refused to allow the decree to go out in name of the agent disburser, on the ground that in another litigation between the parties relating to the same subject-matter, disposed of at the same time, the petitioners had obtained a decree for expenses against the respondent, which they were entitled to set off against the respondent's account. *Portobello Pier Co. v. Clift*, March 16, 1877, p. 685.

3. A wife who had obtained decree of separation and aliment against her husband, *held* entitled to recover from her husband all reasonable and proper expenses incurred by her in carrying into execution the orders and interlocutors of the Court regarding the children of the marriage, including a warrant for interim execution pending appeal to the House of Lords. *Symington, &c., v. Symington*, July 6, 1877, p. 993.

Merchant Shipping Amendment Act, 1854 (17 and 18 Vict. c. 104), sec. 514

—*Merchant Shipping Amendment Act*, 1862 (25 and 26 Vict. c. 63), sec. 54.

4. A petitioner for limitation of liability under the 54th section of the Merchant Shipping Amendment Act, 1862, having been found liable to the claimants in expenses, *held* (1) that several claimants having the same interest and ground of claim should not be allowed the expense of separate claims or appearances; (2) that claimants whose claims are unopposed should be allowed only the expense of preparing and lodging their claims, and of one appearance by counsel to take decree. *Burrell v. Simpson and Company*, July 19, 1877, p. 1133.

See *Process*, 18.

FEE AND LIFERENT.

1. Terms of a provision in favour of daughters in liferent, and their children *nascituri* in fee, held to confer a right of liferent only on the daughters. *Dawson, &c.*, Feb. 24, 1877, decided Nov. 10, 1876, p. 597.

Mineral Lease.

2. A testator directed his trustees to pay to his widow the free annual income of the residue of his estate, and after her death to invest the residue in the purchase of lands in Scotland, to be entailed on a series of heirs. At his death the testator left property worth about £220,000. He also held two mineral leases which had then five years to run. The trustees carried on the mines, and in three years realised £30,000 of profit. The widow having claimed this sum, *held* that it was not free annual income, but part of the residue. *Ferguson v. Ferguson's Trustees*, Feb. 23, 1877, p. 532.

Protected Succession.

3. A testator directed his trustees to retain the residue of his estate, heritable and moveable, till his only child, a daughter, should be married and a child born of the marriage, and upon a child being born to convey "to her and to the child or children of the marriage, or of any subsequent marriage, . . . equally among them, if she shall not otherwise appoint, but subject always to a power of division by her," and failing children of his daughter, then to the truster's nearest heirs and assignees, and he declared and directed that neither the annual proceeds nor the fee should be subject to the *jus mariti* or right of administration of the daughter's husband, or be subject to his or her debts or deeds, or the diligence of his or her creditors, "but that the same shall be an alimentary and inalienable provision for my said daughter during her life, and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them." At the truster's death his daughter was married and had issue. *Held* by a majority of seven Judges that the trustees were bound to convey to the daughter in fee, subject to the condition that the right of succession of her children should not be defeated by any gratuitous act. The minority were of opinion that the conveyance should be to the daughter and her children in such terms as should restrict her right to a liferent annuallly. *Gibson's Trustees v. Ross, et al.*, July 12, 1877, p. 1038.

FEE AND LIFE-RENT—Continued.

Residue.

4. A testatrix, in a testamentary letter of instructions, after bequeathing certain legacies, directed her law-agent "to hold the residue of my estate and distribute it annually between the following gentlemen," &c. Held that this was a bequest of the fee of the residue to the persons named. *Anderson v. Thomson*, July 17, 1877, p. 1101.

FISHINGS. *Title to fishings ex adverso of lands at one time held in karels by way of rundale.*

1. An estate held in karels by way of runrig or rundale was divided in 1795 into two continuous portions by decret-arbitral, which reserved to "both parties the right of salmon-fishing on the river Tay respectively belonging to them, according to their present boundaries." Each proprietor had always exercised the exclusive right of fishing ex adverso of his own karels, and continued to do so as formerly between the date of the decret-arbitral in 1795 and 1874. Held (aff. judgment of the First Division, July 14, 1876, ante, vol. iii. p. 1031, q. v.), in an action raised in 1874, that the title to the salmon-fishing ex adverso of what had been the respective karels of the two proprietors was separate and exclusive, and not pro indiviso subsequent to the date of the decret-arbitral, without deciding whether before the decret-arbitral the title was separate and exclusive, or pro indiviso. *Richardson, &c. v. Baroness Gray, &c.*, June 29, 1877, H. L. p. 76.

Crown Grant.

2. A grant of salmon-fishings having been followed by possession so far as the fishings were available for the time, and the Crown having had no adverse possession, held (aff. judgment of First Division, July 14, 1876, ante, vol. iii. p. 1031, q. v.) that the Crown could not, cum effectu, make a grant to a different party of part of the fishings within the bounds of the original grant, although that part had not hitherto been fished, and had only not become available for being so. *Richardson, &c. v. Baroness Gray*, June 29, 1877, H. L. p. 76.

Operations on bed of river to improve Fishings.

3. Harbour commissioners under Acts of Parliament diverted the channel of a tidal river, having purchased the salmon-fishings at that part of the river. When the diversion was completed there was a steep embankment or bank of the altered channel, which prevented fishing from that side and the take of the fishings was reduced to less than half its previous amount. After three years they proceeded to reduce the slope of the embankment by laying stones and gravel at the foot of it, extending into the bed of the river. The effect of these operations was to diminish the depth of water at that part of the channel, and to enable the proprietors of the fishing to catch more fish, but not to obstruct the passage of fish up the river. An application for interdict, at the instance of the proprietors of the immediately superior fishings, on the ground that the harbour commissioners had no right to use their statutory powers for the benefit of the salmon-fishings, and that, as proprietors of the salmon-fishings they had no right to execute any operations (except repairs) on the bed of the river, *refused*. *West v. Aberdeen Harbour Commissioners*, Dec. 8, 1876, p. 207.

Embankment—Obstruction to the Passage of Salmon.

4. Part of a barony consisted of a long narrow island in an estuary, between which and the shore there existed a side channel dry at low water. Prior to 1857 a long stretch of foreshore extended down the estuary from the seaward end of the island, forming a bank which prevented the water in the main channel of the river at low tide from spreading over a large stretch of shallow. A breach having been made in this foreshore by the stream at low tide, in consequence of the erection of a weir on the opposite side of the estuary, the proprietor of the barony and salmon-fishings, in 1862, raised the foreshore by an artificial embankment which, in 1868, he raised to the height of sixteen inches above the original level of the foreshore. The

FISHINGS—*Continued.*

embankment was found to afford him additional facilities for salmon-fishing. A proprietor of salmon-fishings on the river having in 1875 objected to the embankment as an illegal obstruction to salmon passing up the river, *held* (1) that the proprietor was entitled to restore the foreshore; and (2) that the embankment, whether regarded by itself or as affording to the proprietor greater facilities for the capture of salmon was not in fact an obstruction in the sense of the Salmon Fishery Acts. *Duke of Sutherland v. Rosa*, May 26, 1877, p. 765.

FOREIGN. See *Jurisdiction*, 3.

FRANCHISE. See *Index of Cases decided in the Registration Appeal Court*, p. 1195.

FRAUD.

1. A stockbroker's clerk, who had general authority to represent his principal on the exchange, entered into speculative transactions for his own behoof in his principal's name, without his knowledge, but for which the principal was bound. In order to meet a balance due by the principal, resulting from the clerk's speculations, on settling day, the clerk cashed a forged cheque at a bank, and applied the proceeds for that purpose. *Held* that the principal was bound to repay the amount to the bank, in respect (1) that the money had been obtained by the fraud of his representative (though that would not have been sufficient of itself), and (2) that the principal had been benefited by the fraud to that amount. *Clydesdale Banking Company v. Paul*, March 8, 1877, p. 626.
2. A debtor to a bank transferred certain shares in a joint stock company to the bank absolutely, but really in security of a portion of his debt. He afterwards sold the shares and paid the price to the bank, who executed a transference to the purchaser, and granted a discharge *pro tanto* of the debt. In an action by the purchaser against the bank concluding for rescission of the contract of sale and for repayment of the price, on the footing that the bank were the true owners, and on the ground of fraudulent misrepresentation on the part of the seller, *held* by Lord Shand (1) that although the debtor had induced the sale by fraud the bank were no parties to the fraudulent representations; (2) that the debtor being entitled to sell the shares did not do so as the agent for the bank, although they received the price; (3) that though the bank could not have retained the benefit of the seller's fraud gratuitously, yet as they gave onerous consideration by releasing their security and discharging the debt *pro tanto*, they were not liable to make restitution of the price of the shares. *Gibbs v. British Linen Company*, June 23, 1875, p. 630, *note*.

See *Appeal to House of Lords—Insurance—Issue—Lease*, 11—*Prescription*.

GABLE. See *Property*, 5.

HARBOUR. *Quay Wall.*

1. Circumstances in which, in virtue of possession upon an ancient grant of harbour, and upon the terms of local Acts, statutory harbour trustees were held entitled to construct and maintain a continuous line of quay wall along a harbour, and to prevent the proprietor of an adjoining shipbuilding yard from having a launching slip or opening through the quay wall into the harbour. *Ayr Harbour Trustees v. Weir*, Nov. 7, 1876, p. 79.
2. *Fraserburgh Harbour Commissioners held* not entitled under their local Act to levy dues on wreckage of vessel wrecked in the harbour. *Wallace v. Fraserburgh Harbour Commissioners*, decided Dec. 10, 1876, p. 368.

See *Fishings*, 3.

HERITABLE AND MOVEABLE. See *Succession*, 3, 4.

HOTEL, PROPERTY IN DESCRIPTIVE NAME OF. See *Trademark*.

HUSBAND AND WIFE. *Constitution of Marriage—Res Judicata.*

1. In 1842 *A raised an action of declarator of marriage, and in the summons, as originally framed, laid his case principally on de presenti acknowledgment, though the summons contained some ambiguous expressions which*

HUSBAND AND WIFE—Continued.

might be read as averring promise and cohabitation. Afterwards on review he added a distinct averment of promise subsequeute copula. In the course of the action an interlocutor was pronounced allowing him an opportunity of proving the alleged copula, but he adduced no evidence. In 1846 decree of absolutor was pronounced. In 1875 A raised an action of reduction of the decree of absolutor on the ground of perjury, and subornation of perjury, and of declarator of marriage, founding specially on promise subsequeute copula. Held (aff. judgment of Second Division), that this action was barred by mora and exceptiones rei judicatæ. *Lockyer v. Ferryman, &c.*, March 6, 1877, H. L., p. 32.

Mutual Settlement—Jus Mariti—Legitim—Testing Clause—Executor—Personal and Transmissible.

2. A and his wife caused a mutual settlement to be prepared disposing of their whole estates after their deaths. The deed was duly signed by A before witnesses; but although his wife signed it, she did not do so, nor acknowledge her signature, before witnesses. The deed contained a declaration that the provision for their daughter B was to be exclusive of the *jus mariti* and right of administration of her husband. After the death of A, his widow and three children, including B (whose husband had deserted her), entered into a minute of agreement, whereby, on the narrative that the testing-clause of the settlement had not been filled up, they agreed to hold that the estate was intestate succession, and proceeded to divide it among themselves. The husband of B was no party to this agreement, nor, though he afterwards returned and lived with his wife for a short time, did he either approve of or challenge it. After the death of the mother and of B's husband A's executor became bankrupt. B's son, as executor to his father, claimed in the sequestration one-third of his grandfather's estate, as the share *ab intestato* due to his mother, which had passed *jure mariti* into the estate of his father. In an appeal against the rulings of the trustee and Sheriff-substitute, who rejected the claim, the Court allowed the trustee to complete the testing-clause of the mutual settlement, and thereafter held (1) that the mutual settlement, as completed, was valid and effectual as a testamentary settlement of the means and estate of the father; (2) that by the terms of the settlement the *jus mariti* and right of administration of B's husband had been effectually excluded; and (3) that when B's right to legitim emerged on the death of her father the same did not vest in her husband *ipso jure*, and that whether he could have claimed it effectually or not his executor was not entitled to claim it.

Opinions, in conformity with *Stevenson v. Hamilton*, Dec. 7, 1838, that in the above circumstances the husband would not have been entitled to claim his wife's legitim. *Millar v. Birrell*, Nov. 8, 1876, p. 87.

Wife's Liferent unprotected by Trust—Renunciation—Donation inter virum et uxorem.

3. Held that it was competent for a wife infeft in a liferent of her husband's heritage, conferred upon her by antenuptial marriage-contract, to consent to an alienation by the husband, for onerous causes, of the liferent subjects and that such consent, judicially ratified, was not revocable by her as a donation *inter virum et uxorem*. *Standard Property Investment Company v. Cowe*, March 20, 1877, p. 695.

Mutual Settlement—Donatio inter virum et uxorem—Jus quæsitum tertio—Revocation.

4. A husband and wife, who had married without an antenuptial contract, executed a mutual settlement, by which they conveyed the whole estate presently belonging or which should belong to the spouses, jointly or individually, at the death of the predeceaser, to trustees, who were directed to allow the survivor the liferent use and enjoyment of the estate, and, upon the death of the survivor, to realise and pay over the same in equal halves to relations of the husband and wife respectively. It was specially declared that upon the death of the predeceaser the deed should become

HUSBAND AND WIFE—*Continued.*

absolute and irrevocable, and delivery was dispensed with. The husband was possessed of about £3000, of which a considerable part was heritage, and the wife was possessed of two heritable bonds, together amounting to £460. Upon the death (in 1874) of the wife, who was the predeceaser, the trustees entered into possession of the estate. In an action of declarator against the trustees at the instance of the husband, who had contracted a second marriage, *held* that the mutual settlement was revocable by the husband in so far as it disposed of his own estate, on the condition undertaken by him in a minute lodged in process, that he should renounce all benefit from his wife's settlement. *Mitchell v. Mitchell's Trustees*, June 5, 1877, p. 800.

Mutual Settlement—Revocation.

5. A mutual settlement by a husband and wife held to be onerous and irrevocable in so far as it made a reasonable provision to the wife in the event of her survivance, but to be validly revoked by a subsequent settlement by the husband (who predeceased) *quoad* the ulterior destination of her property. *Gibson's Trustees v. Gibson*, June 8, 1877, p. 867.

Divorce—Lenocinium.

6. Behaviour of a husband who had been told that his wife had committed adultery, which was *held* not to bar him, on the ground of *lenocinium*, from obtaining a divorce on account of a subsequent act of adultery. *Munro v. Munro*, Jan. 25, 1877, p. 332.

Divorce, effect of.

7. *Held* that a husband, who had been divorced on account of his adultery, had a title to sue for moveable estate which had vested in his wife prior to the date of the decree of divorce, but had not been paid. *Ferguson v. Jack's Executors*, Jan. 30, 1877, p. 393.

See *Alimentary Provision*, 1—*Parent and Child—Provisions to Wives and Children.*

INDICTMENT. See *Index of Judiciary Cases*, p. 1197.

INSURANCE. *Fraudulent Misrepresentation.*

Circumstances in which a policy of life assurance in the hands of onerous assignees was reduced on the ground of false statements made by the assured in applying for the policy, with reference (1) to his habits of life, (2) his health, and (3) his transactions with other companies. *Scottish Equitable Life Assurance Society v. Buist, &c.*, July 13, 1877, p. 1076. [*Aff. in H. L. Feb. 1878.*]

See *Ship*, 1.

INTERDICT. *Trespass—Bona fides.*

1. A person in good faith entered upon lands without permission from the proprietor, and dug holes to trace an old drain for the purpose of obtaining evidence for a jury trial then proceeding. The proprietor, a month after, presented a petition for interdict. *Held* that there was no ground for the application, and petition dismissed, with expenses. *Hay's Trustees v. Young*, Jan. 31, 1877, p. 398.

Trespass—Leave from tenant.

2. A landlord applied for interdict against a person entering upon a piece of ground belonging to him, but let for agricultural purposes, and averred that the trespass was committed in order to obtain a short cut to an adjoining railway station, and that he feared a right of way might be acquired. The respondent did not assert that there was a right of way, but averred that he had leave from the agricultural tenant, who was not a party to the petition. Application refused. *Steuart v. Stephen*, June 12, 1877, p. 873.

See *Fishings*, 3—*Nuisance—Patent*, 3—*Right in Security*.

INTEREST. *Price payable by instalments—Payments in Error—Repetition.*

In a mineral lease it was stipulated that the lessees should take over the machinery and plant as valued by a named valuator, "the amount of such

INTEREST—*Continued.*

valuation to be payable . . . by ten equal instalments extending over a period of ten years, each of which instalments shall be payable at the term of Whitsunday yearly, and shall bear interest in case of failure in the punctual payment thereof at the rate of five per centum per annum on the amount which may remain due until payment, but the lessees shall have power to pay up the whole sum at any earlier period when it may be convenient for them to do so ; " it was declared also that though they might be in possession of the plant, &c., and have the use of it, it was to remain the property of the lessor "until the whole price and interest thereof shall be paid." For three years the lessees paid the instalments, and each year they also paid a sum of interest at the rate of five per cent upon the unpaid balance of the whole price. In an action at the instance of the lessor for an unpaid instalment and interest on the unpaid balance of the whole price, held that the lessees were only liable for interest on instalments in arrear, and that the previous payments of interest having been made in error the lessees were entitled to credit for the overpayments in accounting with the lessor. *Baird's Trustees v. Baird and Company*, July 10, 1877, p. 1005.

See *Diligence*.

ISSUE. *Fraud—Essential Error.*

In an action of reduction of a lease brought by a landlord against the tenant the pursuer averred that the lease had been impetrated by the fraudulent representations of the defender's son, who was agent for the pursuer, in pursuance of a fraudulent conspiracy between the defender and his son, and that it was signed by the pursuer under essential error, induced by the said representations. The Court held (1) that the pursuer was not entitled to a separate issue of essential error ; and (2) that to the issue "Whether the pursuer was induced to execute the lease by fraudulent representation made by the defender" (being the issue adjusted by the Lord Ordinary), he was entitled to have added the words "or by his son on his behalf." *Beresford's Trustees v. Gardner*, Jan. 27, 1877, p. 363.

See *Proof*, 2—*Reparation*, 11.

JOINT ADVENTURE. See *Partnership*, 1.

JOINT STOCK COMPANY. See *Public Company*.

JUDICIAL FACTOR. See *Partnership*, 4.

JUDICIAL INSPECTION. See *Lease*, 3, 4.

JURISDICTION. *Dean of Guild.*

1. Dean of Guild jurisdiction of police magistrates under the General Police and Improvement Act, 1862, sec. 408. *Tainsh v. Magistrates of Hamilton*, Jan. 24, 1877, p. 315.

Court of Justiciary.

2. The Circuit Court of Justiciary, in disposing of a small debt appeal, may competently remit to the Sheriff to proceed with the cause, with power to decern for the expenses of the appeal. *Glass v. Laughlin*, Nov. 10, 1876, p. 108.

Court of Session—Proprietor of Scotch Heritage.

3. Held that the jurisdiction of the Scotch Courts, founded on proprietorship of heritage in Scotland, ceases when the proprietor grants an absolute conveyance of the subjects, although he has not been feudally divested. *Bosman v. Wright*, Jan. 24, 1877, p. 332.

House of Lords—Prorogated Jurisdiction.

4. In an appeal from a judgment of the Court of Session which decided a question of alleged infringement of patent, the House of Lords, while holding that the proceedings in the Court below were irregular and did not competently raise the question, at the request of parties decided the question of the alleged infringement. *Dudgeon v. Thomson*, July 10, 1877, H. L. p. 88.

JUSTICIARY COURT. See *Process*, 18, and also separate *Index of Cases decided in the Court of Justiciary*, p. 1197.

LANDLORD AND TENANT. See *Lease—Reparation*, 1.

LEASE, CONSTITUTION OF. *Possession referable to two offers.*

1. A person made a written offer for a lease of a farm on 14th August. At the request of the landlord's factor he met him, and on 12th September subscribed a second offer appended to printed conditions of lease. The second offer omitted certain stipulations in favour of the tenant, and contained new conditions chiefly in favour of the landlord. There was no written acceptance, but possession followed at Martinmas. In defence to an action by the landlord to compel the tenant to execute a lease in terms of the second offer the tenant stated that when he signed the second offer he did so on the understanding that it was relative to and to be taken in conjunction with the first. *Held* that the second offer being only made binding by the possession which followed upon it, proof must be allowed to ascertain whether the possession was referable to the second offer only, or to both. *Duke of Hamilton v. Buchanan*, Jan. 25, 1877, p. 328.

Sequel of preceeding case.

2. It was proved that the tenant had entered into possession of the farm in the belief that the terms of the lease were to include stipulations in the first as well as the second offer, while the landlord had given possession on the faith of the second offer alone. *Held* that there having been no *consensus in idem placitum* there was no contract of lease. *Duke of Hamilton v. Buchanan*, June 8, 1877, p. 854. [Aff. in H. L. March 8, 1878.]

Judicial inspection of buildings, &c.—A. S. July 10, 1839, sec. 137.

3. A tenant was bound by his lease to leave his farm buildings, &c. in good repair, or to pay for their being put in repair at the sight of a person to be appointed by the Sheriff. Three months and a-half after Martinmas 1875, when the lease expired, the landlord presented a petition in the Sheriff Court praying for authority to execute the necessary repairs at the sight of a person to be appointed by the Court. *Held* that the petition was not incompetent by reason of the delay or otherwise. *Dickson, &c. v. Graham*, May 12, 1877, p. 717.
4. *Held* that a petition by the landlord for judicial inspection of premises which the tenants were taken bound to keep in repair, with a conclusion for the expense of the repairs which the tenants should be found bound to execute in implement of the lease, was a competent and proper proceeding, although presented upwards of a year before what the landlord averred was the termination of the lease, the tenants having vacated the premises and taken up the position that the lease was at an end. *Lees v. Marr Typefoundry Company*, July 14, 1877, p. 1088.

Sub-Lease.

5. A sub-lessee of a piece of building ground had the option under his lease of demanding a renewal if the tenant himself obtained a renewal from the landlord. Under a deed of agreement to which the principal tenant was a party, and in which he undertook certain obligations in regard to granting access, the sub-lessee sublet a portion of his holding to a second sub-lessee. The deed contained no assignation of the clause of option. The principal tenant obtained a renewal of his lease from the landlord. In an action against the principal tenant by the last sub-lessee, *held* that the pursuer was not entitled to a renewal of his sub-lease. *Robertson v. Player*, Dec. 12, 1876, p. 218.

Removing—Title to Sue.

6. In a summary petition for removing the tenant *held* not entitled to impugn the petitioners' title, it being proved that he could have no right to his holding unless derived from the petitioners. *Dunlop and Co. v. Meiklem*, Oct. 24, 1876, p. 11.

Removing—Personal Objection—Rei Interventus.

7. A tenant, who had given the landlord to understand that he was to remove,

PARENT AND CHILD—Continued.

Custody of Child.

2. In a petition by a father for the custody of his child, which was eight months old, the mother answered that she had been obliged to leave her husband's house shortly before the birth of the child in consequence of unkind treatment, and that owing to the tender age of the child it required its mother's care. The Court, without inquiry, ordered the child to be given up to the father, reserving to the mother right of access to it at any time she might desire, and appointing the child to be sent on a visit to the mother on a day in each week. *Lilley v. Lilley*, Jan. 31, 1877, p. 397.

Legitim.

3. Held that the right to repudiate conventional provisions made by a father in favour of a married daughter and claim legitim did not vest ipso jure in her husband, who had died without taking any steps to assert the right; and that whether he could have claimed the legitim effectually or not, his executor was not entitled to claim it. *Millar v. Birrell*, Nov. 8, 1876, p. 87. See also *Husband and Wife*.

Legitim—Collatio inter liberos.

4. Large cash advances made by a father to a son in business, and entered in the father's books as "By gifts payable to my son James as he requires," "By allotted for his business, free gift," and "By given over as free gift,"—held to be advances to account of legitim. *Douglas v. Douglas*, Nov. 8, 1876, p. 105.

PARISH. See *Church—School*.PARTNERSHIP. *Joint Adventure.*

1. A and B entered into a joint adventure for the purchase, bleaching, and reeling of 10,000 spindles of yarn. A authorised B to purchase the yarn at a price not exceeding 1s. 11d. per spindle. B then purchased the yarn at 1s. 11½d. in his own name from L, and granted bills for the price, without disclosing to him the existence of the joint adventure. In an action brought against A for the price, after B had become bankrupt, held that A was liable for the price to the extent to which he had authorised B to pay for the yarn. *Lockhart v. Moodie and Co.*, June 8, 1877, p. 859.

Dissolution by Bankruptcy—Interest in Sinking of Pit.

2. Question upon the terms of a contract of copartnery, whether, upon the dissolution of the partnership by the bankruptcy of one of the partners, the bankrupt was entitled to be credited with a share of the value of pit sinkings. *Glass v. Haig and Company*, June 12, 1877, p. 875.

Joint Interest—Business carried on by a Family.

3. A family of brothers and sisters resided together, and without any deed of copartnery or definite agreement of any kind employed themselves in various branches of an extensive bakery, cooking, and confectionery business, which had gradually grown out of a small business in which the deceased father had been engaged, and in which his funds (never distributed) had been mainly embarked. Held, in the circumstances of the case, which were very special, that the concern was carried on for the joint behoof of the family, and that each member was entitled to an equal share of the profits. *Aitchison v. Aitchison*, June 16, 1877, p. 899.

Dissolution and Winding up—Judicial Factor.

4. Where, after the dissolution of a partnership, the two partners differed as to the winding up of the concern, and the realisation of its outstanding accounts, the Court refused a petition by one of the partners for the sequestration of the partnership estate and appointment of a judicial factor, on the ground that the questions between the partners really resolved into questions of accounting, which a judicial factor could not determine, and that in the realisation of outstanding debts the appointment of a judicial factor would be without advantage, and the cause of additional expense to the partnership estate. *Gow v. Schulze*, June 19, 1877, p. 958.

See *Proof*, 2—*Public Company—Reparation*, 9.

PATENT. *Disconformity between Provisional and Final Specification.*

1. The provisional specification of a patent stated the object of an invention to be to preserve animal substances for a long time in a fresh state, and that for this purpose the patentee dissolved a certain quantity of gelatine in hot water, and added a solution of bisulphite of lime. In the final specification the patentee claimed the use of the solution of bisulphite of lime without mixing it with gelatine and water. *Held* that this claim was not protected by the letters-patent as it was disconform to the provisional specification, and claimed more than the provisional specification. *Bailey v. Robertson*, Feb. 23, 1877, p. 545.

Manner in which the Invention is to be performed.

2. The final specification of a patent described the nature of the invention to be "to preserve animal substances, &c.," and then stated "the manner in which our said invention is performed is as follows,—we employ a solution," &c. The solution was then described, but no directions were given as to the mode of use. *Held* that this was not a sufficient disclosure of the manner in which the invention was to be performed. *Bailey v. Robertson*, Feb. 23, 1877, p. 545.

Disclaimer.

3. *When a patentee alters his patent by a disclaimer he cannot thereafter enforce an interdict which he had obtained upon the patent before the alteration, as the amended patent may be liable to objections which did not apply to the former patent, and what would have been an infringement of the old might not be of the new.* *Dudgeon v. Thomson, &c.*, July 10, 1877, H. L. p. 88.

Infringement.

4. *The patentee of a tool for expanding the ends of boiler tubes in the flue sheet claimed in his specification "the combination in an expanding tool of the following implements, viz. the rollers, roller stock, and expanding instruments, these three operating in combination substantially as set forth." The expanding instrument was described as "a tapering plug, or its equivalent, by whose action the rollers are forced outwards in the tube." A manufacturer invented a new tool in which the rollers, being themselves tapered, were fixed at an angle with the axis of the tool, converging towards a point, so as to make the whole tool of a conical shape, and expansion was effected by screwing the tool into the tube, without any expanding instrument or divergence of the rollers.* *Held* (aff. judgment of the First Division, Dec. 22, 1876, Court of Session Cases, p. 256) *that there was no infringement.* *Dudgeon v. Thomson, &c.*, July 10, 1877, H. L., p. 88.

PAYMENT. *Condictio indebiti—Overpayment by bill.*

Averments that a contractor's account had been overpaid to the extent of £100, owing to a mistake induced by the representations of the contractor, *held* relevant to support a *condictio indebiti*, and proof *prout de jure* allowed, although it was pleaded that, as the overpayment had been made by a bill (which had been retired), proof must be restricted to writ or oath. *Balfour v. Smith and Logan*, Feb. 9, 1877, p. 454.

PERSONAL OBJECTION. *Private knowledge of prior right.*

Circumstances in which the purchaser of a piece of ground, a part of which had been, to his knowledge, occupied by a person other than the seller for a long period of years, and who admitted that he knew that the occupier had some sort of right, and had erected buildings on the ground, was *held* to have been put upon his inquiry as to the nature of the occupier's right, and to be barred from founding on his completed title to the lands as excluding a personal right held by the occupier to the *dominium utile* of the portion possessed by him. *Stodart v. Dalzell*, Dec. 16, 1876, p. 236.

See *Superior and Vassal*, 1.

PERSONAL OR TRANSMISSIBLE. *Obligation to reconvey—Assignment.*

In the course of a series of transactions in connection with a feu for building

PERSONAL OR TRANSMISSIBLE—*Continued.*

purposes N, the feuar, conveyed to C, who was his cautioner in the feu-contract, and had also advanced to him funds with which to carry on his building, the whole subjects, whether built upon or unbuilt upon. C a few days afterwards granted N a letter in which he undertook to reconvey to N upon demand and repayment of past feu-duties any of the lots which remained unbuilt upon. N assigned his interest in this letter to the trustees under his antenuptial marriage-contract. *Held* that the letter did not constitute a right of reversion but a distinct personal obligation upon C to reconvey any of the unbuilt-upon lots whenever called upon, and that the right to demand a reconveyance was validly assigned to N's marriage-contract trustees. *M'Callum's Trustees v. M'Nab, &c.*, Feb. 21, 1877, p. 520.

See *Executor*, 3.

POINDING THE GROUND. See *Bankruptcy*, 6.

POLICE. *Edinburgh Police Act, 1848—Cleaning Common Stair.*

1. *Held* that the obligation to clean a common stair or passage imposed by the 197th section of the Edinburgh Police Act, 1848, on the occupants of houses, flats, or stories of tenements entered thereby, did not apply to the occupants of houses having their proper access by a main-door from the street, although entry from the common stair or passage was possible through a passage not intended to be used. *Daish v. Paterson*, Dec. 22, 1876, *Judiciary Cases*, p. 10.

General Police and Improvement Act, 1862, sec. 162—Projection of buildings beyond the line of a street.

2. A house, in a burgh under the General Police and Improvement Act, 1862, stood back some feet from the line of the street, and had a small plot of ground in front of it, separated from the street by a railing. The proprietor proposed to pull down the front wall of his house and advance it to the site of the railing in front, which projected somewhat beyond the line of the adjoining premises. *Held* that the 162d section of the Act above mentioned did not empower the commissioners of police to require the proprietor in rebuilding to keep the new front wall of his house in a line with that of the adjoining house. *Fraser v. Kennedy*, Jan. 9, 1877, p. 266.

General Police and Improvement Act, 1862, sec. 408—Dean of Guild Jurisdiction.

3. *Held* (by Lord Curriehill) that under the 408th section of the General Police Act, 1862, 25 and 26 Vict. c. 101, the magistrates of police of Hamilton, a burgh of regality which had adopted that Act, possessed the powers and jurisdiction relative to buildings pertaining to the Magistrates or Dean of Guild of a royal burgh in Scotland. *Tainsh v. Magistrates of Hamilton*, Jan. 24, 1877, p. 315.

General Police and Improvement Act, 1862—Private Street.

4. A street constructed and maintained by the feuars on either side, to whom the *solum* belonged, and which was from 1870 to 1875 open to public traffic, but had not been sufficiently paved and flagged, was, in 1875, after the district in which it was situated had been erected into a burgh under the Police Act, 1862, ordered by the commissioners of the burgh to be properly levelled and causewayed at the expense of the feuars. *Held* that after this was done the street still remained a private street in the sense of the "General Police and Improvement (Scotland) Act, 1862," and that the feuars were entitled to exclude general public traffic by means of posts and chains. *Kinning Park Police Commissioners v. Thomson and Company*, Feb. 22, 1877, p. 528.

Glasgow Police Act, 1866, 29 and 30 Vict. c. cclxxiii. sec. 384—Obligations to Fence River—Right of Way.

5. The Glasgow Police Act authorises the Master of Works to call upon "any proprietor or occupier of a land or heritage to fence the same, or repair any chimney-stalk, . . . or any rhone, sign-board, or other thing connected with or appertaining to any building thereon, which appears to be dangerous."

POLICE—*Continued.*

ous." *Held* that this did not authorise him to call upon the proprietor of lands, bounded by a public navigable and tidal river along the bank of which the public had acquired a right of footpath by prescription, to erect a fence between the path and the river. *Kerr, Anderson, and Co. v. Lang*, June 1, 1877, p. 779. [Aff. in H. L. Feb. 26, 1878.]

6. Suspension (in Court of Justiciary) of notice to pave footway. *Lawson v. Police Commissioners of Forfar*, March 16, 1877, Justiciary Cases, p. 35.

POOR. *Settlement.*

1. 1st, Circumstances in which *held* that an absence of some months did not break the continuity of residence in the acquisition of a settlement under the Poor-Law Act. 2d, It is a ruled point that facts and circumstances indicating intention to return or not to return to the disputed parish may be an element in a question of residential settlement. *Beattie v. Smith and Paterson*, Oct. 25, 1876, p. 19.

Settlement.

2. *Held* that a woman, imbecile from infancy, had from the time of her father's death, which happened after her majority, a derivative settlement from her father in the parish of his birth, and that the parish of her own birth was not liable for her support. *Lawson v. Gunn*, Nov. 21, 1876, p. 151.

Settlement—Constructive Residence.

3. A farm servant had acquired a residential settlement in the parish of X prior to Whitsunday 1866. From that date until 12th April 1875, when he became chargeable as a pauper, he continued tenant of a house in the parish of X, where his family resided. He himself was employed on farms in neighbouring parishes on which he personally resided, visiting his family at his own house in the parish of X regularly every fortnight, and sometimes more frequently, as the exigencies of his employment permitted. *Held* that he had retained his residential settlement in the parish of X. *Cruikshank v. Greig*, Jan. 10, 1877, p. 267.

Settlement of Illegitimate Child—Forisfiliation.

4. *Held* that an illegitimate child, living apart from his mother, on attaining the age of puberty became forisfiliated, and had then a settlement in his own right in the parish of his birth. *Greig v. Ross*, Feb. 10, 1877, p. 465.

Settlement.

5. *Held* that permanent disability to earn a livelihood, when not combined with mental incapacity, did not prevent a pupil from having a settlement in his own right when he reached the age of puberty and was forisfiliated. *Greig v. Ross*, Feb. 10, 1877, p. 465.

Admission of Liability.

6. *Held*, in conformity with *Beattie v. Arbuckle*, Jan. 15, 1875, *ante*, vol. ii. p. 330, that where one parish has deliberately admitted to another liability for the support of a pauper, it cannot withdraw that admission and open up the question of liability on the ground that the admission was made in error either as to the facts or as to the law. *Young v. Gow*, Feb. 9, 1877, p. 448.

Liability of Parishes inter se—Mora.

7. A parish after admitting liability for a pauper's aliment to a relieving parish and paying its advances, subsequently intimated withdrawal of the admission, which the relieving parish refused to accept. The relieving parish, founding on the admission, frequently applied for payment, and ultimately after seven years raised an action. *Held* that the action was not barred by *mora*. *Young v. Gow*, Feb. 9, 1867, p. 448.

See *School*, 3.

POSSESSION. See *Teinds*.

PRESCRIPTION. *Vicennial Prescription of Retours—Stat. 1617, c. 13—Fraud.*

An action of reduction of a retoured decree of service was brought after the lapse of fifty-six years, upon the allegation that the person served was not the true heir. The summons also contained vague allegations to the effect

PRESCRIPTION—*Continued.*

that the service had been obtained by fraud, perjury, and subornation of perjury. The defenders called were singular successors in the property taken up by the service. Deducting minorities, the full period of the long prescription had not elapsed. *Held* that the action was barred by the vicennial prescription of retours. *Rocca v. Catto's Trustees*, Nov. 2, 1876, p. 70.

See *Teinds*.

PROCESS.

*Summons.**Joint Pursuers—Joint Defenders*

1. In an action at the instance of several proprietors of different lands on the banks of a river against several firms of paper manufacturers having their works at different places on its course, concluding for declarator that the pursuers were entitled to have the water of the river transmitted in a state fit for the primary uses, and for interdict against the pursuers polluting the same, the defenders pleaded that the pursuers were not entitled to sue jointly or to maintain the action against the several defenders, in respect that the rights and interests of the several pursuers and of the several defenders were different, that the summons did not set forth a joint cause of action, each defender being responsible only for his own acts, and that the calling of the defenders in one action was oppressive. *Held* (aff. judgment of the Second Division) that the action having been brought by persons jointly interested in preserving the stream from pollution alleged to result from the works of all the defenders, and the conclusions of the summons being merely for declarator of the pursuers' right to prevent that pollution and for interdict, the conjunction of the several pursuers and of the several defenders in one action was competent and convenient. *Cowan and Sons, &c. v. Duke of Buccleuch, &c.*, Nov. 30, 1876, H. L., p. 14.

Contingency—Conjunction.

2. Three actions raised by riparian proprietors, concluding for interdict against owners of paper-mills upon the banks of a river polluting the water were conjoined by the Court, although some of the parties in one of the actions were not parties in the others. (*Held*, aff. the judgment of the Second Division) that the conjunction was competent and convenient. *Cowan and Sons, &c. v. Duke of Buccleuch, &c.*, Nov. 30, 1876, H. L., p. 14.

Summons, Amendment of—Court of Session Act, 1868, sec. 29.

3. A summons concluded for implement of an agreement, consisting of eight heads, between the outgoing and incoming tenants of a farm. It was averred in the condescendence that certain points were agreed to by the parties verbally, and that then the agreement was reduced to writing and agreed to in draft by both parties, and followed by *rei interventus*, but that the defender afterwards refused to sign it. After a proof the Lord Ordinary dismissed the action. The pursuer reclaimed, and proposed to amend his summons without altering the condescendence, by limiting the conclusions to one of the eight heads of the agreement, which he averred was verbally agreed to (before the agreement was reduced to writing), and afterwards followed by *rei interventus*. Motion refused, on the ground that the amendment would raise a different question between the parties from that intended by the summons. *Gibson's Trustees v. Fraser*, Feb. 10, 1877, p. 1001.

Proof.

4. Circumstances under which the pursuer of an action of damages for personal injury was held bound to submit himself for examination prior to the trial by a particular medical man selected by the defender. *Junner v. North British Railway*, March 17, 1877, p. 686.

*Judgment.**Interim Decree for Expenses.*

5. Where the pursuer in an action concluded both for damages and for costs and reckoning, and the Inner-House, upon a report on issues by the Lord

PROCESS—*Continued.*

- Ordinary, dismissed the conclusion for damages, with expenses—*held* (by Lord Curriehill) in conformity with *Struthers v. Dykes*, 8 D. 815, that the payment of expenses to the defender was a condition precedent to any subsequent procedure under the other conclusion of the action. *Wallace v. Henderson*, Dec. 22, 1876, p. 264.
6. *Held* (by Lord Curriehill) in conformity with *Dalmahoy and Cowan v. Maga. of Brechin*, 21 D. 210, that interest runs upon an interim decree for expenses when the decree has been extracted and charged upon. *Wallace v. Henderson*, Dec. 22, 1876, p. 264.

*Reclaiming Notes and Reponing.**Reponing against Decree by Default.*

7. The pursuer of an action of reduction, through the fault of his agent, failed to appear either personally or by counsel and agent at the diet of proof. Decree by default was accordingly pronounced against him. The Court, in the special circumstances of the case, allowed him to be reponed on paying to the defender the full expenses to which he had been put by the default. *Morrison v. Smith, &c.*, Oct. 18, 1876, p. 9.

Reclaiming Note—A. S. 10th March 1870, sec. 1, sub-sec. 5, and sec. 2—Court of Session Act, 1868, sec. 28.

8. An interlocutor, approving of issues "for the trial of the cause," but neither appointing the cause to be tried by jury, nor fixing a day for the trial, *held* to be an interlocutor importing an appointment of proof, which might be reclaimed against within six days without leave of the Lord Ordinary. *Mason v. Stewart*, Feb. 21, 1877, p. 513.

Lodging Reclaiming Note in Process.

9. A reclaiming note was duly boxed upon the box-day in vacation, but owing to a misunderstanding on the part of the clerk of the reclaimers' agent the principal copy of the reclaiming note was not lodged in process at the Register House until the day after the box-day. These facts having been stated to the Court in the Single Bills, and the respondents not objecting, the cause was sent to the roll in the ordinary course. *Harris, &c. v. Haywood Gas Coal Company*, May 12, 1877, p. 714.

Review—Joint Minute—Reference to Lord Ordinary.

10. Terms of a joint minute by the parties in a cause which *held* not to exclude review of the Lord Ordinary's judgment *Lindsay v. Walker's Trustees*, June 9, 1877, p. 870.

Reclaiming Note—Court of Session Act, 1868, secs. 28 and 54—A. S. March 10, 1870, sec. 2.

1. *Held* that an interlocutor repelling a preliminary plea, and "appointing the pursuer to lodge such issue or issues as he proposes for the trial of the cause," was an interlocutor importing an allowance of proof, and might be reclaimed against within six days without the leave of the Lord Ordinary. *Little v. North British Railway Company*, July 4, 1877, p. 980.

Appeals from Sheriff Courts (for Review).

2. Procedure where no appearance was made for the respondent. Explanation accepted by the Court. *Nicolson v. Munro*, Feb. 1, 1877, p. 434.

Court of Session Act, 1868, sec. 71—A. S. 10th March 1870—Omission to lodge Prints in time.

3. In an appeal from the Sheriff Court the appellant omitted to lodge prints within fourteen days after the process had been received by the Clerk of Court, as required by sec. 3, sub-sec. 1, of A. S. March 10, 1870, the agent having by mistake, as the day for lodging fell in vacation, lodged them on the box-day instead. An objection having been taken by the respondent to the competency, the Court, in the circumstances, overruled the objection, and sent the case to the roll. *Walker v. Reed*, May 12, 1877, p. 714.

Whole subject-matter of the Cause—Court of Session Act, 1868, 31 and 32 Vict. c. 100, sec. 53.

4. *Held* that an appeal from an interlocutor of a Sheriff was not competent, in respect that the whole cause had not been decided, the question of expenses

PROCESS—Continued.

having been reserved. Parochial Board of Greenock v. Miller and Brown, May 25, 1877, p. 737.

Appeals from Sheriff Courts (for Jury Trial).

Leave of Sheriff—6 Geo. IV. c. 120, sec. 40—A. S. 11th July 1828, sec. 5.

15. A. S. 11th July 1828 requires that in advocations for jury trial from the Sheriff Court under sec. 40 of the Act 6 Geo. IV., c. 120, the leave of the Sheriff should be obtained in cases where the claim shall not be simply pecuniary, so that it cannot appear on the face of the bill that it is above £40 in amount. *Held* that an action in the Sheriff Court for 2s. 6d. per week of aliment to a man sixty-six years of age was a claim "simply pecuniary," and for more than £40, and could therefore be removed to the Court of Session under sec. 40 without leave of the Sheriff. *Hamilton v. Hamilton*, March 20, 1877, p. 688.

Leave of Sheriff—Appeal for Jury Trial under 6 Geo. IV. c. 120, sec. 40—Value of Cause—A. S. 11th July 1828, sec. 5.

16. *Held* that an action in a Sheriff Court praying for interdict and £5 of damages was one to which the 5th section of the A. S. 11th July 1828 applied, and could not be appealed for jury trial under 6 Geo. IV. c. 120, sec. 40, without leave of the Sheriff.

Observations (per Lord Ormidale) as to the form of declaration contemplated by A. S. 11th July 1828, sec. 5. *Rain v. Gibb*, May 19, 1877, p. 732.

Amendment of Record.

17. An action of damages for slander contained in a newspaper article was appealed by the defenders from the Sheriff Court for jury trial. An issue was adjusted, and notice of trial was given. The defenders then proposed to amend the record, by adding an averment and plea of *veritas*. Amendment and counter issue allowed, on condition of the defenders paying the whole expenses of the pursuer since the closing of the record in the Sheriff Court. *Keith v. Outram and Company*, June 27, 1877, p. 958.

*Particular Actions.**Suspension.*

18. In disposing of an appeal under the Small Debt Act to the Circuit Court of Justiciary the presiding Judge remitted to the Sheriff to proceed "as may be just," found the appellant entitled to expenses, remitted the account of expenses to the Sheriff Court Auditor, and granted power to the Sheriff to decern for the expenses, which he accordingly did. The appellant lodged a note of suspension in the Court of Session of a threatened charge for the taxed expenses, on the ground that the remit to the Sheriff to decern for expenses was *ultra vires* of the Circuit Judge. *Held* that the remit to the Sheriff was competent, and the suspension refused. *Question*, whether the suspension was competent. *Glass v. Laughlin*, Nov. 10, 1876, p. 108.

Suspension—Debts Recovery Act, 1867, sec. 17.

19. A decree under the Debts Recovery Act was pronounced against a debtor, who thereafter was sequestrated in England. After he had been discharged by the English Bankruptcy Court under a composition contract he was served with a charge upon the debts recovery decree. *Held* that it was competent to try the validity of the charge thus given in a suspension, and that section 17 of the Debts Recovery Act, excluding review of the decree, did not apply to the case. *Samuel v. Mackenzie and Bell*, Nov. 29, 1876, p. 187.

See *Appeal to House of Lords—Expenses—Interdict—Issue—Proof—Res Judicata—Teinds—Title to Sue*.

PROOF. *Condictio Indebiti.*

1. Proof *prout de jure* allowed of averments that a contractor's account had been by a mistake overpaid to the extent of £100, the alleged overpayment having been made by a bill which had been duly retired. *Balfour v. Smith and Logan*, Feb. 9, 1877, p. 454.

PROOF—Continued.

Joint Adventure—Trust—Act 1696, c. 25—Mandate—Agent and Principal.

2. In an action for payment of a share of profits of an alleged joint adventure the pursuer alleged that the defender, his co-adventurer, had, contrary to instructions, taken the title to heritage, belonging to the joint adventurers, in his own name. The defender denied the existence of the joint adventure, and pleaded that, under the Act 1696, c. 25, the pursuer's averment, being an averment of trust, could only be proved by the defender's writ or oath. *Held* that as the pursuer averred that he had not trusted the defender to take the title in his own name the Act did not apply, and that the pursuer was entitled to prove his averments *prout de jure*. Form of issue adjusted. *Horne v. Morrison*, July 3, 1877, p. 977.

Innominate Contract.

3. The proof of an innominate contract is not restricted to writ or oath unless the stipulations are of an unusual and extraordinary character. In defence to an action for payment of an account for stabling horses for an omnibus for several years the defender alleged that the pursuer had agreed to stable the horses free of charge in consideration of the omnibus departing from and arriving at the stabler's inn on its way to and from a railway station, *held* that the contract alleged might be proved *prout de jure*. *Forbes v. Caird*, July 20, 1877, p. 1141.

Hearsay.

4. In questions of pedigree family tradition as to propinquity may be proved by evidence of the deliberate statement of a deceased person, but only if it is shewn that he had special means of knowledge. *Macpherson, &c. v. Reid's Trustees*, Nov. 17, 1876, p. 133, *aff.* July 3, 1877, H. L., p. 87

Criminating Question—Statute 37 and 38 Vict. c. 64, sec. 2.

5. Section 2 of the Evidence Further Amendment Act, 1874, enacts that "no witness shall be liable to be asked or bound to answer any question tending to shew that he or she has been guilty of adultery." *Held* that it is the duty of the Judge to prevent such questions being put to the witness, so as to save him from the necessity of declining to answer, unless he volunteers to answer or make a statement; and when such a question has been put, and the witness has declined to answer, neither the question nor the declination of the witness can be recorded in the notes of evidence. *Cook v. Cook*, Nov. 4, 1876, p. 78.

Reference to Oath.

6. *Observed* (*per Lord Deas*), that when, on a reference to oath of the constitution and resting owing of an alleged debt, a deponent admits receipt of a sum of money, and does not depone to having discharged himself of it in any way, the deposition is affirmative of the reference. *Fenning v. Meldrum*, Nov. 17, 1876, p. 148.

PROPERTY.

Property in Descriptive Name of Hotel—Distinguishing Variation.

1. *Charleson v. Campbell*, Nov. 17, 1876, p. 149.

Feu—Restriction.

2. All the feuars in a street held of a common superior under titles containing a restriction to the effect that "the houses to be built should all be single or self-contained lodgings." One of the feuars was proceeding to convert his house into business offices when an adjoining feuar objected. During the previous thirty years a large number of houses in the street had been converted, without objection, including two houses, within the last three years, in the immediate neighbourhood. *Held* that the right of the feuars to object had been lost by abandonment. *Fraser v. Downie*, June 22, 1877, p. 942.

Common Interest.

3. Two conterminous proprietors of houses and building stances in a street had, under their titles, derived from a common author a right of free ish and entry to their respective subjects by means of a meuse lane at the back.

PROPERTY—*Continued.*

Held that the one proprietor was not entitled to build a shop over the lane opposite his ground converting it into a covered passage. *Bennett v. Playfair*, Jan. 24, 1877, p. 321.

4. *Held* upon the titles, that the proprietor of the upper flats of a tenement had not a right of common property, but only of common interest, in the sunk area. *Johnston, &c. v. White*, May 18, 1877, p. 721.

Mutual Gable.

5. To an action by the proprietor of a tenement in burgh against the proprietor of the adjoining stance to recover one-half the cost of a mutual gable, of which the defender had taken the use, it was pleaded in defence (1) that the mutual gable having been erected by the common author of the parties no claim arose to the proprietor of one stance against the proprietor of the other; (2) that such use had been made by the common proprietor and by subsequent proprietors of the defenders' stance, of the mutual gable, that the defenders on purchasing the stance were entitled to assume that the claim for one-half the cost of the mutual gable had been extinguished or settled. *Held* (1) that the common author in conveying the one stance to the pursuers or their authors, with the tenement erected thereon, conveyed likewise a right as against himself or his singular successors in the adjoining stance to recover one half the cost of the mutual gable whenever they came to make use of it; and (2) that the use of the gable by the defenders' author was by buildings of such a temporary nature that the defenders were bound to have satisfied themselves by inquiry as to the state of the facts before they purchased. *Glasgow Royal Infirmary v. Wylie, &c.*, June 15, 1877, p. 894.

See *Fishings—Mines and Minerals*.

PROVISIONS TO WIVES AND CHILDREN. *Marriage Contract.*

1. Terms of a trust-disposition *held* not to be in itself valid against creditors, nor to be rendered so by a reference to it in an antenuptial contract of marriage executed a few days after by the granter followed by marriage and the birth of a son. *Forrest v. Robertson's Trustees*, Oct. 27, 1876, p. 22.

Marriage-Contract—Jus Crediti.

2. *Observations* (per Lord-Justice Clerk) upon the *jus crediti* created by an antenuptial marriage-contract, in which the husband binds himself to convey a land estate to the heir of the marriage, with a substituted destination to others. *M'Donald v. M'Donald*, Jan. 11, 1877, p. 271.

Wife's Liferent unprotected by Trust—Renunciation.

3. *Held* that it was competent for a wife in feft in a liferent of her husband's heritage, conferred upon her by antenuptial marriage-contract, to consent to an alienation by the husband, for onerous causes, of the liferent subject and that such consent, judicially ratified, was not revocable by her as a donation *inter virum et uxorem*. *Standard Property Investment Company v. Cowe, &c.*, March 20, 1877, p. 695.

Marriage-Contract—Clause of Conquest.

4. *Held* that life-interests and annuities to which a married woman became entitled during the subsistence of the marriage did not fall under a general conveyance of *acquirenda* by her to the trustees under her antenuptial contract, such a clause being read only as referring to principal sums. *Boyd's Trustees v. Boyd*, July 13, 1877, p. 1082.

See *Husband and Wife—Succession*.

PUBLIC BURDEN. See *separate Index of Valuation Appeals*, p. 1196.

PUBLIC COMPANY. *Duties and Obligations of Directors—Payments by Vendors to Directors.*

1. *Held* that an original director of a company, formed for the purchase and working of certain mines, who had received a sum of £10,000 from the vendors out of the purchase money paid them, was bound to repay that sum with interest to the company, although the agreement between the

PUBLIC COMPANY—*Continued.*

vendors and him had been made before the company was formed. *Observed* that the defender's allegation that he had rendered services to the company to the value of the sum he had received from the vendors was irrelevant. *Huntington Copper Company v. Henderson*, Jan. 12, 1877, p. 294. [Aff. in H. L. Nov. 29, 1877.]

Powers of Directors to bind Company.

2. *Opinions* (per Lord President and Lord Shand) that persons dealing with the directors of joint stock companies, although they must be held to have made themselves acquainted with the provisions of the statutes and articles of association under which the companies are incorporated, are entitled to assume that all notices of meetings, and notices of resolutions to be proposed at such meetings, have been properly given, and that shareholders cannot repudiate the actings of directors on the ground that no notice of a resolution conferring power on the directors had been given. *Heiton v. Waverley Hydropathic Company*, June 6, 1874, p. 830.

Purchase by Railway of Minerals—Sale—Servitude.

3. A proprietor sold to a railway company "the perpetual servitude and right to use and occupy so much of" certain ground "as is at present used and occupied by the piers or pillars of their viaduct." The private Act of Parliament of the company contained provisions similar to those afterwards enacted by the Railway Clauses Act, 1845, to the effect that minerals were excepted from the conveyance of lands purchased by the company, but that the company might acquire the minerals within forty yards of their works on payment of compensation. In a question between the railway company and the proprietor and lessee of the minerals the company maintained that they were entitled to prevent the minerals from being worked under and near the viaduct, so as to endanger the viaduct, without any compensation, because they had purchased a servitude of support, which implied that their works would not be endangered. *Held* that the right acquired by the company was subject to the same conditions in regard to payment of compensation for minerals as a statutory conveyance of the land in ordinary form. *Caledonian Railway Company v. Henderson and Others, et c contra*, Nov. 17, 1876, p. 140.

Railway—Compensation for Lands and Injuries thereto.

4. A paid way-leave for access to a railway over ground belonging to B. The railway company, in the exercise of compulsory powers, took a portion of B's ground to form a branch railway, to which A formed an access, without using B's ground, and ceased to pay way-leave. *Held* that the loss of way-leave was not to be taken into account in fixing the compensation to be paid by the railway company for the land taken. *Aikman v. Caledonian Railway Company*, July 10, 1877, p. 1020.
5. The expense of a second petition for winding up a company pending the first, will, in general, not be allowed. Circumstances in which they were allowed, the party being under a reasonable apprehension that the first petition might be withdrawn. *Graham, &c. v. Edinburgh Theatre Company*, July 20, 1877, p. 1140.

PUBLIC HEALTH. See *Justiciary Index*, p. 1198.

PUBLIC HOUSE. See *Master and Servant*, and *Justiciary Index*, p. 1199.

RAILWAY COMPANY. *Formation of Line, and Purchase of Lands, Minerals, &c.* See *Public Company*, 3, 4.

RAILWAY COMPANY, CARRIAGE OF PERSONS BY. See *Carrier*.

REI INTERVENTUS. See *Superior and Vassal*, 1.

REPARATION. *Landlord and Tenant*.

1. *Held* that a landlord of a house and shop was liable in damages sustained by his tenant through the sudden melting of an extraordinary accumulation of snow on the roof, in respect that the injury would not have been sustained if the construction of the roof had not been defective. *Reid v. Baird*, Dec. 13, 1876, p. 234.

REPARATION—*Continued.*

2. Passenger run over by a train while crossing the rails at a station where there was no bridge. *Thomson v. North British Railway Company*, Nov. 16, 1876, p. 115.

Pilotage authority—Unlicenced Pilot.

3. When harbour trustees, who are appointed "a pilotage authority" within the meaning of the Merchant Shipping Act, 1854, do not licence pilots under the powers conferred on them by Part V. of that Act, but employ unlicenced pilots at stated wages to pilot vessels into their harbour, and themselves receive the pilotage dues, and apply them to harbour purposes, they are liable for the fault of the pilots so employed by them. *Holman, &c. v. Irvine Harbour Trustees*, Feb. 1, 1877, p. 406.

Master's liability for fault of servant.

4. *Held* (by a majority of seven Judges, *diss.* the Lord Justice-Clerk), that the rule of law which imposes upon a master responsibility for injury caused by the fault of his servant, while employed in his service, applies only in cases where the person injured is a stranger, not connected with the work in which the servant is engaged, and that in other cases the master is only responsible for personal fault. *Woodhead v. Gartness Mineral Company*, Feb. 10, 1877, p. 269.

Master and Servant—Common Employment—Coal Mines Regulation Act, 35 and 36 Vict. cap. 76.

5. A miner in the employment of contractors for driving a level in a mine belonging to a company, whose manager and underground manager were in charge of the mine, was killed owing to the negligence of the underground manager, who was admittedly a competent person. The pit was conducted under special rules in compliance with the Coal Mines Regulation Act. In an action of damages at the instance of the miner's father against the company, *held* (by a majority of seven Judges), that the company were not liable, as the miner, by becoming a member of the organisation of the mine, had taken upon himself the risk of injury from the fault of other members without claim for redress except against the person in fault. *Woodhead v. Gartness Mineral Company*, Feb. 10, 1877, p. 269.

Liability of Master for Injury to Servant—Process—Relevancy of Averment.

6. In an action at the instance of a miner against colliery proprietors and their manager for damages for personal injury alleged to have been incurred by the pursuer in consequence of the proprietors or their manager having recklessly or culpably failed to properly support and prop the roof of the mine, the Court, on consideration of a proof, found that the pursuer having failed to prove fault on the part of the defenders, they were entitled to absolve. *Stewart v. Coltness Iron Company and Dewar*, June 23, 1877, p. 32.

Breach of Contract.

7. Measure of damages where mineral tenants had failed to remove in terms of a special stipulation in the lease. *Houldsworth v. Brand's Trustees*, Jan. 27, 1877, p. 369.

Breach of Contract of Sale—Measure of Damages.

8. When a buyer of goods refuses to take delivery, or otherwise intimates repudiation of the contract, the measure of the seller's damages for breach of contract is limited to the difference between the contract price and the market price at the date of repudiation. *Warin and Craven v. Forrester*, Nov. 30, 1876, p. 190. [*Aff.* June 5, 1877, H. L. p. 76.]

Breach of Contract.

9. The pursuer of an action of damages for breach of contract set forth a letter of employment, which, after an obligation by the defender to pay the pursuer a certain salary for the first two years, proceeded—"At the expiry of the second year I engage to give you a substantial interest by way of partnership in my business, so that your annual income may be considerably increased." The pursuer averred that at the end of the two years the defender refused to implement the remainder of the contract. *Held* that the action was irrelevant, in respect that there were in the letter no *termini habiles* out of which a contract of copartnery could have been formed.

REPARATION—*Continued.*

Observed (per Lord President)—A contract which cannot be enforced by specific implement, in so far as regards its form and substance, is no contract at all, and cannot form the ground of an action of damages. *M'Arthur v. Lawson*, July 19, 1877, p. 1134.

Slander—Judge.

10. An action of damages against a Sheriff for slander, alleged to have been uttered by him while setting in judgment, *held* to be incompetent. *Harvey v. Dyce*, Dec. 23, 1876, p. 265.

Slander—Innuendo—Issue.

11. Form of issue adjusted to try an action of damages for slander against the writer of a newspaper article, founded on statements innuendoes as conveying a charge of dishonesty. *Dun v. Bain*, Jan. 24, 1877, p. 317.

REVENUE. *Succession-Duty Act, 1853, sec. 2—Entail—Disposition—Devolution of Law.*

1. Under a destination to the heirs-male of A, an entailed estate passed from one of A's heirs-male, who died without issue, to his nephew, the next heir-male, who was a great-great-grandson of the entailor. *Held* (by seven Judges) that in the sense of the Succession-Duty Act the nephew did not succeed by "disposition" to the entailor as his predecessor, but that his predecessor was his uncle, from whom he took "by devolution of law." *Lord Advocate v. Earl of Zetland*, Dec. 5, 1876, p. 199. [Aff. in H. L. Feb. 12, 1877.]

Succession-Duty Act, 1853, sec. 17.

2. A lady on her husband's death became entitled to payment of an annuity of £3000 provided to her by her husband's father in her antenuptial contract of marriage. The Crown claimed succession-duty from the widow as successor to her father-in-law who had predeceased her husband. The widow claimed exemption under sec. 17 of the Succession-Duty Act, 1853, on the ground that the annuity had been granted for valuable considerations set forth in the marriage-contract, viz. (1) the settlement of £10,000 by her father upon the spouses and the children of the marriage, and (2) her renunciation of *jus relicte* and terce. *Held*, in sustaining the claim of the Crown (1) that the provision by the lady's father was not a consideration for the granting of the annuity in the sense of the Act, and (2) that the renunciation of *jus relicte* and terce was not a valuable consideration, the husband, at the date of the marriage-contract, having neither heritable or moveable estate. *Lord Advocate v. Sidgwick*, June 6, 1877, p. 815.

Excise and Customs—Spirits removed without permit—Incapacity of Seller to sue for price—2 Will. IV. c. 16, sec. 12, and 23 and 24 Vict. c. 114, sec. 187.

3. Charge on a bill for the price of spirits which had been delivered without a permit suspended. *Greig and Company v. Conacher's Factor*, Nov. 28, 1876, p. 187.

Inhabited House-duty.

4. Dwelling-house and business premises under one roof, but without internal communication between them, liable as one house. *Russell*, March 6, 1877, p. 1143.

See *Stamp*.

REVOCATION. See *Husband and Wife*, 3, 4, 5—*Succession*, 2, 16.RIGHT IN SECURITY. *Disposition ex facie absolute—Power of Sale—Liquid and Illiquid.*

An absolute disposition of lands was qualified by a minute of agreement which declared that the disposition was granted in security of £6500, and of all other sums for which the lender might become liable on account of or advance to the debtor, and that in the event of the borrower failing to pay or relieve the lender on one month's notice that he desired payment or relief he should be entitled to sell the lands by public roup or private bargain. Three years after the lender gave an account to the borrower con-

RIGHT IN SECURITY—*Continued.*

taining a detailed statement of factory accounts and of borrowed money, and bringing out a balance of £9424 due by the debtor, and gave notice of his intention to sell. *Held* that the debtor was entitled to interdict the sale without caution, in respect that the balance was not admitted or otherwise liquidated, and that the account consisted of miscellaneous charges and factory accounts which required an accounting. *Lucas, &c. (Beneficial Trustees) v. Gardner*, Dec. 2, 1876, p. 194.

See *Bankruptcy*, 6.

RIVER. *Non-tidal River—Alveus—Navigation.*

Held (rev. judgment of First Division, Jan. 26, 1877, *Court of Session Com. p. 344*) that where the public have the right of navigation in a non-tidal river the proprietors of the alveus are nevertheless entitled to erect buildings thereon, unless it can be proved that such buildings would interfere with or obstruct navigation. *Observations on Bicket v. Morris*, July 13, 1866, 4 Macph. H. L. 44. *Orr Ewing and Co. v. Colquhoun's Trustees*, H. L., p. 116.

See *Fishings*, 3, 4—*Police*, 5.

ROAD.

Right of feuars in a burgh under the General Police and Improvements Act, 1862, to exclude general public traffic from a private street constructed and maintained by them. *Kinning Park Police Commissioners v. Thorne &c.*, Feb. 22, 1877, p. 528.

See *Servitude*, 1.

SALE OF GOODS. *Mercantile Law Amendment Act, 1856, sec. 1.*

1. *Held* that the section did not apply to a contract by which a shipbuilder sold the scrap iron lying in his yard and the scrap iron which should be produced during a certain period. *Observed* that the section only applied to cases where the purchaser acquired a *jus ad rem specificam*, of which the seller retained possession. *M'Meehan v. Ross*, Nov. 22, 1876, p. 134.

Rejection.

2. Circumstances in which it was *held* that the strict rule of law as to the immediate rejection of defective goods was not applicable. *M'Carter v. Stewart and Mackenzie*, June 14, 1877, p. 890.

See *Reparation*, 8.

SALE OF HERITAGE. *Completion of Contract.*

1. In an action concluding for declarator that certain fields had been sold to the pursuer it was proved that after a long correspondence the parties were agreed on the subject sold, and the price, and that the only question unsettled was what servitudes should be imposed on the subject to secure the amenity of the sellers' adjoining property, and that a draft conveyance prepared by the buyer's agent had been sent to the sellers' agent and returned revised, with a letter stipulating that the sellers should have an opportunity of going over and considering the draft, "in case we have overlooked conditions which should be inserted in it." *Held* that there was no concluded contract of sale. *Heiton v. Waverley Hydrographic Company*, June 6, 1877, p. 830.

Rei interventus—Locus penitentie.

2. Two persons having agreed for the sale and purchase respectively of a licenced public-house belonging to one of them, the result of the bargain was written out in duplicate by a third party, and the missives were signed by the purchaser and seller, each of whom retained one. The seller afterwards gave the tenant of the house notice to quit, and the purchaser let it to a tenant of his own selection. The purchaser's tenant having failed in getting the licence transferred to him, the purchaser repudiated the bargain before the term of entry. *Held*, in an action for implement at the instance of the seller, that (assuming the missives to be improbable) sufficient *rei interventus* had followed to render the agreement binding, and that there was no *locus penitentie* for the purchaser. *Stewart v. Burns*, Feb. 1, 1877, p. 469.

See *Personal Objection—Public Company*, 2, 3—*Writ*, 1.

SCHOOL. *Education Act, 1872, sec. 9.*

1. The Board of Education having decided a question as to the area of a parish for the purposes of the Education Act, *held* that their deliverance was not final, because it was issued without hearing the parties interested; but that the Court could not pronounce on the merits of the question, the decision of it being exclusively committed to the Board of Education or the Sheriff by the 9th section of the Education Act. *Lochgilphead School Board v. South Knapdale School Board*, Jan. 30, 1877, p. 389.

Education Act, 1872, sec. 55—Emoluments of Schoolmaster.

2. *Held* that a master who, at the passing of the Education Act, was in receipt of a fixed salary and the school fees, was entitled (1) to continued payment of his full salary, though he had for some time prior to the passing of the Act voluntarily employed and paid an assistant, whose place was afterwards filled by a regular assistant employed and paid by the school board; and (2) to the actual school fees paid in each year so long as the school remained on its former footing, and not merely to the average as at the passing of the Act. *Fraser v. School Board of Carlisle*, June 14, 1877, p. 892.

School Fees—Education Act, 1872, sec. 69.

3. Where a parochial board had refused to pay the school fees of a child, on the ground that they were "not satisfied of the inability of the parent to pay such fees," *held* that an action against the parochial board for recovery of the fees could not be maintained. *Callachan v. Paterson*, Sept. 2, 1876, *Justiciary Cases*, p. 1.

SCHOOL BOARD PROSECUTIONS. See *Justiciary Index*, p. 1199.SERVITUDE. *Right of Way—Jus spatiiandi.*

1. *Held* that the uninterrupted use by the public from time immemorial of a piece of vacant and unfenced building ground as a general access to the shore of Leith, fortified by a possessory judgment of the Court in 1793 in an advocacy of a Sheriff Court process of interdict, did not entitle the magistrates of Leith, as representing the public, to prevent the one half of it being enclosed, a sufficient access to the shore being afforded by means of the other half. *Magistrates of Edinburgh v. Magistrates of Leith, &c.*, July 10, 1877, p. 997.

Servitude of Dam.

2. A mill-owner, who had by his titles a right to a dam and mill-lade on another's ground, *held* entitled to prevent the insertion of a pipe into the dam by a person who had obtained leave from the proprietor of the ground. *Scottish Highland Distillery Co. v. Reid*, July 17, 1877, p. 1118.

See *Entail*, 4—*Public Company*, 3.SHERIFF. *Meditatio Fugæ Warrant.*

1. Proper form of petition is that prescribed by sec. 6 of the Sheriff Courts Act, 1876. *M'Dermott v. Ramsay*, Dec. 9, 1876, p. 217.

Decree by Default—Conditions of Reponing.

2. An action of count and reckoning, failing which, for payment of £90, was raised in the Sheriff Court in November 1875. After protracted delays the defender twice failed to appear at diets for his examination as a haver, whereupon decree by default was ultimately pronounced in January 1877 for the sum of £90, with expenses. The defender having appealed to the Court of Session, *held* that the judgment of the Sheriff was properly pronounced, but the defender reponed upon payment of all expenses subsequent to the first prorogation of the time for lodging defences.

Observations on delays in Sheriff Court proceedings. Vickers and Sons v. Nibloe, May 19, 1877, p. 729.*Decree by Default—Sheriff Courts Act, 1876, sec. 20.*

3. In an action in the Sheriff Court the Sheriff-substitute assolied the defender in respect of no appearance by or on behalf of the pursuer at the diet of proof. The pursuer appealed to the Sheriff, and represented that his failure to appear was caused by the illness of his procurator, and a mistake

SHERIFF—*Continued.*

on the part of his clerk. The Sheriff adhered, and the Court refused an appeal. *M'Gibbon v. Thomson*, July 14, 1877, p. 1085.

Debts Recovery Act, 1867—Account appended to Summons.

4. An account appended to a summons in a debts recovery action contained entries of various dates "To goods," with the amount charged at each date. The defender stated as a preliminary defence the plea that the account was not detailed, which the Sheriff repelled. *Held* that the Sheriff was right in repelling the plea. *Cox Brothers v. Jackson and Lamb*, June 16, 1877, p. 898.

Debts Recovery Act, 1867, sec. 17.

5. A decree under the Debts Recovery Act was pronounced against a debtor who thereafter was sequestrated in England. After he had been discharged by the English Bankruptcy Court under a composition contract he was served with a charge upon the debts recovery decree. *Held* that it was competent to try the validity of the charge thus given in a suspension, and that sec. 17 of the Debts recovery Act, excluding review of the decree, did not apply to the case. *Samuel v. Mackenzie and Bell*, Nov. 29, 1876, p. 187.

Slander.

6. An action of damages against a Sheriff for slander alleged to have been uttered by him while sitting in judgment *held* to be incompetent. *Harvey v. Dyce*, Dec. 3, 1876, p. 265.

Appeal for Jury Trial—Leave of Sheriff—A. S. 11th July 1828, sec. 5.

7. *Observations (per Lord Ormidale)* as to the form of declaration contemplated by A. S. 11th July 1828, sec. 5. *Rain v. Gibb*, May 19, 1877, p. 732.

See *Lease*, 3, 4.

SHIP. *Collision—Limitation of Liability—Insurance—Merchant Shipping Amendment Act, 1862 (25 and 26 Vict. c. 63), sec. 54.*

1. A steamship, through improper navigation, ran down and sank another belonging to the same owner. The owner presented a petition, as owner of the vessel in fault, to have his liability limited in terms of section 54 of the above Act. In a competition which followed as to the distribution of the fund, *held* (1) that the underwriters of the sunk ship were entitled to rank upon the fund *pari passu* with owners of cargo and seamen, repelling the plea that they were excluded as being assignees of the owner; (2) that the petitioner was not entitled to claim for loss of freight or expenses of shipwrecked crew. In a question between the petitioner and claimants, *held* (3) that in estimating the "gross tonnage," as prescribed by the 54th section, the petitioner was entitled to deduct the berthage of the crew; and (4) that he was liable for interest at 4 per cent from the date of collision till consignment. *Burrell v. Simpson and Co.*, Nov. 24, 1876, p. 177.

Collision—Limitation of Liability in—Merchant Shipping Act, 1854, sec. 514—Merchant Shipping Act, 1862, sec. 54.

2. The owner of a vessel who is entitled to have his liability for damage caused by the collision of his vessel with another restricted under section 54 of the Merchant Shipping Act, 1862, after presenting a petition for such restriction under section 514 of the Merchant Shipping Act, 1854, is entitled to state a claim as in right of parties whose claims he has settled extrajudicially before presenting the petition, and so limit the ranking of the other claimants. *Rankine, &c. v. Raschen, &c.*, May 19, 1877, p. 725.

Charter-party—Port of Discharge—Demurrage.

3. A ship was chartered to load a cargo of scrap iron, and "therewith proceed to Grangemouth, or so near thereunto as she may safely get." The cargo was to be brought to and taken from alongside the ship at the merchant's risk and expense. The vessel arrived in the roads at the mouth of the river Carron, on which the port of Grangemouth was situated, on 10th September, but the docks were full, and she could not get a berth. On the 12th, being still unable to get into dock, the master brought the vessel

SHIP—Continued.

into the river and moored her off the entrance to one of the docks. On the 13th the master intimated to the charterers that he was ready to discharge. It was proved that vessels frequently discharged cargoes of a similar character by means of lighters, while lying in the river in the same position, but there was no practice as to cargoes of scrap iron, the trade in which was of very recent introduction at Grangemouth. *Held* that on 13th September the ship had reached her destination, and that the charterers were bound to commence the discharge on the following day. *Brenner and Another v. Burrell and Son*, June 19, 1877, p. 934.

Bill of Lading—Seaworthiness.

4. A bill of lading, after the usual obligation on the shipowner to deliver a quantity of wheat in like good order and condition as when shipped, contained a clause stipulating that the shipowner should not be liable for the negligence of the crew. In an action at the instance of the shipper against the owner, concluding for damages "caused by and through the insufficiency of the hull and appurtenances of the vessel, or by and through the gross carelessness and negligence of those in charge thereof for whom the defenders are responsible," an issue was sent to trial whether the wheat was received in good order and condition, and whether the shipowner had in breach of the undertaking contained in the bill of lading failed to deliver it in the like good order and condition. The jury returned a special verdict finding that the wheat had been damaged by sea water, and that through the negligence of some of the crew one of the orlop-deck ports was insufficiently fastened, and "that in consequence the said sea-water was thereby admitted to the hold after the ship had been five days at sea. The First Division, in applying the verdict, held that the clause exonerating the shipowner from liability for loss caused by the negligence of his servants applied, and entered up the verdict for the defenders (March 16, 1877, p. 657). In an appeal, held that the special verdict had not exhausted the case, as it did not find whether the ship was or was not seaworthy at the commencement of the voyage, and that a new trial must take place. *Steel and Craig v. State Line Steamship Co.*, July 20, 1877, H. L., p. 103.

See *Expenses*, 4.

SLANDER. See *Reparation*, 10, 11.

STAMP Stamp Act, 1870 (33 and 34 Vict. cap. 97), sec. 19—*Conveyance on Sale—Discharge of ground-annual.*

- B entered into a contract of ground-annual with C whereby it was provided that he was to pay the amount of the ground-annual for twenty years, but might after that redeem it on payment of twenty-two years and a half's purchase of the ground-annual. After the expiry of the twenty years he paid the twenty-two and a half years' purchase-money and obtained a discharge. *Held* that the discharge fell to be stamped as a discharge of a security and not as a "conveyance on sale." *Belch v. Commissioners of Inland Revenue*, Feb. 24, 1877, p. 592.

STATUTE *Edinburgh Street Tramways Acts, 1871 and 1874, 34 and 35 Vict. cap. lxxix. sec. 44, and 37 and 38 Vict. cap. lxxviii. sec. 4.*

- A tramway company was bound by an agreement, embodied in its Act of incorporation, not to charge passengers more than 1d per mile or fraction of a mile (the minimum charge for each passenger being 2d.) They afterwards obtained an Act by which they were relieved of their obligation to lay certain lines, and were allowed instead to run omnibuses over these routes. This Act allowed them to charge "a sum not exceeding 2d per mile for first-class passengers on omnibus routes and any tramway routes worked in connection therewith." *Held* (aff. judgment of Second Division) that the second Act did not alter the rates chargeable for tramway passengers who did not use the omnibus routes. *Edinburgh Tramways Co. v. Torbain*, July 6, 1877, H. L., p. 87.

STATUTES.

1617, c. 13. See *Prescription*.

1681, c. 5. See *Writ*.

1696, c. 25. See *Proof*, 2.

39 and 40 Geo. III., c. 98, Thellusson Act. See *Succession*, 15.

9 Geo. IV. c. 58, Public Houses Regulation Act, *secs.* 19 and 20. See *Master and Servant*, 1.

17 and 18 Vict. c. 104, Merchant Shipping Act, 1854, Part V. (*Pilots*). See *Reparation*, 3. *Sec.* 514—See *Ship*, 1, 2, and *Expenses*, 4.

25 and 26 Vict. c. 35, Public Houses Acts Amendment Act. See *Judiciary Cases (Public House)*, p. 1199.)

25 and 26 Vict. c. 63, Merchant Shipping Amendment Act, 1862, *sec.* 54. See *Ship*, 1, 2, and *Expenses*, 4.

25 and 26 Vict. c. 89, Companies Act, 1862. See *Public Company*.

30 and 31 Vict. c. 101, Public Health Act, 1867. See *Public Health (Judiciary Cases)*, p. 1198.

31 and 32 Vict. c. 96, Ecclesiastical Buildings, 1868. See *Church*, 1.

33 and 34 Vict. c. 97, *sec.* 19. See *Stamp*.

35 and 36 Vict. c. 62, Education Act, 1872. See *School*.

37 and 38 Vict. c. 94, Conveyancing Act, 1874, *sec.* 4—See *Superior and Vassal*, 2, 4. *Sec.* 15—See *Superior and Vassal*, 3, 4. *Sec.* 55—See *Bankruptcy*, 6.

39 and 40 Vict. c. 11, United Parishes Act. See *Church*, 3.

Police Acts, General and Local. See *Police*.

SUCCESSION. *Mutual Settlement by Husband and Wife.*

1. A deed bearing to be a mutual settlement by a husband and wife contained a conveyance by the husband of his whole estate in favour of his wife in *lifertent* and his children in fee, and a corresponding conveyance by the wife of her estate in favour of her husband and children. The deed was signed by the husband before witnesses, and by the wife, but not before witnesses. *Held* that it was effectual as a testamentary settlement of the husband's estate. *Millar v. Birrell*, Nov. 8, 1876, p. 87.

General Disposition—Special Destination.

2. A testator left a trust-disposition and settlement, by which he conveyed to trustees his whole estate, heritable and moveable, which should belong to him at the time of his death. Subsequent to the date of his settlement he purchased certain heritable subjects, and took the disposition in favour of himself and his assignees and disponees, whom failing, to his sister and her heirs and assignees whomsoever. *Held* that the subjects belonged to the sister as heir of provision, and were not carried to the trustees by the general disposition in their favour. *Webster's Trustees v. Webster*, Nov. 8, 1876, p. 101.

Conversion—Reconversion.

3. A testator conveyed his estates, consisting of heritable and moveables, to trustees, who were directed, after payment of debts and a legacy, to divide the residue equally among the testator's four unmarried sisters. Power was given to the trustees to sell the heritable or make it over at a valuation to one of the beneficiaries. The eldest sister was the sole accepting trustee. The heritable was never sold, and the sisters possessed it in common, the eldest drawing the rents and dividing them. When one of the sisters was married a valuation of the heritable was made and one-fourth of the value was paid to her as her share, she conveying to the others her whole interest in the estate. One of the unmarried sisters having died, *held* that her share of the heritable was heritable—Lord President, Lord Deas, and Lord Mure holding that there had been no conversion, Lord Shand (concurring with Lord Adam, Ordinary), holding that the terms of the deed implied conversion, but that the actings of the beneficiaries had operated reconversion. *Hogg v. Hamilton, &c.*, June 7, 1877, p. 645.

Conversion—Power of Sale—Trust—Alimentary Provision.

4. A testatrix conveyed her whole heritable and moveable estate to trustees,

SUCCESSION—Continued.

"with full power to my said trustees to sell and dispose of the subjects above conveyed as they may think proper, and convert the same into cash, or to borrow money on the security of said subjects, or apportion and divide the same among my children after named as they may think proper or be advised." The concluding trust-purpose was to hold the residue of the trust-estate for the six children of the trust equally, share and share alike, and in case of any of the said children dying before majority or marriage, then the share of such child or children predeceasing should accrue to the survivors equally, with a declaration that the shares were to be strictly alimentary, and not assignable or attachable by creditors. No sale took place until after the children had attained majority. *Held* (1) that the declaration that the shares should be alimentary only applied to the period before the children attained majority, and that the trustees were then bound to convey to the beneficiaries; (2) that the fact of the residue consisting of heritage which could not be divided corporeally into the requisite number of shares did not render a sale of the heritage necessary, as the division might be made by granting *pro indiviso* rights, or by exercising the power to borrow; and therefore (3) that the right of each beneficiary was heritable, being a *jus crediti* to heritage. *Auld v. Anderson, &c.*, Dec. 8, 1876, p. 211.

Special Legacy—Ademption—Deposit-receipt.

5. A lady on 23d March 1875, left a sealed packet with her law-agent marked "to be opened only in the event of my death," containing a letter dated the same day addressed to the law-agent with, *inter alia*, the following testamentary direction—"I empower you to uplift the deposit-receipt lying with you for £4000, to lodge it in your own name, and to hold it in trust for my mother's brothers and sister and for their children." She at the same time verbally instructed her law-agent to transfer the £4000 on deposit-receipt to his own name, promising to send written instructions as to its disposal, which were not sent. The law-agent at the same time said that he had made advances for her of £200 and would keep that sum out of the £4000, to which she agreed, and the balance was put in deposit-receipt in his name "in trust." On 12th May 1875 the law-agent suggested to her the investment of the sum upon a heritable security, for the purpose of obtaining higher interest. She agreed to £3500 being so invested, and this was done. The testatrix died on 8th June 1876. *Held* that the legacy was special, and had been adeemed. *Anderson v. Thomson, &c.*, July 17, 1877, p. 1101.

Fee and Liferent—Residue.

6. A testatrix, in a testamentary letter of instructions, after bequeathing certain legacies, directed her law-agent "to hold the residue of my estate and distribute it annually between the following gentlemen. . . ." *Held* that this was a bequest of the fee of the residue to the persons named. *Anderson v. Thomson, &c.*, July 17, 1877, p. 1101.

Lapsed Legacy—Charity.

7. A testator bequeathed a sum to trustees, directing them to pay the "clear annual interest or produce to the person officiating for the time as school-master in connection with the Established Church in said parish." Some years after the testator's death there ceased to be a schoolmaster answering the description. *Held* that the legacy had not lapsed.

Observed, that there would not be any difficulty in framing a scheme for applying the fund for some useful and beneficial purpose within the intention of the trust. *Grant v. Macqueen, &c.*, May 23, 1877, p. 734.

Term of Payment—Residue.

8. A proprietor of an entailed estate, after making provisions of specific amount to his younger children, payable at majority or marriage, directed his trustees, after the purposes of the trust "have been fully satisfied by the succession to the lands of P opening to them," to convey the residue to

SUCCESSION—*Continued.*

his eldest son, under burden of an annuity to his mother. P was a property to which the testator had succeeded, subject to a life rent, and formed a very large portion of the estate at his own disposal. The life-renter predeceased the testator. Sums having been set aside to satisfy the provisions of certain of the younger children, of which the term of payment had not arrived, the eldest son called on the trustees to convey the residue to him. *Held* that, irrespective of the question whether the younger children's portion had vested or not, he was entitled to a conveyance. *Scott v. Scott's Trustees*, Dec. 13, 1876, p. 229.

Vesting.

9. A truster directed his trustees to pay the free income of his estates, after deducting an annuity to his widow, in equal portions to his brother and four sisters, and failing them without issue, to the survivors and survivor. He further directed his trustees, on the death of any of his brother or sisters leaving issue, to pay to such issue (and the issue of any predeceasers) the capital sum life-rented by their parents, so far as that could be done consistently with retaining enough to secure the widow's annuity; and, on the death of his widow, "to make over and settle my whole heritable and moveable means and estate . . . and that in equal shares, upon my said brother and sisters in life-rent for their life-rent use *allienarly*, and the issue of their bodies respectively, whom failing, to the issue of the survivors or survivor in fee." The truster was survived by his widow and his brother and four sisters. His brother and three sisters predeceased the widow, the brother and two of the sisters leaving issue. The remaining sister survived the widow, and died without issue. In a competition for the fee of the share life-rented by the surviving sister, *held* (1) that, although the fee of the shares life-rented by the brother and sisters who left issue vested in such issue *a morte testatoris*, or as soon thereafter as they came into existence, the fee of the share of the last surviving sister, who died without leaving issue, vested only on her death in the issue of her brother and sisters, or their descendants who survived her, as if the words, "survivors or survivor" had been "others or other," and that, therefore, as regards this share of the fee, intestacy was excluded; and (2) that the share vested in such surviving issue *per stirpes*. *Ramsay's Trustees v. Ramsay, &c.*, Dec. 21, 1876, p. 243.

Vesting—Discretion of Trustees.

10. Where trustees were given a discretion as to the period of realising and dividing the estate, *held* that vesting took place at the earliest period at which the trustees might, in the exercise of their discretionary powers, have fixed the period of division, and was not postponed till the actual exercise of these powers. *Scott, &c. v. Scott's Executrix*, Jan. 27, 1877, p. 384.

Vesting.

11. A testator directed his trustees, upon the death of his widow, to invest in their own names three-fifths of the residue of his estate for behoof of his daughter and her husband in life-rent, for their life-rent use *allienarly*, and for behoof of their children, in such proportions as their parents, or the survivor of them, should appoint by writing; "and failing both of them without having executed such writing, then for behoof of their said children equally, share and share alike, in fee;" declaring that in the event of any grandchild dying without having received payment of his share and leaving issue such share should fall to the issue. The testator was survived by his widow, and also by his daughter and her husband, and by several of the daughter's children, three of whom predeceased their mother and the truster's widow without leaving issue. *Held* by Lord Shand (Ordinary) that a right to a share of residue vested in each of the grandchildren at the date of the testator's death, subject only to the condition that in the event of any grandchild dying before the term of payment and leaving issue the share of such child should belong to such issue. *Snell's Trustees v. Morrison*, March 20, 1877, p. 709.

SUCCESSION—Continued.

Vesting—*Nati et nascituri*.

12. A testator by his trust-settlement directed his trustees to pay the interest of £20,000 to his sister during her life, and upon her death to pay over the said interest, to the extent of £300 a-year, to his sister's husband, in the event of his surviving her. Further, upon the decease of his sister (but subject to the annuity of £300 provided to her husband) he directed his trustees "to hold and apply the said principal sum of £20,000 and the income" thereof, for behoof of the children of his brother B, "procreated or to be procreated," in equal shares, "payable, the several children's shares, to the sons on their attaining twenty-five years of age." Power was given to the trustees to expend the children's shares of income and to advance part of their shares of capital during minority. There was also a clause substituting the issue of children predeceasing the liferentrix to their parents, and a survivorship clause. The truster's sister died in 1875, survived by her husband. At that time the truster's brother B was alive, and two of his children had attained the age of twenty-five. *Held* (1) that no right vested in any child of B before the death of the liferentrix, or until his share became payable by his attaining the age of twenty-five; (2) that on that event the trustees were not entitled to withhold payment on the ground that other children might be born to B; (3) that the subsistence of the annuity of £300 did not prevent a partial payment to account of capital to those children whose shares had vested, £10,000 being reserved to secure the annuity; (4) that such interim payment should be made without caution. *Buchanan's Trustees v. Buchanan*, May 26, 1877, p. 754.

Payments of Income in anticipation of Vesting.

13. Where trustees were directed to hold £5000 and shares of residue for behoof of a mother in liferent, and of such of her children as should reach the age of twenty-five years and the survivors in fee, and where these provisions had not at the death of the liferenter vested in any of the children by reason of none of them having reached that age, the Court held that the children as a class were entitled to the accruing income for their education and maintenance, it being admitted that the testator had placed himself *in loco parentis* to them, and that the advances were necessary. *Duncan's Trustees and Others*, July 17, 1877, p. 1093.

Conditio si sine liberis decesserit.

14. A testator bequeathed to his only brother, who died without issue, the liferent of the residue of his estate, and directed that such residue should, "after his death, be divided equally among the lawful children of my living and deceased sisters who may be alive at the time, share and share alike, namely, the children of the late Mrs P, the children of Mrs G," &c. The whole children of his sisters survived the testator, but some of them predeceased the liferenter, leaving issue. *Held* that the *conditio si sine liberis decesserit* applied, and that the issue of the testator's nephews and nieces predeceasing the date of vesting were entitled to their parents' share of the residue of the estate. *Gauld's Trustees v. Duncan, &c.*, March 20, 1877, p. 691.

Accumulations—Thellusson Act, 1800 (39 and 40 Geo. III. c. 98).

15. The grantor of a trust-disposition, on the narrative that he had executed an entail of an estate, directed his trustees to lay out the residue of the trust-funds in the purchase of land near the entailed estate so soon as a favourable opportunity occurred, and to entail the land so purchased on the heir of entail in possession of the estate, and to pay to him three-fourths of the interest or profits of the residue until a purchase could be made, "the surplus interest being applied to increase the amount of the disposable funds." The trustees did not purchase any lands under this direction for thirty-four years after the truster's death. In an action of declarator afterwards raised by the heir of entail in possession against the trustees and the truster's next of kin, *held* (1) that the Thellusson Act applied to the accumulations so

SUCCESSION—*Continued.*

made by the trustees after the lapse of twenty-one years from the trustor's death; and (2) that the person entitled to these accumulations under the Act as the person "who would have been entitled thereto if such accumulation had not been directed" was the heir of entail who would have been entitled to the rents if the lands had been purchased, and not the trustor's next of kin. *Mackenzie v. Mackenzie's Trustees*, June 29, 1877, p. 961.

Partial Revocation of Conveyance.

16. An heir of entail in possession having in 1835 obtained a judgment declaring that the entail was ineffectual to prevent gratuitous alienation, died in 1845, leaving (1) a *mortis causa* settlement, whereby he disposed the estates to his brother A in liferent allanarly, and the heirs of his body in fee, whom failing, to his brother B in liferent allanarly, and the heirs of his body in fee, whom failing, to the heirs of the body of his deceased sister, whom failing, to his sister D and the heirs of her body, whom failing, to his "nearest heirs and assignees whomsoever;" and (2) a deed of restriction of subsequent date, whereby he revoked, cancelled, and annulled "the said destination and order of succession in so far as regards the persons called and appointed to succeed after my brothers therein named;" declaring it to be his intention "that the destination and order of succession in the said trust-disposition and settlement shall not take effect beyond my said brothers and the heirs of their bodies, and that the person or persons further called to the succession shall have no claim to the same, but shall be entirely excluded therefrom, and are hereby excluded accordingly." He reserved a right to name a new series of heirs, and declared that his trust-settlement, in so far as not restricted, should remain in full force and effect. After the death of A and B, who survived the trustor but left no issue, *held*, in a question between the next heir called under the destination in the entail and the disponees of the last brother B, who had served as heir in general to the trustor, (1) that the terms of the deed of restriction did not revoke the destination in the trust-settlement to the trustor's "heirs and assignees whomsoever;" and (2) that B's right as heir whomsoever was not prejudiced by the fact that a liferent allanarly had been conferred upon him by the same deed. *Mackenzie v. Sharpe's Trustees, &c.*, March 14, 1877, p. 641.

See *Alimentary Provision—Domicile—Fee and Liferent—Husband and Wife*, 2, 4, 5—*Trust*

SUPERIOR AND VASSAL. *Constitution of Feu-right—Writ of Superior—Reversion.*

1. A proprietor of land entered into a verbal contract to feu, and upon receiving the first term's feu-duty granted a holograph receipt, which contained a note of the extent of the ground feued, and the amount of the feu-duty. The vassal entered into possession of the ground, and built certain erections on a part of it, and continued to pay feu-duty to the proprietor and his representatives, for which he obtained receipts as for "feu-duty," but these subsequent receipts were not holograph. *Held* that a contract of feu had been constituted, effectual against the superior and his representatives. *Stodart v. Dalzell, &c.*, Dec. 16, 1876, p. 236. See also *Personal Objection*.

Casualty—Conveyancing Act, 1874, sec. 4.

2. *Held* that the implied entry given by sec. 4 of the Conveyancing Act, 1874, to a person holding an infeftment on an *a me vel de me* precept unconfirmed, had the feudal effect of extinguishing the mid-superiority, so that it was no longer competent for him to demand an entry in the character (which he possessed) of heir to the mid-superior, although this resulted in his being subjected in a higher casualty than if the Act had not been passed. *Ferrier's Trustees v. Bayley*, May 26, 1877, p. 738.

Redemption of Casualties—37 and 38 Vict. cap. 94, sec. 15.

3. An original feu-disposition granted in 1833 contained a clause excluding subinfeudation, fenced by an irritancy. The vassal was duly infeft. After various conveyances of the feu-right to disponees who did not enter with

SUPERIOR AND VASSAL—*Continued.*

the superior, a dispositive, infest on a disposition which did not express the manner of holdings, raised an action against the superior, concluding for declarator that the feu was not in non-entry, the original vassal being still alive, and that the pursuer was entitled to redeem the casualties on payment of a year's rent of the subjects and 50 per cent additional, under section 15 of the "Conveyancing Act, 1874." The feu-disposition did not stipulate for payment of any casualty on a sale or transfer of the property. In defence the superior maintained that the pursuer had no title to sue, in respect (1) that he was not entered, his infestment not being confirmed, and (2) that the irritancy clause excluding subinfeudation enabled the superior to demand a casualty on each sale of the feu, and therefore that the redemption price was twice-and-a-half times the amount of the casualty. *Held* (1) that the pursuer had a title to sue, the Act of 1874 expressly operating as a confirmation of his infestment, and giving an implied entry; and (2) that as the superior could not compel an entry except on the death of a vassal, the pursuer was entitled to redeem at the price stated by him. *Morris v. Brisbane*, Feb. 21, 1877, p. 515.

Redemption of Casualties—Conveyancing Act, 1874, sec. 15.

4. *Held* that a proprietor of part of a feu who was entered with the superior by the operation of sec. 4 of the Conveyancing Act, 1874, was entitled under sec. 15 of the Act to redeem the casualties in so far as applicable to his part of the feu, negating the superior's plea that the vassal could only redeem the casualties of the entire feu as set forth in the last charter. *Edinburgh Roperie and Sailcloth Company, &c. v. Magistrates of Edinburgh*, July 10, 1877, p. 1032.

TEINDS. *Heritable Right—Prescription—Possession.*

1. A proprietor of lands who had no title to the teinds conveyed in 1766 several parcels of land to trustees for family purposes, "with the several manor-places, milns, teinds, &c., belonging to and on the said respective lands above disposed, and contained in the particular charters and infestments thereof." The trustees, as directed by the truster, executed a conveyance in 1772 to a beneficiary in the same terms. The subsequent titles contained no mention of teinds. The proprietors did not pay teind to any titular, but they submitted to localities in 1837 and 1862, made on the footing that they had no heritable right to the teinds. In an action raised by the heritor in 1875, for reduction of the decrees of locality, and declarator of his heritable right to the teinds, *held* (1) that it was competent to ascertain by examination of the previous titles, though beyond the prescriptive period, whether the truster had a right to his teinds in 1766; (2) that as he had no such right, the trust-deed conveyed none.

Observations on the possession necessary to establish a heritable right to teinds. *Mackintosh v. Abinger, et al.*, July 12, 1877, p. 1069.

Interim Locality—Bona fide Perception—Prescription.

2. *Held* in conformity with *Weatherstone v. Marquis of Tweeddale* (12 S. p. 1), that where payments of stipend are made under an interim decret of locality there is an implied judicial contract that when the legal obligations of the heritors are determined by final decret their several interests shall be adjusted from the commencement of the process according to the true state of their rights, and therefore that claims of relief thus arising cannot be affected by the length of time during which the settlement of a final scheme and decret may have been delayed, and that the defence of *bona fide* consumption cannot be sustained. *Sinclair's Trustees v. Campbell's Trustees, et al.*, July 18, 1877, p. 1126.

TESTAMENT. *See Succession.*TITLE TO SUE. *Removing.*

1. In a petition for removing, the tenant *held* not entitled to impugn the petitioners' title, it being proved that he could have no right to his holding unless

TITLE TO SUE—*Continued.*

derived from the petitioners. *Dunlop and Co. v. Meiklem*, Oct. 24, 1876, p. 11.

2. *Held* that a husband who had been divorced on account of his adultery, had a title to sue for moveable estate which had vested in his wife prior to the date of decree of divorce, but had not been paid. *Ferguson v. Jack's Executors*, Jan. 30, 1877, p. 393.

TRADEMARK. *Descriptive Name—Distinguishing Variation.*

Held that the proprietor of a hotel near a railway station, known as the "Station Hotel," was not entitled to object to the proprietor of a neighbouring hotel adopting the designation "The Royal Station Hotel," in respect that the term "Station Hotel" was a descriptive designation applicable to both, and the word "Royal" a sufficiently distinctive variation. *Charleson v. Campbell*, Nov. 17, 1876, p. 149.

TRAMWAYS. See *Statute*.TRESPASS. See *Interdict*, and *Justiciary Index*, p. 1200.TRUST. *Powers of Trustees—Agreement modifying Trust Purposes—Continuation of New Trust—Alimentary Provision—Nobile Officium—Special Case.*

1. A testator left his estate to trustees, with directions to pay an annuity to his widow as the preferable purpose of the trust, and to distribute the estate, so far as consistent with securing the widow's annuity, among his daughters in half-yearly payments, which he termed "annuities," but which really were payments out of the capital of the estate which would have exhausted it in a very few years. From these annuities he excluded the *jus mariti* and right of administration of his daughters' husbands, and declared them strictly alimentary. After four years it was found that the trust had become unworkable, that the moveable property was exhausted, and that though power to borrow on security of the heritage was conferred, no further distribution could be made to the daughters without borrowing in a way prejudicial to their real interests, while the heritage still remaining in the trustees' hands was considerably in excess of what was required to secure the widow's annuity. The mother, and the daughters, who were all of full age, being the only parties beneficially interested in the estate and the trustees, entered into an arrangement for the conveyance by the trustees to the daughters of the remainder of the trust-estate, and for the creation by them of a new trust, securing the widow's annuity, and providing for the distribution of the property among themselves as an alimentary fund and exclusive of the *jus mariti*. A special case was then presented to the Court to determine whether the trustees had power to carry out this agreement. The Court, in respect of the clause in the original settlement declaring the daughters' "annuities" alimentary and excluding the *jus mariti*, but without deciding as to the effect of that clause, declined to sanction a conveyance of the estate to the daughters, but, inasmuch as the whole parties beneficially interested in the estate were parties to the agreement, authorised a conveyance by the trustees direct to new trustees for the purposes of the trust proposed in the deed of agreement, and containing a clause declaring the fund alimentary and excluding the *jus mariti* similar to that contained in the original settlement. *Gray, &c. v. Gray's Trustees*, Jan. 27, 1877, p. 378.

Discretionary Powers of Trustees.

2. A truster left the liferent of the whole residue of his estate to his widow, and gave power to the trustees to make advances out of capital to one of two fiars during the currency of the liferent, the expediency of doing so being left "to the exclusive judgment" of the trustees, "without control or interference from any party whatever." *Held* that the widow had no power to veto the trustees in making advances out of capital. *Caithness Trustees v. Caithness*, June 20, 1877, p. 937.

Powers of Trustees—Allowance for Children's Education.

3. Terms of a trust-deed in favour of the testator's wife and children, upon

TRUST—*Continued.*

which it was *held* that the trustees were entitled, out of surplus income, to make such advances as they might think desirable either for the education of any of the children, or for such change of residence as might be considered necessary for the health of any member of the family. *Christie v. Christie's Trustees*, March 6, 1877, p. 620.

Authority to Sell Heritage and to make Advances from Capital.

4. Circumstances in which trustees under a trust-settlement which gave no power to sell were authorised, under section 3 of the Trusts Act, 1867, to sell heritable property, and under section 7 of the same Act to advance the price obtained for the maintenance and education of beneficiaries, who were minors. *Weir's Trustees (Petitioners)*, June 13, 1877, p. 876.

Conduct of Trustees.

5. Wherever it can be shewn that a trustee has so arranged matters as to obtain an advantage, whether in money or in money's worth, to himself personally, through the execution of his trust, he will not be permitted to retain it, but be compelled to make it over to his constituent. *Huntington Copper Co. v. Henderson*, Jan. 12, 1877, p. 294. [Aff. in H. L. Nov. 29, 1877.]

Effect of Trust-deed.

6. Terms of a trust-disposition which was *held* not to be in itself valid against creditors, nor to be rendered so by a reference to it in an antenuptial contract of marriage executed a few days after by the granter, followed by marriage and the birth of a son. *Forrest v. Robertson's Trustees*, Oct. 27, 1876, p. 22.

Defeasible Directions.

7. When a testator has directed a particular investment for behoof of a beneficiary who would have unlimited control over the investment if it were made the Court will not enforce implement of the direction. *Dow v. Kilgour's Trustees*, Jan. 31, 1877, p. 403.

Charitable and Educational Bequests—Powers of Trustees.

8. Changes *held* to be within the powers of trustees of an endowed school, who by the deed of foundation were authorised to make new regulations consistent with the original intention of the institution. *Allan v. Stiell's Trustees*, Nov. 22, 1876, p. 162.

Charity—Scheme of Administration.

9. Circumstances in which the Court approved an alteration on the scheme of administration of an educational charity for the purpose of adapting it to the altered requirements of the times, and, *inter alia*, authorised the substitution of bursaries for the payment of apprentice fees. *Burnet's Trustees*, November 17, 1876, p. 127.

No prescription against Trust—Mortification.

10. *By deed of mortification the granter assigned certain sums to the town-council of a burgh to be invested and the proceeds applied towards the maintenance of two professors in a university. The funds were invested in land, which were managed for many years by the master of mortifications, an officer of the corporation, in whose name the title was taken. Afterwards the town-council appointed a portion of the lands, including a strip of land on the sea-coast, to be exposed for sale by public roup. The subjects were sold for payment of a feu-duty, and to a person who afterwards declared that he had purchased on behalf of the treasurer of the town, and the latter was infeft upon charter in his favour for behoof of the magistrates, council, and community. Soon afterwards the town-council, upon a representation that they were proprietors of the ground, obtained from the Crown a grant of the salmon-fishings ex adverso of the strip of land. In an action of declarator and accounting brought more than forty years afterwards by the university, with concurrence of two professors interested in the mortification, held (aff. judgment of the First Division) (1) that the town-council still held the lands in trust for the mortification, and that they could plead no prescriptive right against the trust; (2) that, having acquired*

TRUST—*Continued.*

the fishings in the character of proprietors of the trust-property, they were bound to communicate the benefit to the trust, and hold them for behoof of the trust ; (3) that the consent and concurrence of the two professors gave the university a sufficient title and interest to sue for arrears ; but remitted to the Court of Session to allow the parties to amend their pleadings, and to proceed with the cause with a view to ascertain how far back within forty years the accounting should extend, and on what principles it should proceed. Magistrates of Aberdeen v. University of Aberdeen, March 23, 1877, H. L., p. 48.

VALUATION. See *Separate Index of Valuation Appeals*, p. 1196.

WRIT. *Testing-clause—Subscription of Witnesses ex intervallo.*

1. Duplicate missives of sale of heritage were written out by a third party, and subscribed by the seller and purchaser in presence of other persons not specially called as witnesses. The purchaser, four months afterwards, repudiated the bargain, and the seller then caused the persons who had been present to subscribe the missive in her possession as instrumentary witnesses, and had a testing-clause added. *Held* that the subscription of the witnesses and the testing-clause had been competently added, and that the missive was a probative writ. *Stewart v. Burns*, Feb. 1, 1877, p. 247.

Testing-clause—Deed produced in Judgment.

2. Where a deed with an incomplete testing-clause was produced in a process by one of the parties who did not found upon it, *held* that the opposite party was entitled to have the testing-clause completed, and effect given to the deed in the process. *Millar v. Birrell*, Nov. 8, 1876, p. 87.

CASES DECIDED IN THE REGISTRATION APPEAL COURT.

CORRECTION OF REGISTER. *Burgh Franchise—Burgh Voters Act, 1856, 19 and 20 Vict. c. 58, sec. 23—Alternative Qualification.*

1. *Held* that the power given to the Sheriff by section 23 of the Burgh Voters Act, 1856, to correct mistakes in the list of voters, did not authorise him to alter the qualification of a voter from "tenant and occupant" to "joint proprietor and occupant."

Observed (per Lord Ormidale) that a person claiming to be enrolled as a voter is not entitled to found upon an alternative qualification. *Anderson v. Ireland, Nov. 6, 1876, p. 1.*

County Franchise—County Voters Act, 1861, 24 and 25 Vict. c. 83, sec. 44.

2. *Held* (distinguishing from *Veitch v. Young, Oct. 24, 1870, 9 Macph. 28*) that the Sheriff was entitled, under the 44th section of the County Voters Act, 1861, to alter an entry in the register of voters by substituting "tenant" for "joint tenant" as the qualification of a voter, the mistake having occurred casually through the assessor mistranscribing from the valuation-roll to the register of voters. *Nelson v. M'Gowan, Nov. 6, 1876, p. 3.*

DEFEASIBLE TENURE. *County Franchise—Tenant and Occupant—Schoolmaster.*

Held, upon an objection to the qualification of a schoolmaster employed by an iron company at a fixed salary, with a free house, of which he stood on the roll of voters as tenant and occupant, that though the voter's engagement as a schoolmaster was as a contract of service defeasible at the will of his employers, the objector had not, on the facts as stated by the Sheriff, discharged the *onus* which lay upon him, in consequence of the voter being already on the roll, of shewing that his tenure of the house was defeasible along with it. *Brown v. Patterson, Nov. 13, 1876, p. 5.*

SPECIAL CASE FOR APPEAL, FORM OF.

Observations (per Lord Ormidale) as to the framing of special cases for appeal to the Registration Appeal Court. *Anderson v. Ireland, Nov. 6, 1876, p. 1.*

CASES UNDER THE LANDS VALUATION ACTS, 1874-7.

Church.

Held that parish churches were not to be entered in the valuation-roll. Heritors of Kingoldrum, &c. Case 123, p. 1149.

Ferry.

A ferry between two counties entered in both rolls, the value being allocated. Lord Blantyre, Case 125, p. 1150.

Farm—Power to resume land for planting.

A farm was let at £3 per acre, the landlord to allow £5 for each acre he might resume for planting. The landlord having resumed and planted 11 acres, *held* that the tenant's rent should be entered in the roll at the rent actually paid, and that the land which had been resumed should be entered as woodland at £3 only per acre. Mitchell Innes, Case 115, p. 1147.

Farm—Abatements from Rent.

Abatements stipulated by lease not deducted, the lease not stating that the farm was in bad condition. Kinloch, Case 119, p. 1148.

Farm—Farm not in good condition.

A farm was let for nineteen years, the rent for the first two years being one-half of the rent for the remaining years. It was stated that the farm was in bad order. *Held*, in regard to the second year of the lease, that the rent actually paid fell to be entered in the roll. Hepburn, Case 120, p. 1148.

House.

House let to gardener by his master at £14. Objection that this was an over-valuation in order to give the gardener a vote. *Locus standi* of objectors, whose names were not on the valuation-roll. M'Gregor, &c. v. Menzies, Case 105, p. 1144.

Houses, Workmen's—Sublet to Workmen.

Held that the rent paid by the principal tenant was to be entered. Buchanan, Case 111, p. 1145.

Inn.

Where the tenant of an inn, let at a rent of £14, was bound to purchase her stock of ale and beer from the proprietors, who were brewers, *held* that the annual value was properly fixed at £20. Jerdan, Case 118, p. 1148.

Lunatic Asylum—Supported by Mortified Funds. Murray's Royal Lunatic Asylum, Case 112, p. 1145.*Lunatic Asylum—Basis of Value.* Barony Parochial Board, Case 122, p. 1149.*Manufactory—Value of Buildings and Steam Power.* Shields, Case 113, p. 1146.*Market.*

Held that the annual value of the area of a market belonging to a burgh was properly entered at the amount of rent paid by a tacksmen of the dues. Town of Inverness, Case 110, p. 1145. Burgh of Inverurie, Case 116, p. 1147.

Market.

The magistrates of a burgh let the right to levy rents or dues for stands in the public street of the burgh on market days. *Held* that the market stances, being the solum of a public street, and therefore not capable of being the subject of a lease, should not be entered in the roll. Aberdeen City Treasurer, Case 124, p. 1149.

Minerals let for thirty years.

Pitmouth buildings and engine erected by tenants. Summerlee Iron Company, Case 114, p. 1146.

CASES DECIDED IN THE COURT OF JUSTICIARY.

APPEAL. *Summary Prosecutions Appeals Act, 1875.*

1. The Summary Prosecutions Appeals Act provides for appeal on case stated from the judgments of inferior Courts on points of law only. In an appeal presented under this Act, *held* that the question, whether, on the facts stated, a person had committed an offence under a statute by "grossly, and without reasonable excuse," failing to perform a duty therein laid upon him, was one of law, and the competency of the appeal sustained. *Campbell v. Jameson*, Feb. 23, 1877, p. 17.

Summary Prosecutions Appeals Act, 1875, secs. 2 and 3—Summary Procedure Act, 1864, sec. 3, sub-sec. 3—Public Health Act, 1867 (30 and 31 Vict. c. 101), secs. 24, 94, and 105—Assessment.

2. A local authority having covered in a foul watercourse under the 24th section of the Public Health Act, 1867, defrayed in the first instance the cost out of funds in their hands, the produce of a general assessment under the 94th section, but afterwards assessed the cost on the individual owners of premises contributing to the pollution of the watercourse. They proceeded to recover this particular assessment from one of these owners by petition under the 105th section. *Held* (1) that the sum of money so sought to be recovered under the 105th section was not one the recovery of which was otherwise provided for in the Act; (2) that it was a "sum of money in the nature of a penalty" in the sense of sec. 3, sub-sec. 3, of the Summary Procedure Act, 1864; (3) that therefore the proceedings taken under the 105th section were proceedings which might have been brought under the Summary Procedure Act; and (4) that consequently the cause was one in which appeal on case stated under the Summary Prosecutions Appeals Act, 1875, was competent. *Local Authority of Selkirk v. Brodie*, March 16, 1877, p. 21.
3. *Held* that an appeal against a conviction on the ground of insufficient authentication was not competent under the Summary Prosecutions Appeals Act, 1875. *Leishman v. Colquhoun*, July 13, 1877, p. 53.

BREACH OF THE PEACE.

A was charged at common law before the Sheriff with "the crime and offence of disorderly conduct in a public street" (in a town where there was no police magistrate), "by using insulting and abusive language to or of and concerning B, who was then peaceably passing along said street, calling aloud that the said B was a thief, and using other grossly offensive words of the like nature, all in a manner calculated and intended to provoke a breach of the peace." *Held* that the charge was not relevant. *Banks v. McLennan*, Nov. 16, 1876, p. 8.

CRIME. See *Breach of the Peace—Culpable Homicide—Trespass.*

CULPABLE HOMICIDE. *Explosion of Dynamite through negligence of Custodian—Indictment—Relevancy.*

In charging the offence of culpable homicide through an explosion of dynamite in the custody of the accused, which he had culpably, and in neglect or violation of his duty, allowed to remain in an exposed place of common resort (*viz.*, a joiner's shop in connection with a smithy), the libel set forth that the dynamite "became ignited by means of a spark from the said smithy, or by being brought into contact with some other substance, or in some other manner to the prosecutor unknown, and then and there exploded." An objection was taken that the words in italics gave too great latitude to the prosecution. *Held* that as these words were not to be held as introducing into the minor a third *species facti* different from or inconsistent with the two specifically mentioned, but only as a generalisa-

CULPABLE HOMICIDE—Continued.

tion of these two specific modes, for the purpose of giving elasticity to the indictment, the indictment was relevant.

Question, whether it would be a relevant charge to libel the placing an explosive substance in a place of danger, and the fact of its subsequent explosion, without farther connecting the accused with the explosion. *H. M. Advocate v. Clark*, July 2, 1877, p. 48.

INDICTMENT. See Culpable Homicide.**JURISDICTION. Suspension of Notice to Pave Footway—Competency.**

1. The Forfarshire Roads Act, 1874, sec. 22, and the General Police Act, 1850, sec. 212, laid upon the owners of property within the burgh of Forfar the obligation of making paved footways along the frontage of their properties, and empowered the Police Commissioners after the lapse of fourteen days from notice given to any such owner requiring him so to do to proceed against him by summary complaint, on which imprisonment for a limited time might follow. Notice was served upon an owner requiring him to pave the footpath in front of his property, and he at once, without waiting for a complaint to be laid against him, and disposed of by the inferior Court, brought a suspension of the notice in the High Court of Justiciary, and craved interdict against the commissioners carrying out any proceedings under the notice. The Court *held* that the suspension was premature, and refused to entertain it. *Lowson v. Police Commissioners of Forfar*, March 16, 1877, p. 35.

Civil or Criminal—Summary Procedure Act, 1864, sec. 28.

2. *Opinion* (per Lord Justice-Clerk), that the 28th section of the Summary Procedure Act was intended as a test of jurisdiction only in questions of review, and did not exclude an ordinary action in the civil Courts with regard to the subject-matter of such summary complaints as were thereby rendered criminal in relation to review. *Lowson v. Police Commissioners of Forfar*, March 16, 1877, p. 35.

POLICE. Edinburgh Police Act, 1848 (11 and 12 Vict. c. cciii.), sec. 197—Cleaning Common Stair.

Held that the obligation to clean a common stair or passage imposed by the 197th section of the Edinburgh Police Act, 1848, on the occupants of houses, flats, or stories of tenements entered thereby, did not apply to the occupants of houses having their proper access by a main door from the street, although entry from the common stair or passage was possible through a passage not intended to be so used. *Daish v. Paterson*, Dec. 22, 1876, p. 10.

See Jurisdiction.**POOR. See School.****PUBLIC HEALTH. Public Health Act, 1867, secs 24 and 94.**

Held that it was no defence to an individual proprietor against a claim for a particular assessment under section 24 of the Public Health Act, that the cost of the operations in question had been defrayed in the first instance out of funds raised by general assessment under section 94, a portion of which had been already laid on him. *Local Authority of Selkirk v. Brodie*, March 16, 1877, p. 21.

Nuisance from foul ditch or water-course—Public Health Act, 1867 (31 and 32 Vict. c. 101, secs. 18 to 22)—Procedure under.

A parochial board, as the local authority of a parish, presented petitions under sections 18 to 22 of the Public Health Act, 1867, against certain proprietors of subjects abutting on a foul ditch or water-course, to have them ordained to abate the nuisance thence arising. The Sheriff-substitute found that the true authors of the nuisance could not be determined without farther and probably protracted inquiry, and that the nuisance ought to be removed without delay, and accordingly ordained the parochial board to perform the necessary works. He thereafter laid the expense incurred

PUBLIC HEALTH—*Continued.*

upon the parties complained against. *Held* that not having given the respondents an opportunity themselves of abating the nuisance the Sheriff could not under section 22 of the statute decern against them for the expense incurred. *United Kingdom Temperance, &c., Institution v. Parochial Board of Cadder*, June 14, 1877, p. 39.

See *Appeal—Jurisdiction.*

PUBLIC-HOUSE. *Public-Houses Acts Amendment Act, 1862, schedule (A) No. 2.*

1. In an appeal against a conviction for breach of a public-house certificate, by selling exciseable liquor to a child "apparently under fourteen years of age," *held* that no breach is committed if the child is *de facto* the messenger of an adult though this is not within the knowledge of the publican and the child is served without inquiry. *Graham v. Lang*, Dec. 22, 1876, p. 13.

General Police Act, 1857 (20 and 21 Vict. c. 72), sec. 24—Publican harbouring Police Constables.

2. The General Police Act, 1857, section 24, enacts that "if any victualler, &c. shall knowingly harbour or entertain any constable appointed under this Act, or permit such constable to abide or remain in his house, &c., to the neglect of his duty, during any part of the time appointed for his being on such duty," such victualler shall be subject to a penalty. A publican was charged under this section before the Police Court of A, in so far as he did "knowingly harbour or entertain X, Y, and Z, police constables for the A district, . . . being then constables within the meaning of the said Act, or did permit the said X, Y, and Z to abide or remain in his said house, &c. to the neglect of their duty, during part of the time appointed for their being on such duty." It was proved that two of the constables were in uniform, and on duty, and the other one not; that all three did together enter the publican's premises, purchase and consume a certain quantity of liquor, but that they did not sit down, and only remained four or five minutes. The publican was convicted of the offence charged and fined in a slump sum. Conviction *quashed*, on the ground that it was general, in respect of harbouring, &c. all three constables, while, as regards one of these, it was clear the offence had not been committed.

Observations on the prohibition contained in the General Police Act, 1857, section 24, against publicans harbouring police constables during the hours of duty. *Greig v. Stewart*, Feb. 23, 1877, p. 13.

Public-Houses Act, 1862, sec. 17—Conviction—Imprisonment in Default of Payment of Penalty.

3. In a prosecution under the 17th section of the Public-Houses Act, 1862, *held* that the Justices had no discretion to allow any period within which payment of the penalty might be made before the term of imprisonment in default of payment began to run. *Colquhoun v. Leishman*, July 13, 1877, p. 53.

SCHOOL. *School Fees—Education (Scotland) Act, 1872, sec. 69.*

Where a parochial board had refused to pay the school fees of a child, on the ground that they were not "satisfied of the inability of the parent to pay such fees," *held* that an action against the parochial board for recovery of the fees could not be sustained. *Callachan v. Paterson*, Sept. 2, 1876, p. 1.

SCHOOL BOARD PROSECUTIONS. *Education Act, 1872 (35 and 36 Vict. c. 62, sec. 70—Compulsory Education.*

1. In a prosecution before the Sheriff against a parent under section 70 of the Education Act, 1872, it was proved that the parent, who resided in a Highland parish at a distance of $3\frac{1}{2}$ miles from the nearest school, had refused to send a girl of five years that distance to school, and was unable to provide any other means of education. *Held* that the facts proved were not sufficient in point of law to justify the Sheriff in holding that the parent had failed, "grossly and without reasonable excuse," in the sense of the 70th section of the Act, to discharge the duty laid upon him by the 69th

SCHOOL BOARD PROSECUTIONS—Continued.

section of providing elementary education for his child. *Campbell v. Jameson*, Feb. 23, 1877, p. 17.

Education Act, 1872, sec. 70.

2. *Held* that a prosecution of a parent had been improperly instituted, in respect that the school board had failed to inquire into the grounds of excuse stated by the parent, and to grant a certificate in writing, as prescribed by the 70th section of the Education Act, and conviction set aside. *France v. Anderson*, June 29, 1877, p. 42.

Proof—Evidence Act, 1866 (16 and 17 Vict. c. 20)—Witness.

Question, whether in a prosecution of a parent under the 70th section of the Education Act, 1872, it is competent to examine him as a witness in exculpation. *France v. Anderson*, June 29, 1877, p. 42.

SUMMARY PROSECUTIONS APPEALS ACT. See *Appeal*.

SUSPENSION OF NOTICE TO PAVE FOOTWAY. See *Jurisdiction*.

TRESPASS. Actor or Art and Part—Day Trespass Act, 2 and 3 Will. IV. c. 68, sec. 1.

Three men were charged, "all and each, or one or more of them," with a contravention of the Day Trespass Act, "by entering or being in or upon a field" on the property of K in pursuit of game. It was proved that one of them had contravened the Act by entering the field without leave of the proprietor in pursuit of game, and that the other two were acting in concert with him, and were running up and down on the public turnpike road preventing the escape of the game of which he was in pursuit. *Held* that the two latter men were not guilty of contravening the Act libelled. *Calquhoun v. Liddle and Another*, Nov. 16, 1876, p. 3.

